INTERSTATE TRADE AND COMMERCE: THE DOCTRINE OF PROPORTIONALITY REAFFIRMED

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T.T. Krishnamachari, were he alive today, would be ruing his comment in the Constituent Assembly that the provisions of Part XIII of the Constitution of India are "about nearly as perfect as human ingenuity can make them'.[1] Justice Das was closer to the truth in Automobile Corporation[2] when he called it a "mix up of exception upon exception in the series of articles." In that decision, he attempted to formulate the theory of 'compensatory and regulatory measures' that has engendered consensus and dissension alike. A Constitution Bench of the Supreme Court in *Jindal Stainless Ltd. v. State of Haryana*[3] finally managed to restore the theory to something akin to its original form, and correct the conceptual and linguistic distortions that decades of incorrect interpretation had put it through. The judgment has important implications for federalism in general, and the financial autonomy of the Provinces in particular. I assess this judgment in three parts.

Part I, the introductory part, contains a bare description of the judgment of the Court and the relevant constitutional provisions. *Part II* contextualises the decision, by identifying three phases of Supreme Court jurisprudence on the theory of compensatory and regulatory measures, the first beginning with *Atiabari*[4] and the last culminating in *Jindal*. It examines the second phase between *Automobile* and *Jindal*, where the Court departed from precedent, without persuasive reasons. *Part III* assesses the larger significance of this judgment, and concludes the paper.

I. The Decision in *Jindal*- A Brief Description

The Court unanimously held that for a tax to be considered 'compensatory' for the purposes of Article 301 of the Constitution, it must be broadly proportionate to the special benefits derived as a result of it. Before considering the decision in greater detail, it is useful to set out the relevant constitutional provisions.

Part XIII of the Constitution contains provisions on 'Inter-State Trade and Commerce', and is the Indian analogue to the United States 'Commerce

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[1] *CONST. ASSEMB. DEB. VOL. IX*, 1140 ["*CAD*"].

[2] THE AUTOMOBILE TRANSPORT (RAJASTHAN) LTD. v. RAJASTHAN, A.I.R. 1962 S.C. 1406, para. 16 ["AUTOMOBILE"].

[3] JINDAL STAINLESS LTD. v. HARYANA, (2006) 7 S.C.C. 241 ["JINDAL"].

[4] ATIABARI TEA CO. LTD. v. ASSAM, [1961] 1 S.C.R. 809 ["ATIABARI"].

Clause', and Section 92 of the Australian Constitution.

Article 301, the omnibus provision, declares that 'trade, commerce and intercourse' shall be free throughout the territory of India. Article 302 authorises Parliament to impose restrictions on this freedom if necessary in the public interest. Articles 303(1) and (2) restrict this power of Parliament by providing that it may not be used to discriminate between States, except in cases of scarcity. Article 304(a) allows the State Legislature to impose non-discriminatory taxes on goods, while Article 304(b) allows it to impose other reasonable restrictions (with Presidential consent), notwithstanding Articles 301 and 303.

Jindal held that a tax whose quantum is approximately equal to the benefit conferred on trade as a result of the tax will not attract Article 301, as it is 'compensatory' in nature. In other words, if the proceeds of a tax are used to improve trade facilities through, for instance, building infrastructure, and the extent of this benefit to trade is not disproportionate to the levy itself, the tax will be beyond the pale of Article 301. In so holding, *Jindal* overruled the decisions of the Supreme Court in *Bhagatram Rajeev Kumar*[5] and *Bihar Chamber of Commerce*,[6] which had dispensed with this requirement of proportionality between the quantum of the 'compensatory' levy and the benefit flowing from it.

The questions that Part XIII poses are many.[7] So are the implications of the answers, for these answers will shape the financial autonomy of States, and constitute a significant reservoir of clues to the content of India's federalism. This paper confines itself to one of these questions: How has the decision in *Jindal* reshaped the theory of compensatory and regulatory measures vis-à-vis the scope of Article 301? Specifically, this paper examines how *Jindal* fared in resolving the technical inconsistency in Supreme Court opinions on the subject. This inconsistency had materially altered the nature of Indian federalism, both financial and legislative, and this is highlighted where relevant, although an extensive theoretical analysis of the nature of financial and legislative federalism in trade and commerce jurisprudence is beyond the scope of this paper.

