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# The Promise of Common Market: The Role of Constitutional Law of India

*Niladri Mondal*

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## **Abstract**

*Free market has become a buzzword in 21st century. Nations are entering into agreement to ensure free flow of trade and barrier-free trade with a larger objective of ensuring better life for the people. The Constitution has given a broader design of economic structure to be constructed in independent India. The idea behind the common market is to ensure free flow of trade, labour and services across the regions in India. Some of the features of common market are accorded the status of fundamental rights such as right to movement, right to carry on trade and right to reside in any part of the country. These rights are aptly supplemented with a dedicated set of provisions on freedom of trade and commerce throughout the country. On the one hand state needs more revenue, whereas, on the other hand the development require freedom from tariff barriers. Freedom of Inter-State Trade is a fundamental necessity in any federal system so as to avoid economic isolation and trade barriers within the federation. Notwithstanding the commitment expressed in the Constitution, the goal of common market is not a reality even after seven decades of the constitutional democracy in India. This paper explores the thought process undertaken in drafting the provisions related to the establishment of common market/single market by the makers of the Constitution. The*

*paper will travel through the constituent assembly debates to unravel the vision of the makers of the Constitution. Though, the country has made considerable economic advancement in last seven decades but failed to create single market in very effective sense.*

**Keywords:** *Rule of Law, Constitutional Law, Common Market, Quality of Life*

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## **Introduction**

Free market has become a buzzword in 21st century. Nations are entering into agreement to ensure free flow of trade and barrier-free trade with a larger objective of ensuring better life for the people. In the context of India, there has been a need of establishing barrier free trade regime amongst the provinces for drawing the advantage of large demography

The makers of the Indian Constitution were fully cognizant of the high importance of the maintenance of the freedom of inter-state trade and commerce throughout the country as an essential condition of the country's economic health. Part XIII of the Constitution is designed to secure the economic unity of India that such unity required the flow of goods throughout the territory of India, and that such free flow was "essential for the economy of the nation and sustaining and improving the living standards of

the country”<sup>1</sup>. Article 301<sup>2</sup> of the Constitution of India provides freedom to those activities which fall under the categories of trade, commerce and intercourse. The Constitution was shaped with the effect of immediate and distant needs and demands of the people as well as the worries of the historical background before the transfer of power. Perhaps it is for this reason that our courts have often resorted to the history of the constitutional provisions either to support or confirm their interpretation. The Supreme Court has resorted to the historical background of the provisions of part XIII of the constitution while pronouncing the authoritative judgements.<sup>3</sup> In connection to this Seervai has rightly emphasized two things that “first if history is to be appealed to, it must be the whole history; secondly it is necessary to refer expressly to the source of that history in the judicial determination so that the history can be corrected, confirmed or confuted and the question of the value of any historical material as an aid to construction may be properly assessed.”<sup>4</sup>. In the light of this, the paper explores the thought process undertaken in drafting the provisions related to the establishment of common market/single market by the makers of the Constitution. Though, the country has made considerable economic advancement in last seven

decades but failed to create single market in very effective sense.

### **Learning from the existing framework**

#### ***The framework available under Government of India Act and how it has influenced the provisions of the Constitution of India 1950.***

In order to set out the history of Part XIII of our Constitution, we may trace that the development of Indian Federation which led to the scope of Free Trade Clause. Although for the first time, a full fledged federal structure was envisaged only under the Government of India Act, 1935, experimentation in that direction had already started under the Government of India Act, 1919.<sup>5</sup> The basic scheme of federal government in the Constitution of India has been taken over from the Government of India Act, 1935.<sup>6</sup> Now the Government of India Act had no legislative entry relating to inter-state trade and commerce in any of the legislative lists of the Seventh Schedule. However, the freedom of trade and commerce between the Provinces of British India was secured by enacting section 297<sup>7</sup> which prohibited certain restrictions on internal trade.

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<sup>5</sup>M.P. Singh, Freedom of Trade and Commerce in India, 1985 Deep & Deep Publication, New Delhi, p.10

<sup>6</sup>Available at [http://www.legislation.gov.uk/ukpga/1935/2/pdfs/ukpga\\_19350002\\_en.pdf](http://www.legislation.gov.uk/ukpga/1935/2/pdfs/ukpga_19350002_en.pdf)

<sup>7</sup>Prohibition of certain restrictions on internal trade: Section-297 (1) No Provincial Legislature or Government shall:-

(a) by virtue of the entry in the Provincial legislative list relating 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 restricting the entry into, or export from, the Province of goods of

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<sup>1</sup>H M Seervai, The Freedom of Trade and Commerce in the Indian Constitution: The Atiabari Case and after, 21 Cambridge Law Journal 54–84 (1963), p 68

<sup>2</sup>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.

