



TRACING THE IDEA OF COMMON MARKET: HISTORICAL AND CONSTITUTIONAL PERSPECTIVE

Uday Shankar & Niladri Mondal***

Abstract

A country comprising of a large demography brings the inherent benefit of creation of a big market for the consumption of goods, delivery of services and mobility of the workers. India is blessed to have a large boundary which is divided into States and Union Territories. The Constitution of India mandates the creation of a common market by ensuring free trade throughout the territory of India. The research gets guidance from the preservative character of the Indian Constitution whereby the past practices have facilitated in the formulation of the 1950 Constitution. The paper delves into the past to understand the functioning the trade in the pre-constitutional era. The research work details out the position that prevailed in ancient India, during the Mughal period and during the colonial rule. To conclude, it has been argued that the decentralization initiated during the imperial rule should strengthen the autonomy of the States without compromising on the idea of common market.

I. INTRODUCTION

Recently in the NITI Aayog's governing council meeting, the Prime Minister has announced the target of a 5 trillion-dollar economy for India to be achieved by 2024¹ The ambitious plan of the government requires consolidation of the internal market exits in the country. The large volume of the market clubbed with voluminous consumer base can lead to higher economic growth. The large territory with a big population creates a big market for the traders. The advantage of the large market could be realised with barrier free trade across the regions in the country. A barrier free market will convert the large market into a common market wherein there would be free flow of goods, services and labour.

The notion of a common market² grows from the possibilities presented by the adoption of a common external tariff. The benefit of the increase in the free flow of trade results into an integrated market. This results in sustained pressure to reduce the costs of transporting finished and semi-finished goods between the states participating in the integration project. The solution is the harmonisation of border procedures, which in its ultimate form, leads to the virtual elimination of boundaries as internal barriers to trade and the formation of a free-flowing regional economic space. A concomitant change with this complete opening of internal trade is a liberalisation of labour mobility, allowing the inhabitants of one state to work in all the other states of the region. Thus, common market should rightly envisage not for a loose confederation of states but a closely knit organisation. The design of common market needs to

* Associate Professor, Rajiv Gandhi School of Intellectual Property Law, Indian Institute of Technology, Kharagpur.

** Research Scholar, Rajiv Gandhi School of Intellectual Property Law, Indian Institute of Technology, Kharagpur.

¹ Available at: <https://www.narendramodi.in/pm-s-opening-remarks-at-fifth-meeting-of-governing-council-of-niti-aayog-545292>. (last accessed on 22nd July' 19).

² A common market is an extension of the customs union concept, with the additional feature that it provides for the free movement of labour and capital among the states.

be built on the integrated economic interest across the region without compromising the autonomy of the constituent political units.

The idea of trade is considered to originate with human communication and civilization in prehistoric times which took place all through much of recorded human history. The main facility of the prehistoric people was trading by bartering goods from each other before the innovation of the modern day currency. Trade is sometimes loosely called commerce or financial transaction or barter. A network that allows trade is called a market. The original form of trade was barter, the direct exchange of goods. Later, one side of the barter became the metals, precious metals (coins), bill, and paper money. Modern traders instead generally negotiate through a medium of exchange, such as money. Trade can be broadly understood as a form of exchange involving the movement of commodities with fluctuating values conditioned by a wide range of economic, environmental, geographical, social, cultural, and religious factors.³ Though the word ‘business’ is ordinarily more comprehensive than the word ‘trade’, the one is used synonymous with the other. So used, trade or business would mean some real, substantial and systematic course of activity or conduct with a set of purpose.⁴

The Constitution of India also gives apt focus on ‘barrier-free trade’ by providing a set of provisions for guaranteeing free trade and commerce. This article unravels the historical background in detail, starting from its very inception to constitutionalisation of the provisions under the Indian Constitution. The article arranges the discussion in six parts wherein a discussion has been made about the position prevailing during ancient time and how it has been carried forward during imperial rule. It traces the development of trade and commerce in different phases of the history in order to identify the role of the state/ruler. Further, the paper also presents the insight of the development after commencement of the Indian Constitution. Finally, it argues that the country has a potential of achieving that target of becoming one of the largest economies of the world provided it consolidates the existing opportunities as envisaged by the makers of the Constitution. The paper presents a comprehensive narrative on the role of the state in promoting the idea of common market since ancient time. The authors have made a conscious decision to not to examine the judicial pronouncements on the common market as it requires a dedicated approach to understand the approach of judiciary on the matter of free trade under the Constitution.

II. TRADE AND COMMERCE IN ANCIENT INDIA

Some scholars trace the origin of corporate life in the time of *Rig Veda*. R C Majumdar is of the opinion that the *Panis* of the Vedic Times were well organised and in their organisation one may find the trace of the guilds mentioned in the *Jatakas*.⁵ But as corporate activity in economic life generally takes place during a late phase of a civilization and is subject to certain peculiar opportunities and circumstances, the *Rig Vedic* period would be too early a period for

³ Neelis Jason., “Trade Networks in Ancient South Asia” in Jason Neelis, *Early Buddhist Transmission and Trade Networks: Mobility and Exchange within and beyond the North-western Borderlands of South Asia* 183-228 (Brill Leiden, Boston, 2011) pp. 183–228. Also available at: www.jstor.org/stable/10.1163/j.ctt1w8h16r.9 (last visited on December 15, 2019).

