

Regulation of Commerce in Federal Constitutions: A Critical Analysis

Abstract

The problem of trade and commerce of the country assumes two conflicting aspects. On one hand, is the need of freedom of trade and commerce in the territory of the country in the interest of economic development and unity of the various regions forming the federation and, on the other, there is need for regulating or otherwise restricting this freedom in the interest of the people and the country as a whole. The need for control of commerce has been increasing day by day, as the growth of the multinationals has resumed a significant position in the present society and the welfare activity of the government have shrunk to a considerable extent.

Keywords: Regulation, Commerce, Trade, Federation, Economy, Sovereignty, Regional, Union.

Introduction

One of the many problems in countries with a federal system is the distribution of powers between the national and regional governments in the sphere of trade and commerce. The problem is simple in countries with unitary type of government where the law of one single legislature runs throughout the length and breadth of the territory. But in a federal polity there are more than one law making bodies, each responsible for making laws for their respective territories and each enjoying certain amount of autonomy within its territorial jurisdiction.

There are many theories of Federal arrangements. Some thinkers have laid great emphasis on the abstract question of the vesting of sovereignty in such arrangements while others have dealt with the problem from a practical point of distribution of power between the composite and regional governments and also the allocation of power to the different wings of governments in the units and at the apex.¹

But for our present purpose we may take as a starting point the following description of a Federal Government by Professor K. C. Wheare-

1. Existence of dual form of government
2. Written Constitution
3. Supremacy of the Constitution.
4. Division of power between the national and regional governments
5. Special process of amendment of the Constitution

According to Prof. Wheare "what is necessary for the federal principal is not merely that the national government, like the regional governments, should operate directly upon the people, but further, that each government should be limited to its own sphere and within that sphere should be independent of the other"²

In such a setting, the problem of trade and commerce of the country assumes two conflicting aspects. On one hand, is the need of freedom of trade and commerce in the territory of the country in the interest of economic development and unity of the various regions forming the federation and, on the other, there is need for regulating or otherwise restricting this freedom in the interest of the people and the country as a whole. The need for control of commerce has been increasing day by day, as the growth of the multinationals has resumed a significant position in the present society and the welfare activity of the government have shrunk to a considerable extent.

The question in federal governments, therefore, has been as to the amount of control which the national and regional governments should respectively exercise in the field of commerce. Another aspect of this question has been as to the items of commerce which are fit for being looked after by the national government and the items which can be left to regional governments to look after. The question has thus always been as to how much local control of commerce has to be surrendered by the



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regional governments to the national governments in public interest. This question has been especially difficult to answer because what may be of purely local interest one day may become of national importance the next day and the line drawn one day to demarcate the limits of local and national jurisdiction may become artificial and obsolete the next day. Beside this in the light of recent economic crisis the degree of regulation also assumes great importance.

Thus, probably the objective of regulation of commerce in a federation, is to minimize the inter-state barriers as much as possible, so as to inculcate in the minds of the people the feeling that they are members of one nation, though residing in different geographical divisions of the country.

Therefore, it also become important to examine whether and if so, to what extent the trade and commerce is free and how that freedom helps in promotion of trade and commerce? How far restrictions on freedom of trade and commerce may be imposed by the respective government within the Constitutional parameters and how well it meets the challenges that may arise due to free market economy.

Aim of the Study

The research work has been taken up with an objective to make a comprehensive and comparative study of the provisions of commerce clause in major federal constitution of the world namely U.S., Canada, Australia and India. How have these provisions over the years helped to develop trade and commerce and whether provisions under the Constitution of India are an improvement over other constitution of the world?

Review of Literature

In the present paper various literatures related to the area of study have been reviewed to gain knowledge on the related aspects of the research problem so that the research study goes into the right direction. It is important to mention here that the literature available on the research topic is very sparse and the matter which is available is also not holistic.

Wheare K C in his book has magnificently detailed the characteristics of federal governments and against that characters why he considers Indian federal system as not a replica of classical federal government. He calls Indian federal system as quasi federal and tries to justify it against the characteristics devised from different federal constitutions

Collin Howard has presented a lucid and analytical commentary on freedom of trade commerce and intercourse under the Australian constitution. He has traced the history of this legislation and also given a detail analysis of the expression "absolutely Free" under section 92 of the Australian Constitution. He has also explained that absolute freedom under section 92 of the Australian constitution is not absolutely free but subject to restriction in the interest of public. He appreciates the role of judiciary in restructuring the section what was left by the legislature.