<sup>3</sup>*Atiabari tea Co. Ltd. v. State of Assam*, AIR 1961 S.C. 232,238, 246-47 and *Automobile Transport Ltd v. State of Rajasthan*, A.I.R 1962 S.C. 1406,1416,1446.

<sup>4</sup>Supra note 1, p72.

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.<sup>8</sup>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.<sup>9</sup>Any law passed in contravention of this provisions shall, to the extent of the contravention, be void.<sup>10</sup>The purpose of Section 297 was to achieve “as far as possible free trade within India”by imposing limitations on the legislative and the executive powers of the provinces.

On July 18, 1947, the British Parliament passed the Indian Independence Act, which gave India an independent status. After the Independence of India, a Constituent Assembly was constituted with the powers of Central Legislature to draft a

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any class or description; or (b) 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 favor of the former, or which, in the 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.

(2) Any law passed in contravention of this section shall, to the extent of the contravention, be invalid.

<sup>8</sup>Section 297(1)(a), of the Government of India Act,1935

<sup>9</sup>Section 297(1)(b), of the Government of India Act,1935

<sup>10</sup>Section 297(2), of the Government of India Act,1935

new Constitution for Independent India. The Constituent Assembly realized that section 297 of the Government of India Act, 1935, hardly ensured free trade in India. The reason being the restriction in section 297(1) (a) did not apply to any legislative powers of the Provinces so there still existed trade barriers. Due to these inter trade barriers that the inland trade and movement showed a considerable decline before the assembly started its working.<sup>11</sup>

In the draft constitution, Art. 16 under Part III of Fundamental Rights declared that subject to any law made by Parliament, and subject to Art. 244 trade and commerce and intercourse throughout the territory of India were to be free. The drafting committee omitted the words “by and between the citizens” occurring after “intercourse” because “the qualifying words might necessitate elaborate inquiries at the State frontiers as to the nationality of the consigner and the consignee”<sup>12</sup> Draft Article 243 and 244 appeared in Part IX, Chapter II, Administrative Relations i.e. between the (States and the Union) under the subject heading “Interstate Trade and Commerce”. Article 243 enacted a prohibition of preference or discrimination to one state over another by any law or regulation relating to trade and commerce. Article 244 provided that notwithstanding Art. 16 and 243, it was lawful for any State (i) to impose by law reasonable restrictions required by the public interest on the freedom of trade and

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<sup>11</sup> Review of the Trade of India., (1946) Part 11, p 2.

<sup>12</sup> Draft Constitution, p. 8. It need hardly be said that a fundamental right subject to provisions of any law made by Parliament can hardly be called fundamental.

commerce and intercourse with that State, and (ii) to impose on goods imported from other States any tax which was imposed on similar goods manufactured or produced in that State provided that such a tax was not discriminatory. These Articles were replaced by Part XA (now Part XIII) and moving its adoption Dr. Ambedkar said that since the provisions relating to trade and commerce were scattered in different parts of the Draft Constitution a large number of the members of the house were not in a position to understand their implications and therefore:

*“... the Drafting Committee felt that it was much better to assemble all these different articles ... into one single part and to set them out seriatim, so that at one glance it would be possible to know what are the provisions with regard to the freedom of trade and commerce throughout India.”*<sup>13</sup>

Provisions set out under Part XIII of the Constitution as amended in 1956, begins by saying:

Article 301 provides that “Subject to the other provisions of this Part trade, commerce and intercourse throughout the territory of India shall be free.”

Article 302 gives Parliament power to make laws imposing such restrictions on the freedom guaranteed by Article 301 “as may be required in the public interest.”

Article 303 is in two clauses. The first denies both Parliament and State legislatures power to make laws “by virtue of any entry relating to trade and commerce” which provide for

the giving of preference to one state over another or which discriminates between the States.<sup>14</sup> The second clause is a provision to the first and, so far as the Parliament is concerned, removes the prohibition of preference and discrimination if the law made by the Parliament declares that the preference or discrimination is necessary so that a situation arising from scarcity of goods in any part of India may be dealt with.

Article 304 is also in two clauses, so far as its substantive parts are concerned, and each clause operates as a proviso to Article 301 and 303.

The first clause authorizes the States, notwithstanding Articles 301 and 303, to impose taxes on goods imported from other States provided that such taxes are imposed on similar goods produced in the taxing State and that there is no discrimination between the two classes of goods i.e. local and imported. The second authorizes the State to impose “such reasonable restrictions on the freedom of trade, commerce and intercourse with or within that State as may be required in the public interest.” And to that that second clause there is a procedural proviso requiring Bills and amendments for the purpose of that clause to receive the “previous sanction of the President” before being introduced or moved in the State Legislatures.