⁴ *Narain Swadeshi Weaving Mills v. Commr. of Excess Profit Tax*, AIR 1955 SC 176.

⁵ R. C. Majumdar, *Corporate life in Ancient India* 2 (The Oriental Book Agency, Poona, 1922).

the origin of trade-guilds in India. The *Rig Vedic* evidence about the *Panis*, though indicative of their trade influence on the society,⁶ does not suggest the existence of the guilds in them .

By the sixth century B.C. there was a great rise in the volume of the trade in India. Increase in the trade needed an organised and planned production and quick distribution. This was possible only through efficient system of financing. Kings in ancient India and their governments had taken upon themselves the duty to patronise trade by providing capital to help in production and also to safeguard the routes to enable quick distribution.⁷

The existence of economic guilds in ancient India is also proved by the epigraphic evidences.⁸ Two Nasik inscriptions mention the guilds of weavers and potters respectively. Similarly, the inscriptions of *Junnar* record the existence of the guilds of bamboo-workers, braziers, as well as corn dealers. These inscriptions indicate that these guilds acted as modern banks and received deposits of public money on regular interest and lent out money to the people. A guild of *Samitikara Sreni* is mentioned in a *Mathura* inscription of the *Kusana* period. This refers to a wheat flour guild.⁹

As laid down by Manu, regulation of purchase and sale of all marketable goods was done by the King. It was done after considering their source, destination, the period of detention, the margin of profit and the loss of the traders.¹⁰ The general rate of profits should be fixed by the superintendent of commerce. It recommended profits at five per cent over and above the fixed price of local commodities, and ten per cent on foreign produce. A profit beyond this limit was a punishable crime. This principle of fixing the rate of profit on local and foreign commodities seems to have continued up to the third century A. D. A substantial amount of profit accrued from state-trading by restricting and restraining the sale of certain commodities and creating an artificial situation of demand. The traders and the superintendent of commerce regularly studied the condition of sale which was an important factor in creating profits for determining the scope of sale and purchase of a commodity, the next factor was the condition of the demand and supply Thus, if it was found that the merchandise was widely distributed, the state adopted measures to centralise the commodities and created an occasion for enhancing the price. Once the enhanced prices were popular, the state again found an occasion to introduce revised rates of prices, with a view to gain more profit. But it must be noted that such restrictions were not imposed on the commodities of daily necessity as it would have harmed the interest of the people Thus, Kautilya says that there should be no restriction on the time of the sale of those commodities for which there is frequent demand, nor should they be subjected to the evil of centralisation.¹¹ Manu says that “having well considered the rates of purchase and of sale, the length of the road, the expense, for food, the charges of securing goods, let the King make traders pay duty.”¹²

The significance of the trade in generating revenue for the state and creating opportunities for the people were very much visible in the ancient time. In order to maximise

⁶ *Id.*, 17-20.

⁷ B. Srivastava, *Trade and Commerce in Ancient India* 205 (The Chowkhambha Sanskrit Studies, Varanasi, 1968).

⁸ *Id.*, 214.

⁹ *Ibid.*

¹⁰ *Id.*, 233

¹¹ *Id.*, 234.

¹² *Id.*, 245.

the benefit, the ruler had attempted to institutionalise the process of trade in the terms of financing, profit and production. Trade appeared to be a vital part of the state activities in ancient time. The state used to enjoy monopoly on the issue of regulation of the trade.

III. TRADE AND COMMERCE DURING THE MUGHAL ERA

North India saw radical changes in socio-cultural, and political environment after the conquest by the Mughals. The multi-state system of the Sultans was replaced with a centralised political organization controlled by a powerful monarch. As a consequence of the Mughal conquest of India, a large number of immigrants and many celebrities came to the India from Central Asia and Persia and settled down in Delhi and other cities. Many foreigners including merchants contributed in the state administration and the economic setup of the Mughals.¹³ During the medieval period, the whole of Northern and Western India had commercial relations with West Asia and extending through it to the Mediterranean world, as also to Central Asia, South-East Asia and China both oversea and overland routes.¹⁴

The period from fifteenth to seventeenth century A.D. of the Mughal age was a renaissance in India. The trade and industry flourished, fine arts like sculpture, music, painting reached perfection.¹⁵ During the Mughal rule there was huge growth in trade and commerce in India. There was a high consumption in the market due to the much wealth of Mughal aristocracy. There was a large body of consumers who were able to buy above the line of necessity. A uniform tax was levied on goods at the point of their entry into the empire. Road cess or *rahdari* was declared illegal, though it continued to be collected by some of the local *rajahs*. The traders of Mughal age who were involved in large scale business enterprises such as export and import controlled the entire business world of India.¹⁶ Therefore, during the Mughal rule India was highly developed trading centre.

The Mughals had bestowed more confidence on centralisation of the regulation of the trade. The Mughal regime had attempted to introduce features related to free trade which allowed the local traders to freely engage in trading activities with traders in abroad. Perhaps, the large territory appropriated by the Mughals also played an instrumental role in improving the trade and commerce during that time.