II. Three Phases and Two Tests - A Full Circle

Article 301 provides that trade, commerce and intercourse shall be free. Among many others, the question as to *what* trade is free from naturally arose. This question was contextualised in the specific debate on whether *taxation* laws can violate Article 301, by constraining business enterprises

[5] Bhagat Ram v. Commissioner of Sales Tax, 1994 (4) SCALE 1103 ["Bhagat Ram"].

[6] State of Bihar v. Bihar Chamber of Commerce, 1996 (9) S.C.C. 138 ["Bihar Chamber"].

[7] I briefly mention some of these questions in the final section of this paper.

from earning as much as they would without the tax. Mr. Seervai argues that tax laws are entirely outside the scope of Part XIII.[8] The Supreme Court in *Atiabari* rejected this argument. While a detailed analysis of the five reasons Mr. Seervai offers in support of his argument is outside the scope of this paper, it will suffice at this juncture to point out that Article 304(a), an *exception* to Article 301, specifically provides that a non-discriminatory *tax* may be imposed, *notwithstanding* Article 301. This would be entirely unnecessary unless a non-discriminatory tax law violates Article 301 in the first place. If Clause 'A' is an *exception* to Clause 'B', a law will require the assistance of Clause 'A', only if it violates Clause 'B' in the first place.

Hence, it is submitted, with great respect, that Mr. Seervai's conclusion is not persuasive, and the scope of Article 301 must thus be determined without assuming that taxation laws are entirely outside its purview. The answer to this question does not affect merely the enterprise in question. It means that the State Government can only enact that law under Article 304(b), as a reasonable restriction on Article 301, with *Presidential consent*. Thus, a wide interpretation of Article 301 would, as Subba Rao, J., in *Automobile* noted, make the plenary legislative power of the States subject to the control of the Central Executive. The question therefore cuts to the core of State autonomy, both legislative and financial. This consideration greatly influenced the Court, as the following analysis reveals.

i. The First Phase - Atiabari and Automobile

In *Automobile*, Subba Rao, J. cautioned the Court to refrain from adopting an interpretation which would make the State Legislature the "handmaiden of the Central executive".[9] This was inspite of the decision in *Atiabari*, where the Court held that Article 301 confers protection only from 'direct and immediate' restrictions on the 'movement of trade'. Thus, 'freedom of trade, commerce and intercourse from laws' became 'freedom of movement of trade from direct and immediate restrictions imposed by laws'.

The next chapter to this story was the theory of compensatory and regulatory measures, and the author was the Court in *Automobile*. Das, J., accepted the *Atiabari* formulation noted above, with the one 'clarification' that:

> "Regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the

[8] H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY VOL. III 2605-8 (4th ed., 1996) ["SEERVAI"].

[9] AUTOMOBILE, para. 48 (per Subba Rao, J.).

> purview of the restrictions contemplated by Article 301 and such measures need not comply with the requirements of the proviso to Article 304(b) of the Constitution."[10]

The Court had to define what a compensatory tax or regulatory measure was. A regulatory measure, the Court said, is a measure which actually *facilitated trade*, though it *appeared* to harm it. For instance, the rule that a merchant's car loaded with wares must stop at a red traffic signal is a purported restriction on the movement of trade, but actually facilitates it, since it ensures that cars do not destroy each other, and in the process, trade.[11]

The rationale of a compensatory tax is identical. A tax imposed on traders is compensatory if it *actually facilitates* trade, by improving trade facilities. In the words of Das, J.,

> "...[a compensatory tax is] making a charge for the use of trading facilities, such as, roads, bridges, aerodromes etc. The collection of a toll or a tax for the use of a road or for the use of a bridge or for the use of an aerodrome is no barrier or burden or deterrent to traders who, in their absence, may have to take a *longer or less convenient or more expensive route. Such compensatory taxes are no hindrance to anybody's freedom...*"[12] [emphasis added]

In other words, since a compensatory tax actually *benefits* trade, there is no question of it violating a provision that states that trade shall be free. It follows that the crux of a compensatory tax is the robust relationship between the quantum of the levy, and the benefit to trade as a result of the levy. Indeed, Das, J., indicated as much when he said that the tax cannot be "patently much more"[13] than the resultant benefit to trade.