Tripathi, P.K. gives the simple meaning and interpretation of the words used in the Part XIII and Article 19 of the Constitution of India of which Right to trade and trade commerce and intercourse is protected. He explains the intent of the framers of the Constitution in framing the Part XIII of the Indian Constitution. He emphasized the role of judiciary in interpretation the provisions of the Articles mentioned in Part XIII of the Indian Constitution. Legislative and judiciary of the state should be prevented from deceiving people.

Jain S. N has commented in detail on the procedure and regulation of interstate trade and commerce mentioned under Indian Constitution. He has also discussed the restrained-on interstate trade and commerce in light of the taxation powers of the State, in particular the sale tax and whether it offers impediment to interstate trade and commerce.

Stern, Robert L., has presented research papers which give the scope, different provisions, strengths and shortfalls of the Commerce clause under the American Constitution. The Article also gives valuable suggestions to make the commerce clause useful in the present era of globalization. He has also dealt on the role commerce clause as an instrument for national integration of the American economy. An attempt has been made to trace the origin and brief history of commerce clause under American Constitution and to critically analyze its impact on national integration of American Economy.

Seervai, H.M the eminent jurist has delved into the Freedom of Trade Commerce and Intercourse Under Part XIII of the Indian Constitution from different angles – historical, legal, institutional, political, Judicial and even futuristic. The Article is not just a mere commentary on Freedom of Trade Commerce and Intercourse under Indian Constitution but an in dept analysis of the role of judiciary in interpretation of Part XIII of the Indian Constitution and its paradigm shift after the famous Atibari case. He approaches the subject in an extremely comprehensive manner.

SMITH, Alexander, has given a comparative account of Commerce clause in the American and Canadian Constitution. The book is not just a mere commentary on the Commerce clause with some introductory information; but it approaches the subject in a comprehensive manner dealing with the origin, evolution and development of commerce clause in both the country. The book presents the similarity and difference of the commerce clause in the American and Canadian Constitution and the difference in approach of judiciary in interpreting the provisions in both the countries.

Else-Mitchell, The Hon. Mr Justice, compilation of essays on Australian Constitution gives a valuable insight into the working and evolution of section 92 and 52 of the Australian Constitution with the inputs of Judiciary.

Review of literature has helped the researcher to study the different dimensions of Regulation of Commerce in Federal Constitutions and to gain a deep knowledge on this subject. It has helped in framing imperative ideas of research.

BIRCH A. H. "has presented research papers which give the scope, different provisions, strengths and shortfalls of Commerce Clause in Federal Constitution. The book also gives valuable suggestions to make the common man understand the movement of trade commerce in federal system in a simplistic manner. It brings out the origin and history of interstate trade, commerce and intercourse in federal constitution, necessary to understand the clause and analyses the evolution in light of the Judicial pronouncement for a better correlation of the concept in different federal counties.

Thus, a broad perspective was covered by the researcher by reviewing different books, journals and articles on Regulation of Commerce in Federal Constitutions and federalism. Through review of literature, the researcher has made an attempt to study the various concepts and terminology of the research work carried out in the present study.

Regulation of Commerce

Regulation of commerce is perhaps the most important field, in which both the national and regional governments play an important role. In democratic countries the aim of governments is to control the business activities of individuals and groups of individuals rather, than to substitute the State for the individuals or to prohibit an economic activity altogether, unless, of course, such a step in some specific field of economic activity is absolutely necessary. The provisions on the subject in U.S.A. and Canada specifically confine the powers of the national governments to regulation while the Australian Constitution does not mention, the word "regulation", though the presence of a restrictive provision of Section 92 in another part of the Constitution has brought about the same result.

The Indian Constitution in Article 19 and Part XIII Article 302-305 mentions the word "restrictions" whereas in specific entries in the legislative lists simply the words "trade and commerce" appear³ qualified by the expressions, foreign, inter-state or intra-state. For example, entry 33 in List III uses the words "trade and commerce" followed by the words "production, supply and distribution of". Although the word "regulation" is absent in some places or the word "restrictions" has been used in the Indian Constitution, but the general emphasis in all the Constitutions under study is on regulation of commerce and not to impose prohibition or assumption of this function by the state. Regulation of economic activity generally takes four shapes, viz.:

1. Regulating the quality of products or services;
2. The price of such products or services;
3. The conditions of production and;
4. The amount or quantum of such production.