IV. TRADE AND COMMERCE UNDER BRITISH RULE

With the advent of the English, things began to change. The Rule of the Company was anything but wise, it was rigorous, it gave security but destroyed property. The scheme of administration was far from perfect. Adam Smith characterizes the “Company of Merchants” as “incapable of considering themselves as sovereigns, even after they have become such” and says, “Trade or buying in order to sell again, they will consider as their principal business, and by a strange absurdity, regard the character of the sovereign as but an appendix to that of the merchants, as sovereigns, their interest is exactly the same with that of the country which they govern. As merchants, their interest is directly opposite to that interest.”¹⁷

¹³ S.S. Kulshreshtha, *Development of Trade and Industry under the Mughals* 1 (Kitab Mahal, Allahabad, 1964).

¹⁴ Moosvi Shireen, “Production, Consumption and Population in Akbar’s Time”, 10(2) *IESHER* 99 (1973).

¹⁵ Vasant Moon (ed.), *Dr. Ambedkar: Writings and Speeches* 2 (Dr. Ambedkar Foundation, Delhi, 2002).

¹⁶ Ratnakar D Hosmani, “Trade and Commerce in Mughal Period”, 3(6) *IJSR* (2014).

¹⁷ *Ibid.*

The East India Company and the British Parliament, discouraged Indian manufacturers in the early years at British rule in order to encourage the rising manufacture at England. Their fixed policy during the last decade of the eighteenth century was to make India subservient to the industries of Great Britain. They imposed unreasonable restrictions on trade and emphasised only on production of raw materials in order to supply the materials for the looms and manufacture of Great Britain.¹⁸ The policy was pursued with unwearied resolution and total success order were sent out to force Indian artisans were legally vested with extensive power over villages and commodities of Indian weavers, prohibitive tariffs excluded Indian silks and cotton goods from England. English goods were admitted in India free of duty on payment of a nominal duty.¹⁹ However, the Company obtained a royal order exempting their export and import trade from these payments. The goods which the company imported from Europe and those which produced in India for export to Europe were thus permitted to pass through the country without duties. The battle of Plassey in 1757 and the battle of Wandewash in 1761 gave the British supremacy in Bengal and Madras respectively and they turned both of these victories to their account. As a result, while the Company was only engaged in activities related with trade and commerce, which the British later initiated the path to colonization after the battle. The company's interest in conquering Bengal was two-fold, i.e., protection of its trade and control over Bengal's revenue, later on paved the way for their conquest of the whole of India.²⁰ The deterioration in the administration provided a chance to the English Company to play a significant job in the politics. It paved the way for the establishment of the British supremacy in India. Initially, the British Empire gave undue advantage to the British traders in comparison to the local traders with intent to boost the industry back in Britain.

Freedom of Trade and Commerce under Charter Acts

The trading rights of the East India Company granted in 1773 were renewed in 1793 again in 1813 and then again in 1833 and 1853. The measures passed to the effect are known as Charter Acts. The Act of 1793 did not make any significant change to the freedom of trade and commerce. It only extended the period of commercial monopoly for freedom of trade and commerce and political power of the company for another twenty years. The monopoly was hardly serving its ostensible purpose viz. the reservation of the entire profit for the shareholders of the company. As a matter of fact, the Indian ports were crowded with the ships of other European nations and large amount of profit went to the servants of the company.

The East India Company's monopoly was first abolished when the Charter was renewed in 1813. Once private trade was being admitted there was increase in volume of trade, while the Company's trade declined. The private merchants of British were permitted to settle in India and introduce severe competition in trade which prior to this was entirely in the company's hands. Accordingly, the Company's trade was abolished altogether in 1833, and from that date they stood forth simply as administrators of India, drawing their dividends from the revenues of India.

¹⁸ Keith, A.B. Keith, *Constitutional History of First British Empire* 26-32 (Clarendon Press, Oxford, 1930).

¹⁹ R.C. Dutt, *Economic History of India: Early British Rule From the rise of the British Power in 1757 to the accession of Queen Victoria in 1837* 236 (Kegal Paul, London, 1956).

²⁰ Hareet Kumar Meena, "How the Riches of Bengal Laid to the Consolidation of British Empire in India", 18(1) *AJRHASS*, 81-85 (2017).

Trade and Commerce under the Government of India Act, 1919

The British administered their territories in India through separate administrative machinery for each province called the local government. Each province called the administrative unit was appointed the Governors in council to administer the governmental functions. The idea of provincial autonomy was given a fuller expression on the Indian Constitutional Reforms, 1918, which is commonly known as the Montagu Chelmsford Report. The report mentioned that the eventual future of India was to become “a sisterhood of States, self-governing in all matters of purely local or provincial interest”.²¹ Before the establishment of the Indian Federation, there was no scope for any 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, 1919.²² The constitutional experiment that was made in the provincial sphere was known as ‘diarchy’²³. It was realised that the commercial activities should not get affected on account of local politics, thus it was placed among the central subjects.

All the important means of communications, customs, excise duties, income tax and other sources of all-India revenues were among the Central subjects²⁴ and on a declaration by the Central Government, the control of production, supply and distribution of any articles as well as the development of any industries could become Central subjects.²⁵ There was no mention of trade or commerce among the Provincial subjects, though on a declaration by the Central government any matter falling within a Central subject could be converted into a Provincial subject if it was “of a merely local or private nature within the Province.”²⁶

But even with this arrangement the provincial legislatures were not free to pass any law in any manner, and ultimate authority to negative any provincial law always vested in the central government. Nevertheless, this arrangement served as a prelude to the later constitutional development.²⁷ The Government of India Act introduced a novice idea of autonomy to provinces subjugated by the Crown. The autonomous character was operative under a very controlled system, particularly in relation to trade and commerce. Almost, every subject matter related to commerce was assigned to the centre and a very minimal space was given to the provinces subject to the approval of the Governor-General.

