

Freedom of Trade and Commerce – A Constitutional View Point

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Abstract

Trade and commerce have become the largest sectors through which countries develop. Be it already developed countries like Japan or the USA or developing countries like India, trade and commerce has been the root of the survival of the world since ancient times. Evolution, development, and urbanization led to the rapid growth of the human race. Education has become a significant part of countries, and with the need for development came the need for laws. The need for constitutional law travels way back to 1215 when Magna Carta became the most important process that led to constitutional law in today's nations. Countries developed while enacting multiple laws for the protection of their respective citizens. Today with more than 190 countries globally, 167 out of them being democratic, constitutional law has gone through multiple changes and amendments. As far as the Indian Constitution is concerned, it was amended 105 times as per August 2021 data. India provides six primary fundamental rights to its citizens, explained in detail under Part III of the Constitution. Out of the six, one primary fundamental right that falls under the right to freedom is the Freedom of Trade and Commerce. It is widely explained under Sub-clause (g) of clause (1) of Article 19.

Moreover, provisions for freedom of trade, commerce, and intercourse are also separately explained under part XIII of the Constitution – Articles 301 to 307. One of the fundamental rights granted to citizens is the freedom of trade and commerce. More than 40% of India's population is involved in trade and commerce. Every citizen has the right to work in the occupation of their choosing; they can freely profess and practice any profession, occupation of their choice throughout the territory of India. This right is not absolute and does have some exceptions. The Parliament can impose certain restrictions on this right for the public interest. For example, if a particular business is not legal, then the government has the right to stop the persons involved in such business from carrying it on any further. This will not mean that their right to practice and profess any occupation of choice freely is violated. It must be noted that freedom does not make one free from laws. This paper explains the constitutional provisions related to freedom of trade and commerce in detail.

Keywords: *Freedom of Trade and Commerce, Magna Carta, Part III of the Constitution, Article 19 (1) (g), Part XIII of the Constitution, Articles 301 – 307, Fundamental Rights.*

Introduction –

The Constitution of India came into force on January 26th 1950, making India a Republic. The Indian Constitution is the world's most extensive Constitution and is a written constitution. It provides the various rules, regulations, principles, rights, and duties for governing the organs of the Government of a State. It is a fact that the Constitution of India has gone through eminent research and deliberations for the improvement of the administration system. India's Constitution establishes fundamental rights and responsibilities for its inhabitants. One of them is the Freedom of Trade and Commerce that is explained in detail in this paper.

The Constitution's Article 19 (1) (g) guarantees the right to practice any profession. It explains that every citizen of the country can freely practice any profession and trade or business of their choice. Part XIII of the Constitution widely discussed trade, commerce, and intercourse within the territory of India. Articles 301 to 307 fall under this part.

It is a good fact that India is neither wholly a federal-state nor unitary; it is called quasi-federal. By quasi-federal, it must be inferred that there are two sets of government – the central government and the state governments, where more power is given to the central government. Here, it is significant to note that the Centre is not dominating the State, but relatively few provisions can be handled only by the Centre. For example, a situation of national emergency, even in one part of any State cannot be declared by the Governor, only the honourable President of India can declare a situation to be of national emergency if he is satisfied that such situation is making the parts of the State or the State or any part of the nation lose its peace.

In all federations, the nation is deemed to create, preserve, and develop the economy by removing the barriers to domestic economic activities and induce trade and commerce for making the nation one single economic unit for the common advantage of everyone [1].

As far as the Indian Constitution is concerned, the framers felt the significance to maintain the significance of economic unity of the nation. India has been famous for trade since the subcontinent era and is known to have good relations throughout the silk routes of the country. India was one of the largest economies of the world before the British era. Punch marked trade coins, muslin cloths, spices, and many more trade items were exported from India. It is evident throughout the history of India that trade has been in the blood, and traders exported products of variety across the globe.

Maritime trade happened between the Southern Part of India and Southeast and West Asia from the early 14th Century CE. Back in the time, Malabar Coast and Coromandel Coast were important locations of trade centers. During the Maurya era, faster infrastructural developments such as the

building of roads were improvised that gave traders to find out various routes of trade. Along with the building of warehouses, the profession of trading started to grow at a faster pace, and traders felt security with these developments.