Thus, an attempt is made to critically analyze the regulation of commerce by exercise of powers conferred to regulate commerce.

In order to understand the prevailing scenario on the subject, the Constitutional provisions of U.S.A., Canada, Australia and India have been critically studied with the help of judicial pronouncements including the limitation powers, if any, of the

respective governments which have been discussed in detailed.

Part I- The Position in U. S. A.

The main provision on the subject in the Constitution of U.S.A. is contained in Clause 3 of Section 8 of Article 1 which runs as follows: -

"The Congress shall have power —
To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

From the above it appears that the divisions of powers in the U.S. Constitution are on the pattern of the single enumeration system, dependent on the interpretation of the words "regulate", "Commerce", and "among the several States". The exhaustive and ever expansive interpretation given to the word "Commerce" by the Supreme Court in U.S.A. according to which it now includes any movement of goods or persons whether for profit or not.

Since the territorial ambit of the powers of the Congress in the field of regulation has depended on the meaning of the words "Regulate", "with foreign nation" and "among the several states". Therefore, the subsequent portion of this paper aims to provide clear understanding of these terms.

Regulate

The broad outline of the Commerce clause of U.S.A. was sketched by C.J. Marshall in the first case that came up before the Supreme Court i.e. *Gibbons V. Ogden*⁴ C.J. Marshall defined the words "regulate" in the following words at p.196: -

"We are now arrived at the enquiry what is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power like all others vested in Congress, is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the Constitution..."

(Emphasis Supplied)

Thus, in *Gibbons* case Chief Justice Marshall said that the power of the Congress to regulate commerce knows not limitations except those mentioned by the Constitution.

But this does not mean that the Congress has the unlimited power to regulate even to the extent of imposing complete prohibition such powers arbitrarily. The position has been clarified in *Stone V. Farmers Loan & Trust Co*⁵ where the Supreme Court described the power to regulate in the following terms at p. 331s-

"...It is not to be inferred that this power of limitation or regulation is itself without limit. The power to regulate is not a power to destroy and limitation is not the equivalent of confiscation..."

Thus, it may be said that the power to regulate commerce is not without limitation which was

affirmed by the Supreme Court in U.S. V. Hill⁶ case. In Dayton-Goose Creek Railway Co. V. U.S.⁷ It was held that a law of the Congress which appropriates half of the excess profit of railway companies to help those railway companies which earned less was a legal exercise by the Congress of its powers to regulate commerce as this power of the Congress was meant to foster, protect and control commerce with appropriate regard for the welfare of those who are immediately concerned with it as well as of the public. It may be mentioned at the outset that the power of the Congress in this field is both negative and positive. In its negative aspect it checks the various States from imposing regulations on commerce which is foreign or inter-state and in its positive aspects it enables the Congress to make laws which provide for congressional regulation of such commerce. This power has also enabled the Congress to authorize the States to make regulations in respect of such commerce, though in some earlier cases the silence of Congress in certain fields was interpreted by the Courts as meaning the authorization of such powers being exercised by the States pending the exercise of such powers by the Congress.

Part II- Regulation of Commerce under the Constitution of Canada

This part of study is related to the regulation of commerce under the Canadian Constitution.

Although the provisions of item no. (2) of Section 91⁸ of the B.N.A. Act of 1867 do not limit the powers of regulation of trade and commerce either to the commerce with "foreign nations" or "among the several States (Provinces in this Case)" as in the U.S.A. The powers of the Dominion Parliament are circumscribed in the sphere of internal commerce by the rights of the provinces to legislate regarding property and civil rights in their own territories. In this way a similar barrier on the Dominion powers at the provincial boundaries has been placed in Canada as has been provided for in the Constitution of the U.S.A. by the use of the words "among the States" in the commerce clause. How the Dominion power in Canada in its capacity to pierce the provincial boundaries differs from the similar power of the Congress in the U.S.A. on account of the judicial attitude on this subject in the two federations will be seen hereafter. A comparison of the powers of the Dominion Parliament in Canada with that of the Congress in U.S.A. in respect of foreign commerce will be made. It may be pointed out that as the word regulation has been used in both the provisions granting powers on this subject to the national government in the U.S.A. as well as in Canada, and therefore, it is worthwhile to see how the word "Regulation" has been interpreted in Canada by the judiciary.