Simon Commission Report 1930

Indian Statutory Commission was appointed by the British Government in the year 1927 due to the shortcomings of the Government of India Act, 1919. The Commission presided over by Sir John Simon published its report in 1930. The Commission recommended a federation for the whole of India. The commission asserted:

²¹ The Report on Indian Constitutional Reforms, 1918 Para 349.

²² M.P.Singh, *Freedom of Trade and Commerce in India* 10 (Deep & Deep Publication, New Delhi, 1985).

²³ System under which the provincial administration was bifurcated into two halves.

²⁴ Schedule 1 to the Devolution Rules, 1919 of the Legislative List, entries 5,6,10 and 11 of Part I.

²⁵ *Id.*, entries 19 and 20.

²⁶ *Id.*, entry 50 of Part II.

²⁷ *Supra* note 37 at 11.

The ultimate Constitution of India must be federal, for it is only in federal Constitution that units differing so widely in constitution as the Provinces and the State can be brought together while retaining internal autonomy.²⁸

With the recommendation to create a federal structure comprising of the provinces under British India and other Indian states, the Commission stressed upon the need to bring in economic unity for India. Wherein the report stated that:

Economic forces are such that States and British India must stand or fall together. The steady growth of transport facilities has inevitably brought the states into closer contact with British India and with each other, while the forces at work in the modern world are such as to effect even the remotest and the primitive State... In such vital matters as communications (rail, road or postal), customs, monetary policy and labour regulation, co-operation is becoming essential. The fact that the majority of States are land locked places then in a position of reliance on British India for their communication with the rest of India and the outside world, while the existence of ports in some other States has already caused complications. While the Central Government was autocratic, the possibilities of divergent interests might be more easily avoided but with the advent of a measure of a popular control at the Centre one-fifth of the people of India is potentially in economic subordination to the remainder. The point is well illustrated by the effect on the States of the adoption, at the wish of the Assembly, of an extended protective tariff. This body, legislating professedly only for British India, has in effect indirect taxation on the inhabitants of the States. The States have their own tariff policies, and there is serious possibility that, unless provision can be made for the reconciliation of divergent interest, numbers of tariff wall will be perpetuated in an area where fiscal unity is most desirable.”²⁹

The Report highlights the need for minimal barrier for better trading relationship between the states. It also aptly pointed out that protective tariff by the provinces would be detrimental to the overall interest of the British India. Thus, it was suggested to build a framework so that the divergent interests of the states would be addressed without compromising the economic interest of the units. As Indian States were already enjoying internal autonomy, no such solution was provided. A Committee under the leadership of Sir Harcourt Butler started investigating the relationship between the Paramount Power³⁰ and the

²⁸ Report of the Indian Statutory Commission (1930), vol. II, para 21.

²⁹ *Id.*, para 17.

³⁰ The Paramount Power means the Crown acting through the Secretary of State for India and the Governor-General in Council who were responsible to the Parliament of Great Britain. Until 1835, the East India Company acted as trustees of and agents for the Crown; but the Crown was, through the Company, the Paramount power. The Act of 1858 which put an end to the administration of the Company, did not give the Crown any new powers which it had not previously possessed. It merely changed the machinery through which the Crown exercised its powers.

Provinces on fiscal matter. The report also suggested about “Zollverein”³¹ while dealing with the financial and economic relation between British India and the States that:³²

Undoubtedly the ideal solution would be a Zollverein combined with the abolition of internal customs in the states themselves. There would then be free transit of goods over India once they had paid maritime customs. During Lord Reading's viceroyalty a suggestion for such a Zollverein was drawn up, but not put forward on the following lines:

- 1) The adoption of a common tariff administered by the officers of the Government of India even in the maritime States;
- 2) The abolition of all inland customs;
- 3) The division of the customs revenue among British India and different Indian States with the Indian Legislature in the determination of the policy.

The committee pointed out that due to various customs duties in the states, free flow of trade and commerce was not possible. In order to do away with these trade barriers, the committee suggested for the above recommendation though it was not unique. The above recommendation was made keeping in mind that the British India and the States are necessarily dependent one another although the suggestion put forward by the Butler Committee could not be implemented, because the majority of Indian states were not ready to join a custom-union. They feared that it might take away their internal autonomy. It also accepted the fact that the States are a heterogeneous body at varying stages of development, conservative and tenacious of traditions in an unusual degree.

Further, the second Round Table Conference³³ pointed out clearly in para 11 of the proceedings that in the general interest of economic unity and to facilitate trade, a tax would be imposed on the Federation as a whole in order to relieve the inhabitants of the States. The abolition of these taxes must therefore be left to the discretion of the States, to be effected in course of time as alternative source of revenue become available. Suggesting one such possible source is the terminal tax subject to examination by the Expert Committee.³⁴

The Government of India, on the other hand, have pointed out the difficulties which beset this proposal. Therefore, Sir Walton agreed that, if such taxes were levied, the proceeds should go to the provinces and the States. In any case both the rates and the general condition under

³¹ German customs union established in 1834 under Prussian leadership. It created a free-trade area throughout much of Germany and is often seen as an important step in German reunification.