Article 305 is perhaps the most immediately important. It saves from the operation of Article 301 and 303, unless the President orders otherwise, all laws which were

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<sup>13</sup> CAD Vol. IX, p. 1124

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<sup>14</sup> Sec. 99 of the Australian Constitution

made before the commencement of the Constitution<sup>15</sup> and also all laws which relate to (and so far as they relate to) “ the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or otherwise.”

Article 306 has been repealed.<sup>16</sup>

Article 307 authorizes Parliament to establish any authority for carrying out the purposes of articles 301, 302, 303 and 304.

### ***Amendments moved and defeated***

It is well understood that from the comparison of Article 16, 243, 244, and 245<sup>17</sup> with the Articles in Part XA (now Part XIII) that they were not merely arranged seriatim but were substantially altered. It does not disclose the reasons for the change in the proceedings of the Constitution Assembly. An amendment to insert the word ‘reasonable’ before the word ‘restriction’ in the new draft Article 274B (now Article 302) was defeated after discussion.<sup>18</sup> Secondly, an amendment to delete from Draft Article 274C (now Article 303(1)) the words “by virtue of any entry relating to trade or commerce in any of the

legislative lists” was defeated.<sup>19</sup> Opposing the amendment, Sir Alladi Krishnaswami Ayyar said:

*“The next comment was there should be no reference to the power in relation to trade and commerce. It was advisedly put in for the reason that there might be very many powers which may be exercised by different States in regard to supply of goods, the internal or indigenous industry, which may not bear directly upon trade and commerce. It is not the intention to interfere with these powers of the Provinces or States.”*<sup>20</sup>

In the Constitution of India "Inter-State Trade and commerce" became a topic of legislation in the Union List (Entry List 1, Seventh Schedule). When it came to the freedom of trade and commerce, section 297 could have been easily adapted with necessary alterations. Instead the framers of the Constitution turned to section 92 of the Australian Constitution and used words which appeared to language; or rather the emotional appeal of the slogan embodied it. This desire to retain the emotional appeal of section 92 hand in hand with a desire to alter the substance of section 92 beyond recognition, with the result that articles 301 to 306 have given rise to problems as intractable as those under section 92 to a similar diversity of judicial opinion.

### ***Interference of Parliament in Trade and Commerce***

Although Article 301 guaranteeing the freedom of trade, commerce and intercourse, it is obvious that most of the legislative powers conferred on Parliament by Articles 245 and 246, and set out in

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<sup>15</sup> Article 305 read with Article 366(10) of the Constitution.

<sup>16</sup> Constitution (seventh amendment) Act 1956.

<sup>17</sup> Draft Article 245 corresponds to Art 307 of the Constitution which confers a power to appoint an authority to carry out the purpose of the Part.

<sup>18</sup> Constituent Assembly Debate Vol. IX, pp. 1125, 1128, 1138, 1143 (amendment rejected). That the amendment was moved and rejected is important because “... while it is not proper to take into consideration the individual opinion of Members of Parliament or Convention to construe the meaning of a particular clause, when a question is raised whether a certain phrase or expression was up for consideration at all or not, a reference to the debates may be permitted”

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<sup>19</sup> Constituent Assembly Debate Vol. IX, pp. 1144

<sup>20</sup> Ibid.

Lists I and III of the Seventh Schedule to the Constitution, could be exercised so as to interfere with trade, commerce or intercourse. Certainly those powers contained in the following Entries of List I : 5 , 6 ,7, 9, 22, 23, 24, 25, 27, 28, 29, 30, 31, 36, 42, 43, 44, 45, 46, 47, 48,49, 53, 56, 58, 81, 82, 84, 85, 89, 90, 91, 92, 92 A,<sup>21</sup> could be so

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<sup>21</sup> List I (Union List) – 5. Arms, firearms, ammunitions and explosives. 6. Atomic energy and mineral resources necessary for its production. 7. Industries declared by Parliament by law to be necessary for the purpose of defense or for the prosecution of war. 9. Preventive detention for reasons connected with Defense, Foreign Affairs or the security of India; persons subjected to such detention. 22. Railways. 23. Highways declared by or under law made by Parliament to be national highways. 24. Shipping and navigation on inland waterways, declared by Parliament by law to be national waterways, as regards mechanically propelled vessels; the rule of the road on such waterways. 25. Maritime shipping and navigation, including shipping and navigation on tidal waters; provision of education and training for the mercantile marine and regulation of such education and training provided by States and other agencies. 27. Ports declared by or under law made by Parliament or existing law to be major ports, including their delimitation, and the constitution and powers of port authorities therein. 28. Port quarantine, including hospital connected therewith, seamen’s and marine hospitals. 29. Airway’s aircraft and air navigation; provision of aerodromes, regulations and organizations of air traffic and of aerodromes; provisions of aeronautical education and training and regulation of such education and training provided by States and other agencies. 29. Airways; aircraft and air navigation; provision of aerodromes; regulation and organization of air traffic and of aerodromes; provision for aeronautical education and training and regulation of such education and training provided by States and other agencies, 31. Carriage of passengers and goods by railway, sea or air, or by national water- ways in mechanically propelled vessels. 36. Currency, coinage and legal tender; foreign exchange. 42. Inter-State trade and commerce. 42. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporation’s but not including co-operative societies. 43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporation’s but not including co-operative societies. 44. Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including universities. 45. Banking. 46. Bills of exchange, cheques, promissory notes and other like instruments. 47. Insurance. 48. Stock Exchanges and Future Markets. 53. Regulation and development of oilfields and mineral oil resources; petroleum and petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable. 56. Regulation and