India's trade routes grew, and many scholars provided suggestions to improvise trade relations with Eastern Europe. Many traders settled in India between 14th and 18th centuries. This became a boom period for Commerce in India. Towards the north, the Bengal and Saurashtra coasts were significant contributors to maritime trade. The Gangetic Plains, Indus Valley, Punjab region all contributed to trade and commerce with agricultural produces.

The period of the Delhi Sultanate made India develop international trade relations that included social and economic relations. The Sultanate era brought in mechanical technologies, and India adopted them widely.

Historical Background –

Agriculture is regarded as India's economic backbone, and more than 50% of the GDP contributions is by the agriculture sector. India has been known worldwide for spices since time immemorial. In the 17th century, India started the development of crops, majorly maize and tobacco. Farmers of the Bengal began the cultivation of mulberries and developed sericulture (the production of silk and rearing silkworms for producing silk). Indian agriculture was advanced compared to Europe. The Mughal era induced and made more emphasis on agrarian reforms with the establishment of irrigation systems.

Industrial development began with spinning, weaving and manufacturing companies in Bombay (now Mumbai) through the well-known entrepreneur Jamsetji Tata. Other mills were also existing that produced yarn for making clothes.

Exporting cotton and silk to larger markets of America, Africa, Asia, and Europe was broad in the 1750s. British era did affect the Indian trade system. Indian textile industry was manipulated by them, and they made British industries pay taxes for importing Indian textile. They slowly let British textiles enter the Indian markets and increased the value of imports heavily. Many movements broke out, the famous Swadeshi and Boycott movements for adopting Indian products and textiles and refraining from buying British and other foreign goods for self-reliance and improvement of domestic trade.

Many other items of trade were discovered, such as coal mines. The East India Company established maps for identifying available natural resources throughout the territory of India with the help of a Geological Survey. The iron and Steel Industry rose after the mid of the 19th century. The establishment of metal roads for expanding trade networks took place hand-in-hand. Other industries,

such as paper manufacturing, publications, were established. There were also chemical refineries established in India to produce petrol, paints, kerosene, and other chemicals of everyday usage.

Constitutional provision for Trade and Commerce

Article 19 (1) (g):

Every citizen of India is provided with the right to practice a profession of their choice, carry out trade and businesses freely. This provision is given under Fundamental Rights, Article 19 (1) (g) of the Constitution. However, this right has some restrictions on public interest. If the nature of any profession, trade, or business is not lawful or if the law identifies such a job as against the public policy, then such job cannot be carried on further. It is also to be noted that any job, occupation, business, or trade must not obstruct the working of any government statutory body. For the proper understanding of the provision, the essential terminologies are explained:

Profession: refers to an occupation that includes a more extended period of training for acquiring the required knowledge to achieve excellence in the particular profession. Entry into any profession is restricted through examinations, such as a lawyer is required to clear the Bar Exam for acquiring the license to practice law.

Occupation: refers to any job title acquired through required qualifications, such as a manager who has completed MBA or an IT engineer who has completed Computer Science Engineering.

Trade: in simple terms, trade means buying and selling goods and services. In more broad terms, trade requires special skills for conducting the job of selling goods. Trade involves selling of goods in exchange for money. Trade can take place between businesses, business to customers, and between customers as well.

Business: it is defined as any firm or enterprise, or organization that works for achieving some objective. Carrying out a business is a massive task as it involves various facets, such as market interests, public interests, restrictions and requirements of the government, profit, costs of productions, raw materials. An example of business can a publishing company; the main objective of running a publishing company will be to publish books, journals, magazines while earning a suitable and sufficient amount of profit.

Commerce: it includes the exchange of goods and services, and unlike trade, it is an extensive area. It involves macroeconomic sales and purchases made by large organizations. Commerce comes under business and is majorly focused on distribution rather than production.

Clause (6) of Article 19 describes that the State can impose reasonable restrictions for the public interest on the right provided under sub-clause (g) of clause (1) of Article 19. It is further stated that to practice any profession, trade, occupation, or business, professional or technical qualifications are prescribed, and the State can carry on any business or trade of choice by either excluding the citizens wholly or partially.

It is necessary to allow trade with proper control for healthy competition to avoid conflicts and chaos. Proper regulations are required to be implemented so that all traders, business houses and other professionals involved in trading can carry out their occupation freely. Traders involved in hawking are included in the provision, and they cannot be denied that they are working on the streets; they must be regulated with proper provisions of the Constitution, and their rights must also be protected [2].