The Privy Council in the Municipal Corporation of Toronto V. Virgo⁹ explaining the term "Regulation" observed that:

"No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where

such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. But their lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation and governance of it and, indeed, a power to regulate seems to imply the continued existence of that which is to be regulated or governed..."

The Court while emphasizing on need of imposing restrictions on certain grounds like prevention of nuisance or maintenance of order explained the distinction between prohibition or prevention of trade the regulation and governance which according to Court exists and continues ever.

The aforesaid observation gives positive power to regulate (govern) the trade a positive power. The above view was affirmed by the Privy Council in Attorney General for Ontario V. Attorney General¹⁰ for Canada (called the Local Prohibition Case) to the following effect,

"That a power to regulate, naturally, if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation."

The other side of the power to regulate has been explained by the Privy Council In Attorney General, Canada V. Attorney General, Alberta¹¹ in the following words:

"...It must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces."

This observation restricts the power of regulation through licensing of a particular trade. Thus, it may be said that though the power continues to exist but with certain limitations.

Part III- Regulation of Commerce under the Australian Constitution

The Constitutional provisions regarding powers of regulation of commerce in Australian Constitution is mentioned in section 51(1) which runs as:

Section 51

The Parliament shall, subject to this constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:

- (i) Trade and Commerce with other countries and among the states;

From the above it is clear word commerce in Australia means almost the same activities as it does in U.S.A. except those like navigation, shipping and railways which have been specifically mentioned as falling within the sphere of the legislative powers of the Commonwealth. But the total effect of the enumeration of powers under Section 51(1)¹² of the

Commonwealth of Australia Act is that the reach of the power of the Commonwealth is as wide as that of the Congress in U.S.A. whether by means of specific enumerations or the general enumeration under placitum (i) of Section 51.

A longer handle has been provided to the power of the Commonwealth by placitum XXXIX of section 51¹³ which gives powers to legislate over matters incidental to those provided for in the Section. This incidental power extends to all the spheres of power, i.e., legislative, executive and judicial but is confined to the process of execution of the power in the three above mentioned spheres.¹⁴ This express incidental power in Australia is a replica of the implied incidental powers in U.S.A. which C.J. Marshall had expostulated in *McCulloch v. Maryland*¹⁵ as will be apparent from the following observations of C.J. Barton in *Stemp v. Australian Glass Manufacturers Co. Ltd.*¹⁶

“...This criterion has been adopted by the Supreme Court of the United States in many later cases. This Court has on several occasions adopted it...the Constitution marks the outlines of the powers granted to the national legislature, but does not undertake, as a code of laws would, to enumerate the sub-divisions of those powers or to specify all the means of executing them. Laws which, in the language of the American Constitution are ‘necessary and proper’ or in the language of the Australian Constitution, incidental to the execution of the power, are alike Constitutional.”

Part IV-Regulation of Commerce under the Indian Constitution

Having visited the three most leading Constitutions of the world, it is appropriate to examine critically the Constitutional provisions relating inter-state trade, commerce and intercourse powers. The Part XXIII of the Constitution under Articles 301-307 has provided a detailed scheme to regulate commerce inter and intra-state as well. Besides there are also the scattered provisions relevant for the present study. The discussion is presented in the following scheme:

- a) The Constitutional scheme of Regulation.
- b) The Commerce Powers:
 1. Union Power
 2. State Exclusive Powers
 3. Coordinated Regulation of Commerce Powers-The Concurrent Powers.

The Constitution of India, comparatively a younger Constitution in the family of world Constitutions has avoided most of the controversial phases of commerce power that the three Constitutions under consideration have experienced in the past. This can be seen from the entries in the three legislative lists. Besides the two entries nos. 41 and 42 relating to foreign and interstate trade and commerce in the Union List which deal with trade and

commerce in general, there are specific entries in relation to major matters of likely disputes like Industries declared by parliament to be necessary for war & defence (entry 7), Railways (entry 22) National Highways (entry 23) Maritime matters (entry 25) Ports and Quarantine (entry 27 and 28), Aerial Navigation (entry 29) Banking (entry 45) Insurance (entry 47) Patents etc. (entry 49) Oilfields (entry 53), Inter-State rivers and river valleys (entry 56) and Inter-State migration and Quarantine (entry 68), besides other minor matters affecting commerce.