used and there may well be others. Similarly, the powers in the following Entries in List III could also be used: 7, 15, 18, 20, 21, 29, 31, 32, 33, 34, 35, and no doubt there are others.

This interference can only be imposed so long as these restrictions are “required in the public interest”. With regard to this interference Sir Ivor Jennings asked “*Who is going to decide whether it is required in the public interest?*” The answer to this he said can be that “*Though the matter is not free from doubt, it would seem that the task must fall upon the courts.*” If the answer given by Jennings is accepted, then the impact for the scope of judicial review under this Article is much less to the Parliament's powers. There will be a strong presumption regarding Parliament's legislation to be of public interest. This presumption will force the person challenging the validity of a law of Parliament under Article 301 to show the court why it is not “required in the public interest”

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development of Inter-State River and river valleys to the extent to which such regulation and development under the control of the Union are declared by Parliament by law to be expedient in the public interest. 81. Inter-State migration, Inter-state Quarantine. 82. Taxes on income other than agricultural income. 84. Duties on excise on tobacco and other goods manufactured or produced in India except- a) alcoholic liquors other than human consumption; b) opium, Indian hemp and other narcotics drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry; 85. Corporation tax. 89. Terminal taxes on goods and passengers, carried by railway fares and freights. 90. Taxes other than stamp duties on transactions in stock exchanges and future markets. 91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, and policies of insurance, transfer of share, debentures, proxies and receipts. 92. Taxes on the sale or purchase of newspaper and on advertisement published therein. 92A. taxes on the sale or purchase of goods other than newspaper, where such sale or purchase takes place in the course of inter-State trade or commerce.

irrespective of the constitutional validity of the laws in issue.<sup>22</sup>

Although Article 303 provides a further qualification of Parliament's powers but two things limit the importance of that qualification. Firstly, if Parliament enacts a law which makes a declaration satisfying the terms of Article 303 Clause (2), then the qualification is removed altogether. Secondly, the qualification itself is a restricted one and is framed in such a way as to have limited practical effect if Parliament wishes to ignore the spirit which inspired it. This is for two reasons: firstly, because the qualification affects only those laws made "by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule," and, secondly, because of the interpretation likely to be given to the words "preference to one State over another" and "discrimination between one State and another" in Article 303. Prohibition against preference and discrimination is not a major restriction upon Parliament's power. Therefore if the Parliament with its legislative power wishes anything to do by law can be done either by invoking Article 303(2) if the circumstances so required or by drafting the law in such a way as to avoid Article 303(1)<sup>23</sup>.

Thus despite Articles 301 and 303, the powers are wide enough to permit almost any interference with trade, commerce or intercourse whether by regulation, monopoly control or prohibition. That is not only with respect to inter-State trade,

commerce and intercourse but also with respect to intra-State trade, commerce and intercourse in many of their aspects.

### ***State's Power of interference in trade and commerce***

Again the freedom of trade, commerce and intercourse guaranteed under Article 301, legislative powers conferred upon the state by the Constitution could be exercised to interfere with trade, commerce and intercourse. The powers conferred to the following Entries in List II of the Seventh Schedule could be so used and there may well be others: 1,2, 5, 6,7, 8, 13, 14, 15, 26, 27, 28, 30, 31, 32, 52, 53, 54, 55, 56, 57, 58, 59, 60, and 62.<sup>24</sup> The following Entries in List III are also

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<sup>24</sup> List II (State List) -- 1. Public order (but not including the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power). 2. Police, including railway and village police. 5. Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration. 6. Public health and sanitation; hospitals and dispensaries. 7. Pilgrimages, other than pilgrimages to places outside India. 8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors. 13. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; municipal tramways; ropeways; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways; vehicles other than mechanically propelled vehicles. 14. Agriculture, including agricultural education and research protection against pests and prevention of plant diseases. 15. Preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice. 26. Trade and commerce within the State subject to the provisions of entry 33 of List III. 27. Production, supply and distribution of goods subject to the provisions of entry 33 of List III. 28. Markets and fairs. 30. Money-lending and money-lenders; relief of agricultural indebtedness. 31. Inns and inn-keepers. 32. Incorporation, regulation and winding up of corporations, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies. 52. Taxes on the entry of goods into a local area for consumption, use or sale therein. 53. Taxes on the

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<sup>22</sup> David P Dehram, "Some Constitutional Problems arising under Part XIII of the Constitution", Indian Law Institute. Vol. – 1, 1958, Pages No: 523-566. .