It is significant to note that to sell liquor in India, one need to acquire a license. It is the State's responsibility, and for the very purpose of preventing dangerous products from being sold to the public at large, the police are provided with the power to take the necessary actions. The State has powers for ensuring that the sale and manufacture of intoxicating liquors are prohibited. However, this does not mean that sale of liquor is illegal; if proper licenses and other legal requirements are done accordingly; one is free to manufacture and sell liquor. It must also be noted that in India, the State has the right to manufacture and sell liquor.

Part XIII of the Constitution

Article 301:

Article 301 of the Constitution defines freedom of trade, commerce, and intercourse. It states that trade, commerce, and intercourse is accessible throughout the territory of India. The Indian Constitution has adopted Section 92 of the Australian Constitution as Article 301, which describes that trade, commerce, and intercourse between the states must be free whether it is done through road or ocean or any other means [3].

This provision of the Constitution was initially intended to remove State custom barriers. Customs barrier means charging fees or implementing rules for limiting trade. However, later on, this intention was changed due to judicial reviews and decisions. Now, it is applicable for states and well the commonwealth [4].

The provision of Article 301 is applicable for inter-state as well as intra-state trade purposes. It is important to note that Article 301 states that it is free to carry on a trade or business of choice, but that

does not mean that one is free from the laws. Any regulatory law cannot become a violative law. Laws are specially made to ensure that people abide by the regulations, and application of any law cannot be violative; of course, there are exceptions. For example, levying tax does not act as a barrier to trade or cannot be called Article 19 (1) (g) or Article 301 are both considered infringing.

Article 302:

Article 302 talks about the power of the Parliament for the imposition of restrictions on Article 301. Article 302 states that the Parliament can impose mandatory restrictions on the freedom of trade, commerce, or intercourse between one State and another within multiple states or within any part of the territory as it thinks fit [5].

This article delegated authority to the Parliament to impose restrictions for the public interest. By restrictions, it must be inferred that the freedom of trade in the territory of India is restricted. The Parliament is free to impose such restrictions in inter-state and intra-state business transactions, trade, or commerce.

This provision was widely explained by the Sarkaria Commission clearly. The explanation states that some situations might arise where it is necessary to impose restrictions on trade and commerce activities. In a country like India with a vast economy and cultural diversity, it becomes the responsibility of the Centre to regulate trade and commerce activities in certain situations. For example, the need to protect the natural resources of various states from getting exploited. Natural resources are used for trade and business, and other related activities, so it is the ultimate responsibility of the Centre to ensure their availability and prohibiting their exploitation. It is also further explained that it is significant that the Parliament controls intra-state trade in situations where production takes place only in one State, but the distribution of the products is done to different states [6].

Article 303:

Clause (1) of Article 303 states that neither the Parliament nor the Legislature of any state has the power to make any law in favour of one particular State or authorizing the making of any such law as it becomes discriminatory on other states. Clause (2) of Article 303 states that if a situation arises in any state, such as goods scarcity, and the Parliament finds it necessary to make such law as mentioned in clause (1), the Parliament can do so.

In case of law, the Supreme Court once again refused to explicit an opinion in the well-known query, or even at the confined question whether, for the provisions of Article 303, entries referring to Tax on Sale of Goods Act (Section 92A) are referring to trade and commerce. It was argued that because it

hampered trade and commerce via means of providing choice to at least one State over another or utilizing discrimination among one State and another, In *State of Madras v. Nataraja Mudaliar*, it was alleged that Arts. 301 and 303(1) were violated because they impeded trade and commerce by favouring one State over another or discriminating between one State and another. The Court rejected the claim, finding that an Act adopted for the "purpose of imposing a tax to be collected and kept by the State "does not amount to a law favouring one State over another or discriminating between them simply because of various tax rates in different states. Several reasons were adduced in support of this view.

First, the flow of trade does not necessarily depend upon the sales tax rates, and various other factors also are relevant. Secondly, referring to the Australian cases, the Court derived the principle applicable in the present case, viz., "where differentiation is based on considerations not dependent upon natural or business factors which operate with more or less force in different localities that the Parliament is prohibited from discriminating." Thirdly, by leaving it to the State from which the movement of goods commences to levy Central sales tax on the sale, at rates prevailing in the State, no discrimination can be deemed to be practiced. "It is clear that the legislature has contemplated that elasticity of rates consistent with economic forces is intended to be maintained."