It is relevant to note, at this juncture, that this decision reshaped the financial and legislative autonomy of Provinces. Applying solely the yardstick of 'degree of Provincial autonomy', Mr. Seervai's view that no tax can ever offend Article 301 is the most beneficial, and Justice Shah's wide view in *Atiabari* that Article 301 bars any restriction on any aspect of trade and commerce, regardless of proximity or causation, the most detrimental. Were Justice Shah's view the law, the State Government would require Presidential consent to levy any tax that it is competent to levy, or exercise regulatory powers conferred on it, even on ancillary aspects of trade and commerce. This would have had the effect of subordinating the 'exclusive' competence

[10] *Id.*, para. 24.
[11] *Id.*, para. 24.
[12] *Id.*, para. 17.
[13] *Id.*, para. 27.

of the State Government to legislate on entries in List II of the Seventh Schedule to the Head of the Central *Executive*. This was clearly not intended by the drafters of the Constitution, and is not a result consistent with the scheme of distribution of legislative powers in the Constitution. *Automobile* averted the possibility of the wide view gaining acceptance by affirming that 'trade and commerce' pertained only to the 'movement of goods', and resolved the tax law debate by striking a middle path - taxes which proportionately benefit trade (compensatory tax) do not require Presidential consent, thereby leaving a sphere of State autonomy untouched. It is significant to note that *Automobile* achieved this result within the language and scheme of the Constitution. Later decisions, however, did not, as is demonstrated below. That is attributable solely to ignoring that the theory of compensatory taxes is *premised* on this principle of proportionality.

ii. The Second Phase - Bolani Ores to Geo Miller

The theory was a potent weapon in expanding the autonomy of the Provinces, and obviating the need to obtain Presidential consent to pass laws. While the Court rightly allowed this consideration to influence its reading of Part XIII, its careless reading of precedent introduced several avoidable errors into Part XIII jurisprudence, until *Jindal* set it right in 2006.

The mistakes began with *Bolani Ores*[14] in 1974. The Court relied on *Automobile* to conclude that *every* law taxing vehicles under Entry 57, List II, was compensatory. In *Automobile*, the Court had only held that since the Rajasthan Government raised around Rs. 34 lakh annually from a motor vehicle tax under the Rajasthan Motor Vehicles Taxation Act, 1951, and spent Rs. 60 lakh on upkeep of roads, the tax was compensatory. *Bolani Ores* changed "*this vehicle tax statute* is compensatory" to "*vehicle tax* is compensatory", and rewrote Entry 57, List II from "tax on vehicles" to "compensatory tax on vehicles". *Jindal* did not notice this anomaly. Fortunately, it makes little difference as *Jindal* has impliedly overruled *Bolani Ores*.

Around six years after *Bolani*, the Court compounded the error in *International Tourist Corporation*,[15] and held that

> "Having regard to *Atiabari Tea Co. Ltd... Automobile Transport (Rajasthan) Ltd.* ... and *Bolani Ores Ltd.* ... the power exercisable under entry 56 of List II is the power to impose taxes which are in the nature of regulatory and compensatory measures. But to say that the nature of a tax is of a compensatory and regulatory nature

[14] BOLANI ORES v. ORISSA, (1974) 2 S.C.C. 777.

[15] INTERNATIONAL TOURIST CORPORATION v. HARYANA, (1981) 2 S.C.C. 318 ["TOURIST CORPORATION"].