The State list contains very few matters relating to commerce and these, too, have been very much qualified either in their territorial extent or in their being subject specifically to the overriding powers of the Parliament, directly or indirectly. For example, entry 26 relating to trade and commerce within the State is indirectly subject to the powers of the Parliament through entry 33 about which laws made by the Parliament would prevail over the laws made by the legislatures of the States. Entry 13 relating to communications is directly subject to corresponding entries in List I. It will also be seen that all the important entries in List II relating to “commerce” are confined to the territorial limits of the States.

A novel feature of the Indian Constitution is the presence in it of a long list of concurrent legislative powers in which both the States and the Union have powers to make laws with the rider that in the event of a conflict between the laws made on the same matter by the two legislatures the law made by the Parliament will prevail¹⁷ unless a law made by the legislature of a state has been assented to by the President in which case the law made by the legislature of the State will prevail in that State over the law made by the Parliament.¹⁸ The Concurrent list contains very important items affecting trade and commerce and expressed in very general terms, too. For example item 29, “Economic and social planning” by itself is wide enough to give overriding commercial powers to the Parliament. But, then, there are items pertaining to contracts (7) vagrancy (16), Adulteration of food stuffs and other goods (18), commercial and industrial monopolies combines and trusts (21) Ports (31) Inland shipping and navigation (32), price control (34) Mechanically propelled vehicles (35) and lastly item 33 relating to trade and commerce in and production, supply and distribution of industries and foodstuffs, produced in the country or imported into the country which may be declared to be expedient to be controlled in the public interest by the Parliament.

One of the important features of the entries in the three lists on this subject is that the word “regulation” which has had to be defined and given a restricted meaning to save the powers of the States or Provinces in U.S.A. and Canada or to protect the rights of the individuals have been sparingly used in the entries in the Indian Constitution. The main entries relating to commerce are general and, therefore, give wide powers to the governments concerned in their respective fields. For example, “price control” in the concurrent List applies to control of the prices of all goods, including the goods produced by industries in

item 7 of the Union List, whether price control, being general, will also include the fees for professional services is a moot question.

But what is doubtless is that the powers of the Union through the Union and the Concurrent Lists are more than abundant in the field of commerce.

The Constitutional Scheme of Regulations

The free Trade Clause

Article 301

Freedom of trade, commerce and intercourse- Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.

Provisions for Regulation of Commerce under the Constitution

Article 302

Power of Parliament to impose restrictions on trade, commerce and intercourse- Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any Part of territory of India as may be required in the public interest.

Article 303

Restrictions on the legislative powers of the Union and of the States with regard to trade and commerce-(1) Notwithstanding anything in article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorizing the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule.

(2) Nothing in clause (1) shall prevent Parliament from making any law giving, or authorizing the giving of, any preference or making, or authorizing the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India.

Article 304

Restrictions on trade, commerce and intercourse among States- Notwithstanding anything in article 301 or article 303, the Legislature of a State may by law impose on goods imported from other States¹⁹ (or the Union territories) any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in public interest;

Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

The Commerce Powers:

1. Union Power
2. State Exclusive Powers
3. Coordinated Regulation of Commerce Powers-The Concurrent Powers.

Powers of the Union to Regulate Commerce

The legislative regulation of commerce is enshrined in the three Lists given in schedule VII of

the Constitution. These powers of legislation are divided between Union State Legislature. The State Legislature enjoys autonomy in making laws on the subjects enumerated in Lists II, whereas the powers under other two Lists i.e. List I & List III are more or less enjoyed by the Parliament.²⁰