The movement to create a free-trade zone in Germany received great impetus from economists such as Friedrich List, its most active advocate in early 19th-century Germany. In 1818 Prussia enacted a tariff law abolishing all internal customs dues and announced its willingness to establish free trade with neighbouring states. A decade later Prussia signed the first such pact with Hesse-Darmstadt. In 1828 a customs union was set up in southern Germany by Bavaria and Württemberg, joined in 1829 by the Palatinate; also in 1828 the central German states established a similar union, which included Saxony, the Thuringian states, electoral Hesse, and Nassau. In 1834 these were among the 18 states that joined in the Zollverein. Hanover and Oldenburg joined in 1854; the two Mecklenburgs, Schleswig-Holstein, Lauenburg, and Lübeck joined in 1867; and thereby all Germany outside Austria was included except Hamburg and Bremen, which adhered in 1888, 17 years after the establishment of the German Empire. Also available at: <https://www.britannica.com/topic/Zollverein> (last visited on 25 June, 2019).

³² *Infra* note 51 at para 83.

³³ Indian Round Table Conference, 7th Sept. 1931-1st Dec. 1931

³⁴ *Id.*, 955

which such taxes would be imposed should be subject to the control of the federal Government and the Legislature. Transit duties whether in the Province or in the federating States should be specifically forbidden. Also, levying of internal customs should be debarred by the Province.³⁵

Therefore, by debarring the provinces from levying internal customs it is in the general interest of the economic unity and to facilitate trade. Internal customs tariff which states may levy at their frontiers would be economically undesirable from the point of the view of federation as a whole.

In the Third Round Table Conference, it was stated that the general scheme of the federal finance outlined by the sub-committee of the Second Round Table Conference, the transfer to the Provinces of almost the whole proceeds of taxes on income (other than corporation tax) has subsequently been criticised on the ground that it jeopardizes the solvency of the federation.³⁶ It also suggested regarding legislative procedure that the legislation for the corporation tax and for the operation of special power should be entirely federal.³⁷ Legislation for the rates of Provincial surtax would be entirely provincial. All other legislation for the imposition of tax on income, whether affecting the basis of assessment or the rate of tax, would be uniform, and would be affected by the Federal Legislature with the leave of Governor General given after consultation with a council of representative of the units and of the Federal Government.³⁸

The aim was to provide all the Provinces start with a reasonable chance of balancing their budget, to afford them the prospect of revenue sufficiently elastic for subsequent development, to assure the solvency of the federation and to ensure that after an initial period the federal source of revenue shall be derived from British India and the States alike.

Finally, these conferences provided a frame for the future Constitution of India through a white Paper proposal published in 1933 which appointed a joint committee on Indian Constitutional reform to examine the working basis of the new Indian Constitution. Thus the joint committee aiming at economic unity and to protect inter-state trade and commerce recommended that:

It is greatly to be desired that states adhering to the Federation should, like the provinces, accept the principle of Internal freedom for trade in India and that the Federal Government alone should have the powers to impose tariffs and other restrictions on trade. Many States, however, derive substantial revenues from customs duties levied at their frontiers on goods entering the States from other parts of India. These duties are referred to as internal custom duties, but in many of the smaller states are often more akin to octroi and terminal taxes than to customs. In some of the larger States the right to impose them is specifically limited by treaty. We recognize that it is possible to deprive States of revenue upon which they depend on balancing their budgets and that they must be free to alter existing rates of duty to suit varying

³⁵ *Id.*, 956.

³⁶ Indian Round Table Conference 46 (third Session, 1932), para 1.

³⁷ Para 9 of the proceeding states that in addition to the normal powers of the Federal Government, special powers designed to meet such a situation as might arise if the federal budget, initially balanced by the amount retained from the Provinces, failed to remain balanced despite increased taxation upon existing sources and the development of new sources of revenue permanently allocated to the Federation. It is implicit in the scheme that the Federal Government should do its utmost to develop its permanent resources from the outset.

³⁸ *Infra* note 57 at 50.

condition. But internal custom barriers are in principle inconsistent with the freedom of interchange of a fully developed Federation, and we are strongly of the opinion that every effort should be made to substitute other forms of customs. The change must, of course, be left to the discretion of the States concerned as alternative source of revenue become available. We have no reason for thinking that the States contemplate any enlargement of the general scope of their tariffs and we do believe that it would be in their interest to enlarge it. But in any case we consider that the accession of a state to the Federation should imply its acceptance of the principle that it will not set up a barrier to free inter-change so formidable as to constitute a threat to the future of the Federation.

Though the Committee did not advise for complete abolition of internal customs duties which being important source of revenue but suggested to have milder approach in imposing such duties. Making its proposal on financial relations between the Centre and the units the committee re-emphasised that the Indian States should accept the “internal freedom for trade in India and that Federal Government alone should have the power to impose tariffs and other restrictions on trade.” The Report very succinctly highlights the adverse effect of internal custom duties on establishing a robust market at the federal level. It was suggested to look for an alternative to augment the requirement of revenue by the states in place of imposition of penalising internal duties. That internal custom has been a matter of concern for creation of open market in the pre-independence era.