The approach of the Court in *Nataraja* appears to have been influenced by the fact that the Central sales tax is to be levied by the State of export; that it is in the interest of such a State to fix such rates of sales tax as may not discourage prospective buyers, and this would discourage the State from imposing an unduly high rate of sales tax. The question of a State of import is, however, covered explicitly by Art. 304 (a). Though the scheme of the Central Act was held valid in the *Nataraja* case, nevertheless, there appears to be little doubt that if the Central Act had itself levied differential rates of sales tax (and not left it to the States to fix the rate then it would have been invalid because of Art. 303. As the Act, itself did not do anything like this and merely left the matter to the States. It can be argued that the Centre was not indulging in any discrimination between State and State. Moreover, by equating intra-State and inter-State commerce as to the rates of taxation, even a state cannot be accused of discriminating against interstate trade. [7].

Article 304:

Clause (a) of Article 304 states the Legislature of any State can impose a tax on goods that are imported from other states where similar goods are produced. Clause (b) of Article 304 states that the Legislature of a State can impose reasonable restrictions on the provisions as mentioned under Article 301 with any other state or within the State for public interest if necessary.

It must be noted that the Legislature of any state is not allowed to introduce any bill or make any amendment without the prior consent of the President. Article 304 does not restrict the levying of tax on goods but restricts the levy of the tax on goods that would be seen as discriminatory between goods that were imported from other States and similar goods that were produced. The main objective is that the tax levied on local goods and on imported goods from other states must be the same.

In this case, Madhya Pradesh imposed a sales tax on the sale of tobacco sold in the State by a merchant by importing. Importing tobacco without help from anyone else was not liable to burden, and if the imported tobacco was not sold in the State, no tax was payable. Still, the Supreme Court held that the tax being referred to straightforwardly obstructed exchange and trade between Madhya Pradesh and different States. The duty was not saved by clause (a) of Article 304 because tobacco manufactured or produced inside Madhya Pradesh was not dependent upon any charge. Thus that tax was unconstitutional [8].

Article 305:

Article 305 includes the provision for saving the existing laws and providing the laws for State monopolies. It states that the provisions of Articles 301 and 303 will not affect any other existing laws. The only exception is when the President directs any changes. Also, Article 301 does not affect any other law made before the 4th Constitutional (Amendment) Act, 1955.

In a case [9], it was questioned by the Supreme Court that does State monopoly for few trade and commerce activities violate the provision of Article 301 and 19 (1) (g) or not. The question was left undecided. The judgment inferred that even after the first amendment to take out such state monopolies, no other provision was added to Article 305. Thus, even though the amendment was made, if any law that makes such state monopoly, it must be justified before the Court that such is done for in public interest, is not violative of freedom of trade and commerce, and falls under reasonable restrictions under clause (b) of Article 304 of the Constitution.

After the fourth Constitutional Amendment, existing laws and future laws that include state monopoly for any trade or commerce activities are not violative of Articles 301 and 303.

Article 307:

Article 307 explains the appointment of authority to carry out the provisions of Articles 301 to 304 smoothly. Article 307 states that the Parliament can appoint such authority it thinks fit for fulfilling and carrying out the provisions as mentioned and explained under Articles 301 to 304. Parliament can confer powers and duties it thinks fit on such authority as appointed.

Case Laws

In the case *Atiabari Tea Co. v. State of Assam*[10],the petitioner was into the transportation of tea to Calcutta through Assam. During the transportation to Calcutta, the tea was liable to tax in Assam. It was questioned that whether this violates the provision given under Article 301 of the Constitution and whether it can be protected under clause (b) of Article 304. The Supreme Court held that levying the tax, in this case, is infringing the movement of goods. Thus, this will fall under Article 301, and the Act under which such tax was levied was held void.

In another case, *Sukumar Mukherjee v. State of West Bengal*[11],the appellant argued that there were unreasonable restrictions imposed on the right as given under Article 19 (1) (g) of the Constitution of India. The restriction was imposed by Section 9 of the West Bengal State Health Act, 1990, which prohibited teacher doctors working at West Bengal Medical Education Service (WBMES) from practising privately. However, the restriction was teacher doctors of WBMES and not on doctors of the West Bengal Health Service (WBHS). The Court held that such restriction was reasonable because when one has decided to work for the government, they are bound by the terms and conditions of service to the government.