> is *not to say that the measure of the tax should be proportionate to the expenditure* incurred on the regulation provided and the services rendered. *If the tax were to be proportionate to the expenditure on regulation and service it would not be a tax but a fee*." [emphasis added]

This statement was made by a 2 judge Bench, in direct contravention of the 7 judge Bench ruling in *Automobile* that the essence of a compensatory tax is its proportionality to the benefit, and that it cannot be 'patently much more' than the benefit. The comparison to the concept of a fee was entirely irrelevant, since it implicitly, and wrongly, assumes that every proportionate levy is a fee. The fact that a fee is a proportionate levy does not prove the converse, that every proportionate levy is a fee. *Jindal* is a fine exposition of the distinction between a compensatory tax and a fee.[16] Briefly, a fee is levied on an individual as such, while a compensatory tax is levied on him as a member of a class.

Moreover, the decision is open to criticism for misunderstanding the basic premise of a compensatory tax. A compensatory tax is outside the purview of Article 301 only because it is not a restriction on trade, and it is not a restriction only because benefit and exaction are approximately equal. If this were not the case, it would be no different from any other tax, and would be valid only if it satisfied Article 302 or 304. The effect of the decisions in *Bolani Ores* and *International Tourist Corporation* is that a taxation law which is not compensatory (in terms of exaction approximating benefit) is *still* outside the purview of Article 301, *though* it is a restriction not in accordance with Articles 302 and 304. It is submitted that this has no basis in either text or precedent, and was rightly rejected in *Jindal*.

That set the stage for the two decisions which *Jindal* specifically overruled. The first of these was *Bhagat Ram*, decided in 1995. The Court observed here that the nature of a compensatory tax had 'changed'. Specifically, "The concept of compensatory nature of tax has been widened and if there is substantial or *even some link* between the tax and the facilities extended to such dealers directly or indirectly the levy cannot be impugned as invalid" [emphasis added].[17] In *Bihar Chamber*, decided a year after *Bhagatram*, the Court affirmed this patently incorrect proposition, holding that "some connection" between the levy and trading facilities is sufficient.[18]

Before considering *Jindal*'s analysis of this concept in detail, it is pertinent to note a few other judgments, which *Jindal* failed to expressly

[16] This has been discussed later under the head "The Third Phase - Jindal Revives the Principle of Proportionality".

[17] BHAGAT RAM, para. 8.

[18] BIHAR CHAMBER, para. 12.

overrule. In *Hansa Corporation*, the Supreme Court considered the validity of a surcharge on sales tax. Even today, it has not been established that sales tax is a direct and immediate restriction on Article 301.[19] Even assuming it is, it is submitted that the Court in *Hansa Corporation* incorrectly formulated the following 'test' for compensatory taxes:

> "Karnataka...abolished octroi...its abolition would cause such a dent on municipal finances that compensation for the loss would be inevitable. Accordingly, the State Government undertook a policy of compensating the municipalities year by year. For generating funds for this compensation, rates of sales tax were raised and in some cases a surcharge was levied... No attempt was made to establish ... *that the impugned tax was a measure for compensating the municipalities for the loss of revenue or for augmenting its finances.*" [emphasis added]

The Court did go on to hold that it was not necessary for it to consider whether the tax was compensatory or not. But by holding that it was not proved that the tax 'would compensate the municipalities for the loss of revenue', or 'augment its finances', the Court implicitly endorsed the proposition that if that were the case, the tax would be compensatory. Interestingly, both *Bhagatram* and *Bihar Chamber* relied on *Hansa Corporation* to propound the new theory of compensatory taxes.

In *Geo Miller*,[20] faced with a similar situation, Rajendra Babu, C.J., made the following observations:

> "...the respondents have reiterated that the tax being imposed is compensatory in nature as the revenue earned therefrom passes over to the local bodies to compensate them for the loss incurred due to abolition of octroi. Augmentation of their finance would enable them to promote Municipal Services more efficiently helping in the free flow of trade and commerce."