<sup>23</sup> Constitution (Fourth Amendment) Act, 1955

relevant: 7, 15, 18, 20, 21, 29, 31, 32, 33, 34, and 35.<sup>25</sup>

Article 303(1) applies to State Legislatures as well as to Parliament. Regarding this Sir Ivor Jennings asked that when the State has no power to make law at all, then how it can discriminate is one of those mysteries which seem to take us into the realm of the supernatural? Certainly it goes too far as it is possible to imagine preferences and discriminations which could not be said to diminish the freedom of trade, commerce or

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consumption or sale of electricity. 54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I. 55. Taxes on advertisements other than advertisements published in the newspapers. 56. Taxes on goods and passengers carried by road or on inland waterways. 57. Taxes on vehicles, whether mechanically propelled or not, suitable for the use on roads, including tramcars subject to the provisions of entry 35 of List III. 58. Taxes on animals and boats. 59. Tolls. 60. Taxes on professions, trades, callings and employments.

<sup>25</sup>List III (Concurrent list) – 7. Contract, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land. 15. Vagrancy; nomadic and migratory tribes. 18. Adulteration of foodstuffs and other goods. 20. Economic and social planning. 21. Commercial and industrial monopolies, combines and trusts. 29. Prevention of the extension from one State to another of infectious or contagious disease or pests affecting men animals or plants. 31. Ports other than declared by or under law made by Parliament or existing law to be major ports. 32. Shipping and navigation on inland waterways as regard mechanically propelled vessels, and the rule of the road on such waterways, and the carriage of passenger and goods on inland waterways subject to the provision of List I with respect to national waterways. 33. Trade and commerce in, and the production, supply and distribution of, -

- (a) The products of any industry where the control of any industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;
- (b) Foodstuffs, including edible oilseeds and oils;
- (c) Cattle fodder, including oil cakes and other concentrates;
- (d) Raw cotton, whether ginned or un-ginned, and cotton seeds; and
- (e) Raw jute.

34. Price Control. 35. Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied.

intercourse and the States do have powers under Entry 26 of List II and Entry 33 of List III which are relevant here.

The limited operation of the clause as explained, is apparent that most State laws made by virtue of “any entry relating to trade and commerce” which gave preferences or worked discriminations among the States would offend Article 301 and that there is little room for the operation of Article 303 (1) where the States are concerned. In any case the exceptions to Article 301 contained in Article 304 permitting the States to interfere with the freedom of trade, commerce and intercourse are expressed to operate “Notwithstanding anything in—Article 303,” and this makes this particular prohibition of preferences and discrimination virtually inoperative so far as the States are concerned.

The Article permitting the States to interfere with the freedom of trade, commerce and intercourse in spite of Article 301 is Article 304. This may be seen as the States equivalent of Parliament's Article 302. Article 304, as has been noted, falls into two clauses; and a procedural proviso is attached to the second clause. For the time being it is to be noted that ordinary and unambiguous meaning of Clause (a) of article 304 is that, if the States have taxed or do tax goods of local origin then they are not barred by Article 301 or Article 303 from imposing the same tax, non-discriminatory, on similar goods imported from other States. But Article 304(b) clearly permits “reasonable restrictions” notwithstanding Article 301 that is to say notwithstanding that trade,



commerce or intercourse are by them made un-free.

### **Learning from other jurisdictions - Australian positions and Americans position**

#### ***Scheme of Allocation of Power in the Trade and Commerce Field***

The Indian draftsmen had two important considerations in their mind while drafting the provision on the allocation of legislative power between the Centre and the State from the working experience of American and Australian commerce clause. The first consideration that the draftsman had instead of general clause as mentioned the Commerce clause of the American Constitution, incorporated specific heads of power dealing with many of these component parts in three legislative lists. The second consideration which the makers kept in view is to minimize problems of divided jurisdiction which the federations like United States, Australia and Canada faced under the distribution of power made in their Constitution. The makers allotting important heads of power completely to the Union in India instead of restricting the reach of the Union legislative power to the foreign and inter-state phases of the topic sought to be regulated. The allocation of separate heads of power under three lists is made on the basis that while subject of national and local importance should be mentioned in the Union and State legislative lists<sup>26</sup> other subjects which are primarily of local importance but which at future date may become matters of national importance should be

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<sup>26</sup> List I and II of the Seventh Schedule

enumerated in the concurrent lists<sup>27</sup> so that Union have the requisite over riding power to legislate exclusively on these subjects if the situation demands it.