The Government of India Act, 1935

The Government of India Act, 1935 was the result of four main key sources which are Simon Commission Report, discussions at the third round table conference, the white paper of 1933 and the Reports of the joint select committees. The Act of 1935 proposed to set up all India Federation comprising of the British Indian provinces and princely states. Regarding distribution of the legislative powers, the Act drew three lists of the entire legislative subject with 59 entries in List I³⁹, 54 entries in List II⁴⁰ and 36 entries in List III.⁴¹ On trade and commerce within the provinces, the tax entries were separate from general entries and there was no entry on tax in List III. None of the three legislative lists provided for power over inter-provincial trade and commerce. But Interprovincial trade and commerce could be regulated by the Governor-General under the residual powers, vested in him by section 104⁴² of the Government of India Act, 1935.

There was one most important clause which was introduced for the purpose of prohibiting certain restrictions on internal trade. For the first time in the constitutional history of India, a

³⁹ Matters enumerated in List I in the seventh schedule in this Act exclusively called the Federal Legislative List (s. 100(1)) of the Government of India Act, 1935.

⁴⁰ Matters enumerated in List II in the seventh schedule in this Act exclusively called the Provincial Legislative List (s. 100(3)) of the Government of India Act, 1935.

⁴¹ Matters enumerated in List III in the seventh schedule in this Act exclusively called the concurrent legislative list (s. 100(2)) of the Government of India Act, 1935.

⁴² The Governor General may by public notification empower either the Federal Legislature or a Provincial Legislature to enact a law with respect to any matter not enumerated in any of the list in the Seventh Schedule to this Act, including a law imposing tax not mentioned in a such list, and the executive authority of the Federation or of the Province, as the case may be

provision was made for the protection of inter-provincial trade and commerce. The provision which provided for free movement of trade and commerce under the Government of India Act, 1935 was section 297 which constituted a limitation not only on the taxation power but also the trade and commerce power of the provinces.⁴³ The provinces were not only given powers over trade and commerce within the provinces but also taxation powers which in some measure, involved regulation of trade and commerce. They could put restrictions on inter-provincial trade. In order to prohibit the states from imposing restrictions harmful to economic unity and trade and commerce, a protection clause was necessary. This shows that the British Parliament wanted the free trade clause to constitute a limitation not only on the taxation power but also the trade and commerce power of the provinces.

Therefore, this section tries to achieve “as far as possible free trade within India” by imposing limitations on the legislative and executive powers of the provinces. Another provision of this Act which has some relevance to freedom of trade and commerce was section 298 which prohibited discrimination on the grounds of religion, place of birth, descent, colour or any of them in matter of carrying on any occupation, trade, business or profession.⁴⁴

These sections put fetters on the commerce power of the Provinces in two directions. It banned restrictions at the frontiers of the Provinces on the entry and export of goods. Further, as regards tariff-walls, it prohibited discrimination, in the taxation of goods, between goods manufactured and produced in the Province and goods not so manufactured or produced. It should be noted that this section applied only to Provincial Governments and Provincial Legislatures, while the Centre or the Native States did not come within the purview of this section. Thus, India was still lacking a free trade clause applicable throughout the territory of India.⁴⁵

The Act proved to be a watershed moment on integrated market. It initiated a process of constitutionalisation on barrier-free trade so that executive fiat would not be an obstacle for

⁴³ The provision of s. 297 was as follows:

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 any class or description;
 - b) by virtue of anything in this Act have powers to impose any tax, cess, toll or due which, as between goods manufactured or produced in the province and similar goods not so manufactured or produced, discriminates in favour of the farmer, 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.

⁴⁴ The provision of s. 298 was as follows:

- 1) No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the crown in India or be prohibited from acquiring on any occupation, trade, business or profession in British India.
- 2) Nothing in this section shall affect the operation of any law which-
 - (a) Prohibits, either absolutely or subject to exceptions, the sale or mortgage of agricultural land situate in any particular area, and owned by a person belonging to some class recognised by the law as being class of persons engaged in or connected with agriculture in that area, to any person not belonging to any such class; or
 - (b) Recognises the existence of some right, privilege or disability attaching to members of a community by virtue of some personal law or custom having the force of law.

⁴⁵ Shiva B. Rao, *The Framing of India's Constitution-A Study* 699 (Universal Law Publishing Company, New Delhi, 2004).

realisation of the benefit of large market. The provinces were restricted to enact discriminatory laws on the matter of tax on goods in relation to other provinces. Non-discriminatory taxes had laid down the foundation of cooperation between the provinces in the matter of trade and enabled the traders to look beyond the province. However, the Government of India Act 1935 had introduced several features which form the nucleus of our Constitution.