The easiest way to analyse this 'test' is to *compare* it with the original test. *Automobile* had held that the tax imposed must confer approximately as much benefit on trade as the tax the traders are asked to pay. This was called a 'compensatory' tax, and the rationale was best expressed by Mathew,

[19] There has been a considerable difference of opinion on this point. In ANDHRA SUGAR v. ANDHRA PRADESH, A.I.R. 1968 S.C. 599, the Court held that sales tax does not normally constitute a restriction on the freedom of movement, since it is an indirect restriction. A sales tax law would thus not have to be tested for its validity on the touchstone of Article 301. In MADRAS v. NATARAJA MUDALIAR, [1968] 3 S.C.R. 829, however, Shah, J. observed that it is 'in essence a tax that encumbers trade'. Bachawat and Hegde, JJ. disagreed with this line of reasoning, preferring, in their concurring opinions, to rest their decisions on independent grounds.

[20] GEO MILLER v. MADHYA PRADESH, A.I.R. 2004 S.C. 3552.

J., in *G.K. Krishnan*, in the following words:

> "...because the users of vehicles generally, and of public motor vehicles in particular, stand in a special and direct relation to such roads, and may be said to derive a special and direct benefit from them, it seems not unreasonable that they should be called upon to make a special contribution to their maintenance over and above their general contribution as taxpayers of the State."[21]

After *Bolani Ores* and *Tourist Corporation*, a vehicle tax was considered *conceptually* compensatory, which is a contradiction in terms. A tax statute is compensatory if in a *particular case*, it does more to benefit trade than harm it. It is never generically compensatory, and cannot be. That was the first distortion. The second was introduced by *Bhagatram* and *Bihar Chamber*, where a tax was considered compensatory if there was 'some connection' between the quantum of the levy and the benefit to trade, which, as pointed out, flies in the face of the fundamental premise of proportionality. The genesis of the third distortion was *Hansa Corporation* and *Geo Miller*. A tax was considered in these cases to be compensatory if it compensated the State. The only purported justification is that this enables the State to promote commerce. If that is true, *every* tax is compensatory, and the concept loses analytical relevance. Indeed, this is exactly what *Jindal* observed, when it corrected the second and third misconceptions. The first, however, continues to have the force of law, and deserves to be overruled.

iii. The Third Phase – Jindal Revives the Principle of Proportionality

Jindal has its origins in a commercial dispute that the Supreme Court considered in 2003. The Haryana Local Area Development Tax Act, 2000, sought to tax the transport of raw materials required by the Haryana industries which sent finished products to other States. The petitioners challenged the constitutionality of this Act, contending that it violated Article 301. A Division Bench of the Supreme Court referred the matter to a larger Bench, to consider whether the decisions in *Bhagatram* and *Bihar Chamber* were correct.[22]

The Division Bench, in its referral, considered *Atiabari* and *Automobile*, and concluded that "it is of the essence of compensatory tax that the service rendered or facility provided should be more or less commensurate with the tax levied."[23] The Court also observed that a 'specific, identifiable object behind the levy' and a 'nexus between the subject and the object of the levy' were required. Consequently, the Court correctly observed that there was incompatibility between

[21] G. K. Krishnan v. Tamil Nadu, (1975) 1 S.C.C. 375, para. 17 (per Mathew, J.), relying on Freightlines & Construction Holding Ltd. v. New South Wales, [1968] A.C. 625.

[22] Jindal Stripe v. Haryana, 2003 (8) SCALE 122.

[23] *Id.*, para. 16.

the decisions in *Bhagatram*, *Bihar Chamber* and *Automobile*.

These issues were considered *in extenso* by the Constitution Bench in 2006. The petitioners argued that to accept the *Bhagatram* test would eliminate the distinction between a compensatory tax and a tax for general revenue. The respondents made two important arguments, which were eventually rejected - *firstly*, that a compensatory tax does not have to be proportionate to benefit, for that would make it indistinguishable from a fee, and *secondly*, that in any event, the parameter on which a tax is adjudged as compensatory cannot be the nature of the levy, but the nature of the *legislative entry* under which the relevant law is passed. It was argued that Entries 56, 57 and 59 of List II indicate a nexus with roadways and waterways, and are hence compensatory. It is significant that both sides relied on the comparison with a fee, and other types of taxes.