The more important of the topics coming either directly within the field of trade, commerce and intercourse or are indirectly connected by having close links with it specifically included in the Indian Union legislative list<sup>28</sup>

#### ***Role of American Commerce clause in the Constitution***

The Indian Provisions on the commerce clause owe their inspiration to American models. The commerce clause contained in Article I, Section 8, Clause 3 of the American Constitution which

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<sup>27</sup> List III of the Seventh Schedule.

<sup>28</sup> 1. Railways. 2. Highways declared by or under law made by Parliament to be national highways. 3. Shipping and navigation on inland waterways, as regards mechanically propelled vessels; the rule of the road on such waterways. 4. Maritime shipping and navigation, including shipping and navigation on tidal water. 5. Ports declared by or under law made by Parliament or existing law to be major ports. 6. Port quarantine including hospitals connected therewith. 7. Airways; aircraft and air navigation; provision of aerodromes; regulation and organisation of air traffic and of aerodromes. 8. Carriage of passenger and goods by railway, sea or air, or by national waterways in mechanically propelled vessels. 9. Posts and telegraphs, telephones, wireless, broadcasting and other forms of communication. 10. Inter-State trade and commerce. 11. Banking. 12. Bills of exchange, cheques. 14. Stock Exchange and future markets. 15. Regulation and development of Inter-State River and river valleys to the extent to which such regulation and development under the control of the Union are declared by the Parliament by the law to be expedient in the public interest. 16. Inter-State migration and inter-state quarantine. 17. Duties of excise on tobacco and other goods manufactured or produced in India except a) alcoholic liquors for human consumption b) opium, Indian Hemp and other narcotic drugs and narcotics; but not including medicinal and toilet preparation containing alcohol or any substance included in sub paragraph (b) aforesaid. 18. Corporation Tax. 19. Terminal taxes on goods or passenger carried by air or sea; taxes on railway fares and freights. 20. Taxes on sale or purchase of goods other than newspaper, where such sale or purchase takes place in the course of inter-state trade and commerce.

vests in Congress the power "to regulate commerce with foreign nations and among the several States ...." has functioned in two ways. Firstly, as a great workshop for the federal centre to fashion a wide range of powerful instruments for regulating in the country's larger interests the countless activities which are comprehended in foreign and inter-state commerce. Secondly as a brake upon the action of the constituent states of the federation which in any wise obstructed, burdened or discriminated against the free operations of foreign and inter-state commerce. Not like the American commerce clause, the Indian commerce clause plays a relatively minor role in the economic life of India. The Constitution-makers have thought of it only as a residuary grant to strengthen a wide and impressive category of specific powers given to the Union legislature under lists I and III of the seventh schedule for that legislature to regulate trade and commerce topics of national import.

#### ***Article 301 reverberating the language of Section 92 of the Australian Constitution***

Section 297 of government of India Act 1935 was available at hand. Instead the Constituent Assembly incorporated Article 301 with the emotional appeal of Section 92 of the Australian Constitution. As a result, the provision was altered beyond its recognition. This shows that makers of our constitution wanted "to enrich and widen the content of freedom guaranteed by section 297". The freedom guaranteed by Part XIII as originally enacted, and as subsequently amended, because such a statement will show unmistakably that the

freedom of trade and commerce secured section 297 has not been enlarged but has been substantially, if not drastically, curtailed. No doubt the freedom of trade was extended to intra-State trade and to that extent freedom of trade was enlarged, but the content of that freedom was also limited in comparison with the freedom of trade secured for inter-State trade by section 297.

#### **Comparison of Section 297 and Article (301-305)**

Parliament has the power to put restriction on the freedom of trade and commerce provided under Article 301 by the virtue of Article 302 as may be required in the public interest. Provided that it cannot give preference or make any discrimination by virtue of any entries in the legislative lists relating to trade and commerce<sup>29</sup> unless it is necessary to do so to meet a situation created by the scarcity of goods in any part of the territory of India.<sup>30</sup> The restrictions are not qualified by the word 'reasonable' though an amendment to insert that word was defeated. Discrimination or preference by virtue of other entries is not forbidden. As to the State they cannot give preference or make any discrimination by virtue of any entry relating to trade and commerce,<sup>31</sup> but even discriminatory restrictions, can be imposed on the freedom of trade and commerce provided that they are reasonable restrictions in the public interest and the President assents to a bill being introduced for that purpose<sup>32</sup> or subsequently

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<sup>29</sup>Article 303(1) of the Constitution of India