Powers of the States to Regulate Commerce Concurrent powers

The States have equal powers with the Union in regulating trade and commerce under the entries in the Concurrent List. These powers are both legislative and executive. The legislative powers are, however, subject to an important restriction, besides those enumerated earlier, viz., the silence of Article 201 about the extent of the powers of the Union President to veto a State law in the Concurrent List. While Article 200 specifically makes it obligatory on the Governor to assent to a bill, if it is passed again by the two Houses without amendments recommended by him, Article 201 is significantly silent on what the President is to do when a bill, to which certain amendments have been recommended by the President to the Houses of Legislature of a State through the Governor, is passed again by the two Houses, without the amendments so recommended. This, viewed along with the fact that all bills passed by the Houses of Legislatures of the States on entries in the Concurrent List have to be reserved by the Governor for the assent of the President makes the powers of legislation by the States on these matters very hollow. Another significant fact is that while the Governor under Article 200 recommends specific amendments in his message, the President under

Article 201 may not always be specific but can send a message in any form which may at times be very confusing to the Houses which have to consider it and thus delay understanding being reached between what the Houses and the President want. For instance, the Speaker of the Kerala Legislative Assembly was non-pulsed as to how to put the message of the President to the Assembly for incorporation in the Kerala Education Bill, 1957, when the President simply sent a copy of the opinion of the Supreme Court to the Speaker of the Kerala Legislative Assembly. When the Speaker of the Kerala Legislative Assembly posed the parliamentary and procedural problems involved in this situation before the Conference of Presiding Officers in 1958 at Darjeeling²¹ the problem remained as unsolved after consideration by the Conference as it was when the point was disposed of. In the Kerala case, for instance, it was only an opinion of the Supreme Court and was subject to alteration by it and was not binding on anybody under Article 141 as an opinion is not law declared by the Supreme Court.

The other kind of power in the field of trade and commerce derived by the States is of executing the laws made by the Union Parliament in this field. Under Articles 73 (l) and Article 162 the executive powers in matters in which the States have, powers to make laws, i.e., in matters specified in the State and Concurrent Lists of the Seventh Schedule vest in the States unless any such power is reserved by the Parliament to itself on any matter in the Concurrent

List. This executive power coupled with the device of subordinate law-making by the States under the general laws made by Parliament have actually given very substantial law making powers to the State executives in this field. Of course, it was held in *In Re: Delhi Laws*²² (if at all this reference decided anything) that essential legislative powers cannot be delegated. This has been repeated in a number of cases later on but what are essential and nonessential elements in law depends on the yard stick of the man who measures the elements. But the tendency being towards making more and more general laws, the scope for subordinate law making has been becoming wider and wider and the States have therefore enjoyed larger and larger powers in the executive field to regulate trade and commerce²³

Exclusive powers

The exclusive powers of the State generally consist only of those relating to intra-state trade and commerce. But as the Union Parliament can make laws for the whole of the territory of India naturally this power is subject to any laws of the Union on the subject. As the powers enjoyed by the States by way of executive law making under the laws of the Union are very wide, there is really not much scope for exercise by them of law making powers under the State list in the field of commerce.

But mention maybe made of the U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1963, the validity of which was upheld by the Supreme Court in *Ch. Tika Ramji V. The State of U.P.*²⁴ The decision of the Supreme Court in this case, besides laying down that both the States and the Union could make different laws on the same subject, so long as the aspects of the same activity regulated by the laws of the two legislatures could be distinguished by the application of the doctrine of pith and substance²⁵ boldly held that a state may, by law, control the price, sale and movement of a commodity in a State to the extent of depriving other States from obtaining it. This decision has, therefore, put a very wide interpretation on entry 27 of the State List and it may be presumed that the States may control all commodities in the States in any way they like so long as there were no central laws under entry 33 of the Concurrent List or entry 52 of the Union List and so long as the pith and substance doctrine can save their laws from encroachment by the laws of the Union on the same subject.

The States also enjoy the rights to license professions and regulate transport by non-mechanically propelled vehicles within their territories under their powers to legislate on public health and communications etc, in addition to the general powers regarding intra-state trade and commerce, production, supply and distribution of goods etc. Thus, in *Saghir Ahmad V. State of U.P.*²⁶ the power of the States to license and regulate internal communications was upheld by the Supreme Court, though certain other powers were denied to the States.