Article 47 of the Constitution of India describes that the State must increase the nutrition level and standard of living of the people and focus on improving health as one of its primary duties. It is the responsibility of the State to prohibit the consumption of intoxicating beverages and substances that are harmful to one's health, unless for medical reasons[12]. The application of Article 47 along with Article 19 (1) (g) was made in a case[13]where liquor business was prohibited. The controversy was whether it is a fundamental right of a citizen to trade or carry on a business in liquor. The Supreme Court held that even though we have the freedom of trade and Commerce under Article 19 (1) (g), they are not absolute, and the State has the authority to impose reasonable restrictions. It is further held that citizens do not have the fundamental right to do a business that deals in goods that are injurious to the health and safety of the public.

It is another significant restriction of Article 19 (1) (g) that one professional is restricted entry into another profession. In a case, *Dr Haniraj L. Chuhani v. Bar Council of Maharashtra and Goa*, [14] the appellant, who was a doctor by profession, had applied for enrolling as an Advocate. The rules under the Bar Council prohibited him from such enrolment. This made the appellant challenging the validity of Article 19 (1) (g) of the Constitution of India. The appellant argued that he was entitled to practice as an advocate even though he was a doctor and practice both professions simultaneously. However, the Supreme Court held that one person could not practice two or more professions at one

time. It was further held that the State Bar Council's rule prohibiting entry of a person who is already a professional to enrol for the bar is justified.

In the case, *B. R. Enterprises v. State of Uttar Pradesh*, [15] the petitioners claimed that the Lotteries (Regulation) Act, 1998 and the order passed by the State of Uttar Pradesh is violative of Articles 301, 302 and 303 of Part XIII of the Constitution of India. The order passed by the State of Uttar Pradesh stated that the sale of lottery tickets from other states is banned. The Supreme Court held that a lottery could not be considered a business or commerce but gambling. Thus, the order passed is not violative of Articles 301, 302, and 303. The significant difference between trade and gambling (lottery as in this case) is that trade involves skills, whereas gambling involves only chance (in simple words, luck). Therefore, the ban on lottery tickets from other states in Uttar Pradesh is not violative of Article 19 (1) (g) or part XIII of the Constitution.

The establishment of educational institutions is neither trade nor commerce nor business. It was held in a case [16] that trade or business generally has profit as the main objective, but education is a service and does not intend to earn profit.

In a country like India, with religious diversity, many animals are worshipped, and the cow is one. Cattle are also considered an essential contributor to agriculture which automatically helps in economic growth. In a case,¹ the butcher petitioners had filed a petition that Section 5 of the Bombay Animal Preservation Gujrat Amendment Act, 1994 that is applicable in Gujrat, is violative of Article 19 (1) (g) and Part XIII of the Constitution of India. They argued that the Act imposes a ban on the slaughter of cows, calves and other milch cattle thus, violating the right of the butchers to practice an occupation of their choice freely. The Supreme Court held that the Act imposes a ban only on a particular class of cattle only and not all types of cattle, the butchers are free to slaughter cattle that are not mentioned under the said Act, and it was concluded that the Act is not violative of freedom of trade and commerce.

In *Indian Cement v. State of Andhra Pradesh* [17], the petitioners argued that the notification issued by the State of Andhra Pradesh and Karnataka under Section 8 (5) of the Central Sales Tax Act, 1956 was violative of Part III of the Constitution of India, the reason being that the reduction of the tax rate on the sale of cement by local cement manufactures did not benefit the cement manufacturers from other states who had their sales officers in Andhra Pradesh. The Supreme Court held that Section 8 (5) of the Central Sales Tax Act, 1956 was violative of Part III of the Constitution of India and were liable to be repealed.

Conclusion

Fundamental Rights are the most important for every citizen. Freedom of Trade is one of them. This right gives access to the citizens to practice any profession, occupation, a business of their choice. This is a fundamental right as it helps build a source of income for the citizens and the development of the economy for the nation. Article 19 (1) (g) under Part III of the Constitution and Articles 301 to 307 under Part XIII of the Constitution talks widely about the Freedom of Trade, Commerce, and Intercourse. It must be noted that this freedom is not absolute and holds reasonable restrictions that can be imposed. Such restrictions are not violative of the provisions mentioned and explained in this paper. Over the years many cases, regarding violation of such provisions have taken place, and in most cases, the Courts have given sound judgments. The freedom of trade and commerce is protected, and no one can violate such rights.

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