<sup>30</sup>Article 303(2) of the Constitution of India

<sup>31</sup>Article 303(1) of the Constitution of India

<sup>32</sup>Article 304(b) of the Constitution of India

assent to it<sup>33</sup>. The States can impose non-discriminatory taxes on goods imported from other States.<sup>34</sup> Existing laws violating Article 301 and 303 are saved, unless the President otherwise directs.<sup>35</sup> Again, Parliament and state legislature can enact laws providing for carrying on by the State or by a corporation owned or controlled by the State of any trade, business, industry or service to the exclusion, complete or partial, of citizen or otherwise notwithstanding Article 301 (amended Article 305). Thus freedom of trade guaranteed by Article 301 bears no resemblance to the absolute freedom of trade secured by Section 92 of the Australian Constitution. Further, the complete freedom of internal trade secured by section 297 is curtailed because the import or export of goods can be prohibited, since restrictions include prohibitions, and preference can be given and discriminations made as provided in Article 303(2) and 304(b).

#### **The relation of Article 19(1) (f) and (g) to the freedom of trade guaranteed by Article 301 by the Supreme Court**

Several High Courts and even Supreme Court have dealt with the relation of Article 19(1) (f) and (g) to Article 301 in their judgments. Justice Das in a case<sup>36</sup> said that Article 301 considered trade as involving movement and this article comes into play only when that movement is interfered. Art. 19(1)(g) guarantees the right in favor of citizens, whereas no such distinction is made in article 301.

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<sup>33</sup>Article 255 of the Constitution of India

<sup>34</sup>Article 304(a) of the Constitution of India

<sup>35</sup>Article 305 of the Constitution of India

<sup>36</sup>*Chamarabaugwala v. Union of India*, 1957 SCR 930

Article 19(1)(f) and (g) confers the fundamental right to acquire, hold and dispose of property and the right to carry on any trade or business on ‘citizens’ and not on “any persons”. However, the rights conferred by Article 19 on citizens are subject to reasonable restrictions and in so far as trade or commerce involves the buying and selling of goods, restrictions on the right to trade can be put in the scheduled tribes [Article 19(5)].<sup>37</sup> Even the right of free movement throughout the territory of India guaranteed to every citizen and the right to settle in any part of the territory of India can also be restricted for the same reasons. The non-citizens are also not guaranteed right to carry on trade under Article 301 when Article 19 itself by its limiting words expressly limits that right to citizens. If the language of Article 19(1) (f) and (g) restrains the right of a citizen to trade with members of the scheduled tribes in the interest of such tribes, it would be unreasonable to hold that Article 301 has the effect of abrogating those restrictions. Therefore, the power to legislate on the freedom of trade, commerce and intercourse is restricted not only by the provisions of Article 302 to 306 but is also restricted by the provisions Article 19(1)(f) and (g).

Simply stating article 19(1)(g) deals with the right of an individual citizen to carry on any occupation, trade or business. The purpose of Article 19(1)(g) is the protection of the individual interests in carrying or trade or business. The word ‘profession’ read with other words in article 19(1)(g), implies that the guarantee in that article

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<sup>37</sup> H. M. Seervai, *Constitutional Law of India*, Volume 3, 4<sup>th</sup> Edition, Universal Book Traders, Delhi, 2002

was for the development of individual personality.<sup>38</sup> While article 301 deals with freedom of interstate trade and commerce generally. This freedom is necessary so that the state may not restrict the free flow of trade and commerce. The free flow of trade is the basic need of economic unity of the country against disruption by local interest. Thus both the articles provide two different things and not one and the same thing.

### **Conclusion**

India today stands on the threshold of an economic and commercial revolution. The expansion of government activity involved makes an increase in the revenue needs of the State inevitable. On the one hand state needs more revenue, whereas, on the other hand the development require freedom from tariff barriers. Freedom of Inter-State Trade is a fundamental necessity in any federal system so as to avoid economic isolation and trade barriers within the federation. Part XIII of the Indian Constitution provides for this freedom. This part of the Constitution has been criticized as the most badly drafted part. The states try to erect trade barriers for their selfish purposes and this has posed problems for the said freedom not only in India but also in other federal countries. The provisions for interstate trade and commerce maintains a balance between the freedom and the public interest. If the State Legislature wishes to upset the balance, it finds itself under the control of two

supervisors, firstly, the President, and secondly the Court. The free trade clause provides for the freedom of trade but if the freedom clashes with the public interest, then the interest of the interest of the public will prevail.

*Niladri Mondal is Research Scholar, RGSOIPL, Indian Institute of Technology Kharagpur, India*

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<sup>38</sup>CAD (1948) Vol. vii page 950- Per Dr.Ambedkar. T. K. Tope uses the words dignity of individual for Art. 19(1)(g). Whereas for Art. 301 national unity in sphere of trade.

would meet with such resistance and be termed as ‘historical compromise’, of course Fatah’s did expect certain resistance, but, uprising of Hamas and completely romping over the Fatah’s wasn’t expected. Hamas came to power primarily questioning the ‘historical compromise’ were to be made while effectuating the self-determination and two state theory. The author provides an account on how the Hamas came to power with their radical and single state claim made a note that in the wake of two states as proposed by Fatahs. Further, what would be the effect on repatriation claim as Israel definitely would be inclined to deny the repatriation claims.