Limitations on the powers of the Union and the States

There are certain general limitations on the powers of the Union as well as of the States laid down

by Articles 14, 19 and 301 to 304 the effect of which may now be considered. Out of these the first two appear in the Chapter on Fundamental Rights and the last group in a Chapter of the Constitution devoted to trade and commerce. Article 13 of the Constitution provides that all laws existing and to be made would be void if they infringed the provisions of the Fundamental Rights. Thus, Fundamental Rights had glamour of their own, even though in *A.K. Gopalan V. The State of Madras*²⁷ Kania, C.J. said that Article 13 was inserted in the Constitution as a matter of abundant caution. But in *M.S. M. Sharma V. Sri Krishna Sinha*²⁸ the Supreme Court held that other provisions of the Constitution, if in conflict with a Fundamental Right, can be enforced by the Supreme Court by ignoring the Fundamental Rights, in this case it was virtually held that Article 194 overrode Article 19 (i). We need not go into the confusion about parliamentary privilege which the Supreme Court judges disclosed in this case by not being able to distinguish between the right of a House to exclude strangers and the right of the House to publish its own proceedings as against the right of the strangers (here the Press) to publish the proceedings when allowed to view them²⁹. But the repercussions of the relationship established by the Supreme Court between the Fundamental Rights and other parts of the Constitution may lead one to wonder why the Supreme Court has been admitting writs under Article 19 about matters which in other countries have come under "commerce" powers and in India should more properly come under Part XIII of the Constitution.

Conclusion

In the matter of Constitutional provisions relating to regulation of commerce, India presents a marked contrast. The Constitution of U.S.A. in most general terms presents the enumeration of national powers only, the residue having been left to the States. Almost similar is the case with Australia, with the difference that the powers of the Commonwealth have been defined in greater details and the relations between the Commonwealth and the States have also been broadly laid down. Neither in U.S.A. nor in Australia there are exclusive defined powers of the national governments except for those given in Sections 90 and 125 of the Commonwealth and Australia Act relating to customs excises, counties and seat of government. However, in Canada the powers of the Dominion and the provinces have not only been separately defined but also made exclusive with a small concurrent field also there, as has been seen earlier. The residuary powers in Canada vest in the Dominion. In all these three countries the laws of the national Parliament, if validly made within their legislative competence, would prevail over those of the regional legislatures.

It is noted from the study that India has followed the Canadian pattern of vesting exclusive powers in the national Parliament and the regional Legislatures in respect of the subjects allotted to them. It has substituted a large concurrent list for a small Canadian one. What is more important in this context is that the exclusiveness of the powers in Canada has caused more trouble and litigation

between the provinces and the Dominion and has made uniformity in the field of Commerce elusive. The doctrine of pith and substance has not yet resulted in a demarcation of fields of Dominion and provincial competence even nearly certain, as far as Commerce goes, nor has the conferment of exclusive powers on the provinces allowed the residuary powers of the Dominion to prove as effective as the Parliament of U.K. had at that time anticipated. As far as India is concerned a more detailed enumeration of powers in the legislative lists as well as in the Constitution itself has helped in the smooth sailing in the field of commerce with some initial hiccups.

The role of the Judiciary in all the countries in interpreting the Constitution has been very significant. In U.S.A. it was the judiciary which first made the powers of the Congress exclusive, though there is no express provision in the Constitution to this effect. Also, it was the Judiciary which made the ambit of the commerce power as wide so as to cover everything under the sun therefore at times vague and absurd like inclusion of rape victim within commerce. But the judiciary in U.S.A., in making the powers of the Congress exclusive left them flexible and allowed the States to legislate where the Congress had not occupied a particular portion of the field or where the Congress was silent. It also gave the powers to the Congress to delegate its functions to the States.

In Canada, on the other hand, as the series of cases cited earlier shows, it was the judiciary which, but to its orthodox outlook undid the unity in trade and commerce which, with vesting of the residuary powers with the Dominion, the Constitution-makers had aimed at. The result in Canada is in marked contrast to that in U.S.A. where the Judiciary has molded the Constitution to fit in with the changed needs of the community.

The record of achievement in Australia has been even more commendable. There the Judiciary was faced with what may be called a stone-wall in Section 92 and it has already been noticed how many devices have had to be attempted by the Judiciary to pierce it with the result that not only regulation of trade and commerce but also its prohibition among the States followed by a public monopoly has been held to be possible by the Judiciary. The angry remark of the Privy Council in James V. Cowan that if a quota scheme could leave inter-state trade and commerce absolutely free; the Constitutional Charter might as well be torn up, no longer remains true today.