As to the first argument, the difference between a compensatory tax and a fee was explained on the basis of the 'principle of equivalence'. The principle behind a tax, the Court said, was the ability or capacity to pay, or the 'principle of burden'. A fee, on the other hand, was based on the 'principle of equivalence', which required that the exaction approximate the benefit flowing from the exaction. The Court held that the basis for a compensatory tax was also the principle of equivalence, thus affirming the pre-1995 position, and rejecting the view taken in *Bhagatram* and *Bihar Chamber*. The Court further observed that the distinction between a fee and a compensatory tax is that a compensatory tax is levied on an individual as a member of class, while a fee is levied on an *individual as such*. This is *Jindal*'s most important contribution, for it clarified the distinct niche that each of these concepts occupies. It is relevant here to note that *Tourist Corporation* wrongly stated that a compensatory tax need not approximate benefit since that would render it indistinguishable from a fee, which has been impliedly overruled by *Jindal*. The difference between a compensatory tax and a fee is conceptual. A fee is 'compensatory' if that particular fee improves the flow of trade, and if so, it will be outside the purview of Article 301. But that does not make it a compensatory tax, because a fee is not a tax in the first place. In other words, equivalence is a necessary but not sufficient condition for a levy to be considered a fee. A tax is generally not compensatory. However, that does not mean that a tax which *is* compensatory becomes a fee. It continues to be a compensatory tax, and is outside the purview of Article 301 for that reason. A fee, on the other hand, usually has elements of *quid pro quo*,[24] but will not be 'compensatory' unless

[24] This proposition has been doubted in VIJAYALAKSHMI RICE MILL v. COMMERCIAL TAX OFFICERS, A.I.R. 2006 S.C. 2987, where Katju, J., has observed that the concept of fee has undergone a 'sea change' and 'transformation', and that a 'mere causal connection' will suffice, dispensing

it improves *trade*. Thus, the test, after *Jindal*, is exactly the same test as after *Automobile* - does the levy benefit trade to approximately the same extent as the quantum of its exaction?

The Court also rejected the second contention of the respondents, observing that the *legislation* must

> "...broadly indicate proportionality to the quantifiable benefit. If the provisions are ambiguous or even if the Act does not indicate facially the quantifiable benefit, the burden will be on the State as a service/facility provider to show by placing the material before the Court, that the payment of compensatory tax is a reimbursement/recompense for the quantifiable/ measurable benefit provided or to be provided to its payer(s)."[25]

III. Concluding Remarks - *Jindal*'s Pointers to Future Courts

Jindal, as this paper pointed out, has correctly held that a 'compensatory' tax must be proportionate to the benefit that accrues to trade as a result of it. However, the larger problem is one with the interpretation of Part XIII itself, which is so unclear that the proliferation of inconsistent opinions is hardly a surprise. It is imperative that these questions be authoritatively settled by the Supreme Court, when the opportunity presents itself. Consider a few instances:

Is Article 301 subject to other provisions of the Constitution as well? What is the scope of the expression - trade, commerce and intercourse? Does it extend to industries which primarily harm the public, in the context of *res extra commercium*? What is trade, commerce and intercourse free from, and to what extent is it free? Under Article 302, is the satisfaction of Parliament subject to judicial review? If so, is the standard of review any different? What does 'entry relating to trade and commerce' in Article 303(1) cover? Is internal production a prerequisite for the application of Article 304(a)? How can the conflict in two Constitution Bench decisions[26] on the scope of 'regulation by taxation' be reconciled?

These questions, among many others, are representative of two conflicting interests that define trade and commerce jurisprudence. This, of

with the requirement of strict quid pro quo and specific privilege. The decision in JINDAL was cited to the Court as establishing the fallacy of this proposition, but the Court summarily rejected it. This decision, however, is of no relevance to the meaning of compensatory tax, and the debate on whether *quid pro quo* is still a *sine qua non* for a fee is outside the scope of this paper.

[25] JINDAL, para. 39.