In Chapter 20 of Deuteronomy, some Mosaic rules for the conducts of war are set out. One says: ‘When in the course of war you lay siege to a town for a long time in order to take it, do not destroy its trees by taking an axe to them, for they provide you with food; you must not cut them down’<sup>40</sup>. Eventually after centuries the Hague Regulations on the Laws and Customs of War on Land annexed to 1907 Hague Convention No. IV wherein under Article 55 a provision on the similar lines was incorporated. The world today needs to integrate Human Rights and Humanitarian Rights; can we actually serve one by not serving others? As it is rightly noted by the author that, it may seem bizarre to speak of natural resources right in the same breath with economic, social and cultural right, but on a closer it might not remain that bizarre when once takes cognizance of General Comment No.15 (2002) on the right of Water as adopted by the Committee on

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<sup>40</sup>International Law, Vaughn Lowe, OUP Page 266.

Economic, Social and Cultural Rights. The water crisis as per the statistics shows that the level of disparity between the Palestine and Israel reflects that at the occupied territory the Palestinians are facing heavy discrimination with the most basic requirement of Life to exist on this Planet – ‘Water’. While Israel was out to manipulate and misinterpret Article 55 of Hague Regulation, one would wonder why the International Community did not stand up against it? why UNSC appears to be toothless wherein a settled jurisprudence is violated? Ironically the article violated would find its roots in Deuteronomy- the fifth book of Hebrew Bible and of Jewish Torah; one would wonder that if such interpretation stays in sync with the developed and super-powers hidden agenda, hence, the silence? The author in eighth essay, remains silent certain questions of which answers are pertinent to the Solution the Israel Palestine issue.

In the final essay of the third part limits itself to the question of establishing rule of law. The author says that Palestine Administration, which serves as the current political system and self-governing entity in the West Bank and Gaza Strip came on the face of the earth primarily due to Oslo Accord, however it falls short on numerous counts to qualify as Statehood under International law. A Constitutional Framework established under Palestine Administration well might have laws and judicial set up established but the whole arrangement was conditioned by the Israeli Government as it is absurd to expect rule of Law when the basic law of Palestine is subject to Israel’s whims and fancies. The primary sources

of law used by the Palestinian administration are International Laws and Laws of such other countries which had witnessed political and legal transition. However, Palestine Administration has also not given much to cheer about in terms of law and order, as various NGO and others have maintained that rights and freedom of Palestinians have been compromised by the Palestinian Authority themselves. With such challenges of conflicting laws coupled with limited law making power, it would be a Himalayan task to establish rule of law indeed. A strong legal system can't be established without the most elementary pre-requisite-'Sovereignty'.

One State or two State what the future is? Theorists, political scientists, international lawyers, international bodies and 'interested states' all are perplexed with the question of which would bring peace and harmony in the Middle East. Given the divide among the people the Jews and the Palestinians, the history of more than last 60 odd years it is obvious that two states theory is what would come the mind of anyone, especially the people who are living in those areas. The author notes that what each side desires is to greatly reduce its need to encounter 'others' in 'its land.' One -State Solution is virtually impossible to many. But imagination of theorists can do wonders; in this case the author like a mathematician excluded the possibility practical realization of two-state theory in totality, and then verifies and strategized the one-state theory if it is possible. While strategizing numerous arguments and road blocks were considered while coming to the conclusion that he fails to generate enough

support for one state solution even if it is running alone in the race. However, the counter argument in favor of 'single-state solution' as the future of Israelis presented in the final essay of the edited collection. He expresses that how International Law can act as a catalyst to guide negotiations towards resolution recognizing rights for both parties. A rigorous right based solution could bring eventual end to the conflict and for that the author suggested possible invocation of pressure from International Community even though it comes in conflict with the consent of the Palestinian & Jews. However, the whole idea remains legally untenable in addition to the self-contained antithesis provided within the argument by the author and somewhere between the arguments we lost essential rights of the individuals and rather the argument advocating against self-determination in true sense was realized.

The book identifies aptly the critical issues with respect to Palestine-Israel Conflict with plausible arguments and possible solutions. However, it must be noted that the book is not for non-specialist, even though the language is lucid but the issues dealt with are not of common knowledge and warrants basic understanding of United Nations, World Affairs and legal jargon and of course the historical events leading to the Conflict and subsequent events.

*Souvik Mukherjee is a Research Associate at Centre for Regulatory Studies, Governance and Public Policy, The West Bengal National University of Juridical Sciences.*