In India, however, there has been little difficulty before the Supreme Court so far in interpreting the Constitutional provisions because of a political cohesion between the States and the Union, further it is also such due to the fact that because so far, the States have not yet settled down to attained that sense of individual identity which is necessary to develop regionalism. Moreover, for the time being the powers of the Union to control trade and commerce are ample and what was missing at the commencement of the Constitution has been provided, not by the judiciary, but by amendments of the Constitution. A long and general concurrent list gives to India the advantage of central direction by

legislation and regional execution by the States according to their local needs by means of rule-making powers in the execution of the Union laws by the States. So, the Indian Constitution is starting where the U.S. Constitution has reached by the aid of judicial interpretations.

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Footnotes

1. *Sobei Mogi "The Problem of Federalism: A Study in the History of Political Theory", Volume 2 (Allen & Unwin), London 1931, P-151*
2. *K.C. Wheares "Federal Government (Oxford University Press), London 1963. (III Edition) p. 15*
3. *Entries 41 and 42 of List I and entry 26 of List II*
4. *(1824) 9 wheat 1.*
5. *(1885) 116 U.S. 307*
6. *(1918) 248 U.S. 420*
7. *(1924) 263 U.S. 456*
8. **Section 91.** *It shall be lawful for the queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding any thing in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter innumerate, that is to say, Item no :2. The regulation of trade and commerce.*
9. *(1896) A.C 88 at p. 93*
10. *(1896) A.C. 348 at p.363.*
11. *(1916) 1 A.C. 588 at p. 596*
12. *Section 51. The Parliament shall, subject to this constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to: (i)Trade and Commerce with other countries and among the states;*
13. *Section 51. The Parliament shall, subject to this constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:(xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal judicature, or in any department or officer of the Commonwealth.*
14. *Attorney General for the Commonwealth of Australia V. Colonial Sugar Refining Co. Ltd. (1914) A.C. 237.*
15. *(1819) 4Wheat. 316*
16. *(1917) 23 C.L.R. 226 at p. 233.*
17. *Article 254 of Indian constitution*
18. *Article 254(2) of Indian constitution*
19. *Ins. by the Constitution (Seventh Amendment) Act, 1956, sec.29 and Sch.*
20. *Article 246(1): subject matter of laws made by Parliament and the Legislature of State-(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with*

respect to any of the matters enumerated in Lists I in the Seventh Schedule.

(3) subject to Clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any matters enumerated in List III in the Seventh Schedule.

Article 248:Residuary powers of legislation- (1) Parliament has exclusive power to make laws with respect to any matters not enumerated in the Concurrent List or State List

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

Article 249: Power of Parliament to legislate with respect to any matter in the State List in national interest-(1) Notwithstanding anything in the foregoing provisions of this chapter, if the Council of States has declared by resolution supported by not less two-thirds of the members presents and voting that it is necessary or expedient in national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matters while the resolution remains in force.

Article 253: Legislation for giving effect to international agreements- Notwithstanding anything in the foregoing provisions of this chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or body.

21. *Though the actual proceedings of the Conference are confidential and are not meant for publication, the points considered by the Conference and decisions arrived at at the Conference are not confidential and appear regularly in the Press.*

22. *(1951) A.I.R. (S.C.) 332.*

23. *For instances of such powers reference may be made to the following recent Orders of the U.P. Governments-*

The U.P. Food grains Dealers Licensing Order, 1959.

(2) The U.P. .Wheat Price Control Order, 1959.

The U.P. Wheat Procurement (Levy) Order, 1959.

The U.P. .Wheat (Restriction on movement) Order, 1959.

The UP Paddy (Restriction on movement) Order, 1958,

The UP, Guest Control Order, 1959.

24. *(1956) A.I.R. (S.C.) 559.*

25. *The Supreme Court in this case proved that the doctrine of pith and substance could be stretched as much as verbal Jugglery and the extent of English vocabulary would permit.*

26. *(1954) A.I.R. (S.C.) 728.*

27. *(1950) A.I.R. (S.C.) 27*

28. *(1959) A.I.R. (S.C) 395*

29. *Pl. see The Table Vol. XXVI (1967) pp. 148-149 and the Evidence of the Clerk of the House of Commons on the subject in the Report of Committee on Privileges, Cmd. 138 of 1947.*