[26] WEST BENGAL v. KESORAM INDUSTRIES, (2004) 10 S.C.C. 201; PUNJAB v. DEVANS MODERN BREWERIES, (2004) 11 S.C.C. 26. Interestingly, both decisions were before the *same* Bench – Khare, C.J., Lahoti, Agrawal, Sinha and Lakshmanan, JJ.

course, does not mean that the same considerations operate across different jurisdictions with respect to trade and commerce.[27] However, the underlying object of trade and commerce provisions is to preserve as much Provincial autonomy as is compatible with the economic unity of the nation as a whole. This paper, of course, answered a limited question on the concept of compensatory taxes. But that question must be understood in this framework, for the law was shaped by the Court's effort to mediate between these concerns.

The glaring inconsistencies in the Court's treatment of this area of law are perhaps attributable to this factor. This, as this paper pointed out, was visible in three distinct phases. It began in *Atiabari* where the Court evolved the first limitation to the language of Article 301, to substantially reduce the scope of its application, by holding that it applied only to 'direct and immediate restrictions' on the 'movement of trade'. *Automobile* went further, and evolved the theory of compensatory and regulatory measures. After *Atiabari* and *Automobile*, therefore, the Court's interpretation of Article 301 strongly favoured the Provinces - only a law which directly and immediately restricted an aspect of trade intimately connected to transportation would be struck down, and that too only if it failed to benefit trade. Even this law could be saved with Presidential consent. While Provincial autonomy was robust at this stage, the Court had been careful to maintain more than a semblance of textual and structural authority for its interpretation. The legacy of the first phase was precisely defining the *fundamental premise* of a compensatory tax, i.e. the doctrine of proportionality. In other words, a tax is compensatory *only if* it benefits trade, and it is entirely outside the purview of Article 301 only if it is compensatory.

Structural consistency, however, is something that the second and third phases of Supreme Court jurisprudence cannot boast of, largely because of ignoring this fundamental premise. By holding that every law passed under a certain legislative *field* is compensatory (Entry 56, List II), *Bolani Ores* and *Tourist Corporation* wrongly assumed that a law could be adjudged to be compensatory without reference to the quantum of exaction or benefit, the first inroad into the premise of proportionality. It was, however, merely the tip of the iceberg. *Bhagatram* and *Bihar Chamber of Commerce* were next,

[27] There is one residual area of criticism that *Jindal* invites. That is the observation that Part XIII is an 'amalgam' of Article 1, § 8 of the U.S. CONST., and § 92 of the AUS. CONST., provides that trade and commerce must be 'absolutely free', and does not authorise *any* restrictions of any sort on any aspect of trade and commerce. Article 301, on the other hand, does not provide that the freedom shall be 'absolute', and is qualified by permitted restrictions in Arts. 302-4. The American Constitution is also of limited relevance. While a detailed analysis of these differences is beyond the scope of this paper, *see* BOMBAY V. R.M.D.C., [1957] 1 S.C.R. 874.

expressly rejecting the idea that proportionality was required for a tax to be compensatory. The last distortion, introduced by *Hansa Corporation* and *Geo Miller*, was by far the most absurd, suggesting that a tax is compensatory if it compensates the 'State' for loss of revenue. Thus, what had begun in *Automobile* as the simple proposition that 'a tax is compensatory if it proportionately benefits trade' was changed to 'a taxing entry is compensatory, regardless of the law passed under it', and then to 'a tax which does not benefit trade proportionately is still compensatory', and then to 'a tax is compensatory if it benefits the State'.

Jindal rightly overruled *Bhagatram* and *Bihar Chamber of Commerce*. However, given its analysis of the distinction between a compensatory tax and a fee, and its emphasis on the doctrine of proportionality, most of the other similarly incorrect propositions highlighted here must now be considered impliedly overruled. *Jindal*, therefore, has ensured that "provincial autonomy" is not a licence to ignore canons of interpretation or the provisions of the Constitution. As a matter of evaluation, Provincial autonomy is not significantly curtailed even after *Jindal* – the State can now pass any law which it could after *Automobile*, so that only a blatantly discriminatory law or one which substantially affects the movement of trade will be subject to scrutiny. This is clearly not an excessive fetter on provincial legislative autonomy, since it ensures that the object of Part XIII, i.e. the economic unity of the country is not frustrated.