Freedom of Trade and Commerce since Independence

With the introduction of provincial autonomy in April, 1937, it was considered necessary to place this matter on a statutory basis. Accordingly, section 297 of the Government of India Act, 1935, prohibited Provincial Governments from imposing barriers on trade within the country; nor could they levy any tax, cess, toll or other due which discriminated between goods manufactured in one locality and similar goods manufactured elsewhere. On the other hand, this was far from ensuring freedom of internal trade throughout the sub-continent. Indian States could, and very often did, levy export and import duties at their frontiers, and some of them derived considerable revenue from this source.⁴⁶

A Committee was appointed to suggest an adequate solution to the problem of trade barrier on 29th August 1947. Perhaps, the Committee felt that the subject was of such vast importance that it should be considered by a separate sub-committee. The sub-committee after prolonged discussions put the protection clause under the heading of "Fundamental Rights" in Clause 10. While presenting the report of the Advisory Committee Sardar Vallabhbhai Patel, Chairman, pointed out that in dealing with that clause, they had taken into account, the fact that among Indian States depend upon internal customs for a good part of their revenue and that it would be responsible on the part of the Union to enter into an agreement with such States by which internal customs could be eliminated and complete free trade established within the Union.⁴⁷

The Interim Report under Clause 10 proposed the following arrangements:

Subject to regulation by the law of the Union trade, commerce and intercourse among the units by and between the citizens shall be free; Provided that any unit may by law impose reasonable restrictions in the interest of public order, morality or health or in an emergency;

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

Provided further that no preference shall be given by any regulation of commerce or revenue by a unit to one unit over another.⁴⁸

Commenting on the clause when the draft of the sub-committee's report was under consideration, Ayyar Alladi Krishnaswami suggested that:

- i) goods entering a particular unit from other units of the Union should not escape duties and taxes to which goods produced in the concerned unit itself were subject;
- ii) it must be open to a unit in an emergency to place restrictions on inter-State trade and commerce;

⁴⁶ *Ibid.*

⁴⁷ Interim Report of the Advisory Committee on Subject of Fundamental Rights 21 (1948).

⁴⁸ Draft Report, April 3, 1947. *Supra* note 45.

- iii) the freedom of trade guaranteed in the clause should specifically cover coastal trade; and
- iv) it should be clearly laid down that this right would not extend to non-citizens carrying on trade.⁴⁹

These suggestions were accepted by the sub-committee and incorporated in its report submitted to the Advisory committee on April 16, 1947. When the clause came up for consideration in the Assembly on May 1, two amendments were moved by Munshi. The first amendment sought to make the right of the units to impose reasonable restrictions on freedom of trade and commerce less qualified by deleting the word “reasonable”. The second amendment provided that the right of a unit to tax the goods coming from other units would only be exercised under regulations and conditions which were non-discriminatory. Both the amendments and the clause as amended thereby were adopted by the Assembly without much discussion.

The Draft Constitution of India, 1948 provided freedom of trade, commerce and intercourse in its article 16, which provided that subject to the provisions of article 244 of this Constitution and of any law made by Parliament, trade, commerce and intercourse throughout the territory of India shall be free. article 243 of the Draft Constitution prohibits discrimination between States while making any law or regulation relating to trade. Article 244 permits the State to impose similar tax on goods imported from other States and goods so manufactured or produced within the State and a reasonable restriction can be made on freedom of trade on the ground of public interest. Article 245 empowered Parliament to appointment an appropriate authority for the carrying out of the provisions of articles 243 and 244.⁵⁰ The Drafting Committee was of the opinion that it would be more appropriate to provide for the appointment of an authority by law instead of providing for an inter-State commission with limited powers as such a commission, if appointed with powers only to adjudicate disputes as to trade or commerce, might not have sufficient work to do.⁵¹

When the Draft Constitution was published and circulated for eliciting opinion, Alladi Krishnaswami Ayyar commented that the power of imposing reasonable restriction on inter-state trade envisaged in draft article 244 was so drastic in scope that it might practically nullify the freedom of trade secured under draft article 16, for the expression ‘in the public interests’ was vague and uncertain and could not be the subject of judicial review. The West Bengal Legislative Assembly also shared this view and pointing out that the provision was too wide, recommended the power of limiting the power of the States to impose restrictions on the power of trade and commerce. While B. N. Rao justified the retention of the provision on the ground that that it might be necessary for a State to restrict the freedom of intercourse with the inhabitants of a neighbouring State on the outbreak of an epidemic disease like plague.⁵²

⁴⁹ Ayyar Alladi Krishnaswami’s note on the Draft Report, April 14, 1947, Select Documents II, 4(v) 159-160, see *Supra* note 45 at 700.

⁵⁰ Art. 16 was retained in the Fundamental Rights Chapter in the Draft Constitution of February 1948 and art. 243-245 appeared under a separate heading “inter-State trade and commerce” in Part IX of the Draft Constitution dealing with relation between the Union and the States.

⁵¹ *Supra* note 45 at 702.

⁵² Committee and Suggestions on the Draft Constitution. Select Documents IV, 1(i) 328-31.

However, draft articles 243, 244 and 245 came up before the Assembly on June 12, 1949 but their consideration was held over on suggestion from T. T. Krishnamachari.⁵³ These suggestions were accepted on 8th September, 1949. Draft article 16 was put in a new Chapter, X-A, exclusively devoted to “trade, commerce and intercourse within the territory of India”. Its purpose, as Dr. Ambedkar explained, was to assemble under a single part all the provisions on the inter-state trade and commerce scattered in different parts of the Draft Constitution. Part X-A contained five new articles, namely, articles 274-A, 274-B, 274-C, 274-D and 274-E.⁵⁴ The new article 274-A virtually repeated the content of article 16 laying down the general principles of trade, commerce and intercourse; article 274-B empowered Parliament by law to impose restriction in the public interest; article 274-C prohibited Parliament and the State Legislature from making any law giving any preference to one state over another, or making any discrimination between one state and another, except when the Parliament found it necessary to do so to deal with a situation arising from the scarcity of goods in part of India; article 274-D vested in the State legislature the power to impose non-discriminatory taxes on good imported from other States and reasonable restriction on inter-state trade, commerce and intercourse in the public interest; and article 274-E provided that Parliament might establish an appropriate authority for carrying out the purpose of article 274-A to 274-D. the idea of the framers was that the proposed authority might be something like the Inter-State Commission in the United States. The article did not mention any such authority as it was thought desirable to give Parliament full freedom to establish such kind of authority as it might deem fit.⁵⁵

The new articles 274-A to 274-E stumble upon severe criticism. Thakurdas Bhargava considered any restrictions on the freedom of inter-state trade and commerce except in emergencies is derogatory to the very concept of that freedom. He suggested that the word ‘restrictions’ in article 274-B should be qualified by ‘reasonable’ so as to enable the judiciary to adjudicate on the reasonableness of the restrictions on inter-state trade and commerce that might be imposed by the Parliament in the public interest. By another amendment he sought to replace the phrase ‘in the public interest’ in article 274-B and article 274-D under which the Union and the State Legislatures could impose restrictions on the freedom of inter-state trade in the public interest- by what he called the more comprehensive phrase ‘in the interest of general public’. P. S Desmukh, who was critical of what he considered involved drafting, suggested that the entire question of trade and commerce, not only of the entire Union or in regard to any particular State or States, but so far as all States and their trade and commerce inter-se was concerned, should be subject to determination of policy in that regard by a future Parliament.⁵⁶

Replying to the criticism of Bhargava, T.T. Krishnamachari and Krishnaswami Ayyar dealt at length with the arguments. Krishnamachari said that regarding whittling down of discretion given to Parliament and State Legislature could not be done without rendering the future economic progress of the country well-nigh impossible. In this connection he referred to the experience of Australia, where section 92 of the Commonwealth Constitution, which guaranteed an omnibus right of inter-state trade and commerce, had stood in the way of many

⁵³ C.A.D. Vol. VIII, 819.

⁵⁴ *Id.*, Vol. IX at 1124.

⁵⁵ *Id.*, 1123-24.

⁵⁶ *Id.*, 1125-33

measures of economic reform undertaken by the Government. With regard to the suggestion of using 'reasonable' he said, such a change would open the flood gates of litigation over every fiscal policy of the Union Government.⁵⁷ The subject of freedom of trade and commerce again came up before the Assembly on October 13 and 16 when two more articles were proposed to be added i.e. article 274-DD and article 274-DDD⁵⁸ and article 16 was proposed to be deleted therefrom. The new article 274-DD sought to provide that any of the Indian States which was levying any tax or duty on inter-state import or export of goods might, by agreement with the Union Government, continue to do so for a maximum period of ten years, subject to the power of the President to terminate or modify such an agreement after a period of five years and subject to the consideration of the report of the Finance Commission constituted under draft article 260.⁵⁹

Proposing the deletion of article 16, Krishnamachari pointed out that the substance of the article having been covered by article 274-A, the former had become superfluous. Subsequently while revising the Draft Constitution as adopted by the Assembly, freedom of trade, commerce and intercourse was put in a new Chapter, viz. XA consisting articles 274A to 274DDD. When the final draft came before the Constituent Assembly the draft provisions of Part XA were reshaped and finally put in Part XIII consisting of articles 301-307, without any change in the scheme.

V. CONCLUSION

From the foregoing discussion, we can see that the period of ancient time and that following thereto was an age of economic self-sufficiency and all the rural centres were self-supporting. The scope of trade was very much occasional and limited. The great Indian epics clearly show the socio-economic relation between state and individual, and restrictions over trade by the state to make possible the all-round prosperity in the interest of all classes and their harmonious development.

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

That trade has been a significant activity for building of a nation. It has led to centralisation of the power structure so that the unitary system should have greater role in controlling the economic activities of the regions. Gradually, under the imperial ruler, there was a proposition to enable the provinces to raise revenue with necessary control with the central government. In independent India, there was comprehensive framework designed with an idea to accord autonomy to the provinces with necessary power to the centre.

⁵⁷ *Id.*, 1138-43.

⁵⁸ Art. 274-DDD laid down that the new art. 274-A to 274-C, which enunciated the general principle of freedom of trade and commerce and prohibited the Union and the State Legislatures from discriminating between one State and another, would affect the provision of any existing law except in so far as the President might by order otherwise provide.

⁵⁹ The corresponding provision in the Constitution is art. 280.

The constitutional arrangement made in the 1950 Constitution promises free trade within the territory of India without compromising the autonomy of the provinces. The autonomy accorded to the provinces play a significant role in improving quality of life of the people. It facilitates the provinces to commit to the responsibility assigned under the Constitution with the necessary support of the Centre. Therefore, any compromise with the idea of common market as envisaged in the Constitution would have adverse impact upon the constitutional goals of better living and freer trade in the country.

The aim to become a prominent player in the global economy could be achieved by striking out the discriminatory practices related to trade amongst the provinces in India. Also, the provinces need to be accorded autonomy to design the trade policy so that they could fulfil the responsibilities entrusted in the Constitution. The autonomy would give necessary leeway to the provinces to attract investment and encourage the mobility of human resources. The abuse of autonomy would adversely affect the benefit of the big market. Therefore, there is a need to integrate internal market with necessary autonomy to the provinces in order to make quality of life better for millions living in the country.