In the present era of constitutionalism the courts like any other organ of the government influence equally, if not more, the development of a constitution. Constitution is a living organism. It is the courts which by means of their power of interpretation, make the growth of the constitution possible and make it fit for being adapted to the changing needs and thinking of the community. The process of amendment to the constitution brings sometimes sweeping changes. In contrast the courts move by gradual and often indirect, cautious, well considered steps, that enable the past to joint with the future, without undue collision and strife with the present\(^1\) and thus keep the constitution contemporary.

Further the form and philosophy of a constitution depends upon as to how it is interpreted by the judges. A judge is not like an impersonal calculating machine who merely applies the letter of the law. A judge pays due regard, though to a limited extent, to the ideas which he believes in. Accordingly there is some strength in Chief Justice Hughes' observation that the constitution is what the judges say it is. The truth of this observation can very well be realised in the context of American constitutional law. The 'due process clause' has been interpreted to include anything that judges want to read in there. Furthermore,

the history of American constitutional law, is evidence of the fact that the Supreme Court has more than often exercised its power of judicial review to strike down the acts of the executive on no other ground than that of political or ideological. The court has not escaped from the criticism, both in and outside the Congress on this account. Nonetheless people look to the court, for the safeguard and protection of their liberties. Again the smooth working of the United States Constitution, which is neither detailed nor comprehensive, has been ascribed to the Supreme Court.

In contrast the position of the Supreme Court of India is different from that of the Supreme Court of the United States. It is different because the Constitution of India is at once detailed and comprehensive. There is not much scope for the Supreme Court to interpret the provisions in the manner it likes to suit different exigencies. Chief Justice Kania referred to this in his decision in Gopalan v State of Madras. The Chief Justice quoted Munro and observed: "The architects of 1787 built only the basement. Their descendents have kept adding walls and windows, wings and gables, pillars and porches to make a rambling structure which is not yet finished. Or to change the metaphor, it has a fabric which to use the words of James Russell Lowell, is still being 'woven on the roaring loom of the time'..... In contrast to the American Constitution, the Indian Constitution is a very detailed one. The constitution itself provides in minute details the legislative powers of the Parliament and the State Legislatures. The same feature is noticeable in the case of the judiciary,

Further, because of the rigid character of the American Constitution amendments are at once difficult and cumbersome, consequently, it is extremely difficult to resort to this device to nullify the effect of a judgment of the Supreme Court, which is distasteful to the representatives of the people. The Supreme Court being conscious of this fact often gets into a defying mood both against the Executive and the Congress. But in India the Constitution being far less rigid than the Constitution of the United States, the Parliament does not have much difficulty in amending the Constitution to negative the effect of the judgment of the Supreme Court. Most of the important amendments to the Constitution have been made as a result of the decisions of the Supreme Court relating to fundamental rights. Though the Parliament has felt offended occasionally but the Supreme Court has not given in and has even scrutinised the validity of the amendments also, when challenged before it.

It is now proposed to discuss a few of the important amendments to the Constitution, which have been passed by the Parliament in consequence of the decisions of the Court in meeting the adverse decisions of the Supreme Court and also to discuss those amendments that have been challenged before the Court.

**Supreme Court and the Amendments of the Constitution**

The Constitution of India has been amended twenty three times to date (Jan. 1971). Most of the important amendments

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2. The twenty fourth amendment Bill relating to the abolition of Privy Purses was passed by the Lok Sabha on September 2, 1970 but was defeated in the Rajya Sabha. See The Tribune, September 3, 1970; September 6, 1970.
relate to Part III of Constitution, dealing with Fundamental Rights and most of these amendments have been made as a result of clash between the Directive Principles and the Fundamental Rights, the former being non-justiciable and the latter being justiciable. In pursuance of the declaration in the Preamble and the Directive Principles, to establish a socialistic pattern of society, the Parliament and the State Legislatures enacted legislation to bring social and agrarian reforms, immediately after the Constitution came into force. Such legislation as affected Fundamental Right was challenged before the High Courts of various States and the Supreme Court. The Fundamental Rights being justiciable, were upheld and many Acts passed by the State Legislatures which offended the Fundamental Rights were declared as ultra vires of the Constitution. This necessitated the First Amendment of the Constitution, which sought to amend Articles 15, 19 and 31.

The necessity of amending Article 15 arose after the Supreme Court had announced its decision in Champakam Dorairajan v State of Madras\(^1\). In this case the Court declared an order of the Government of Madras, which had been passed in view of Article 46 of the Constitution which contemplates the promotion of education and economic interests of the weaker sections of the society particularly the Scheduled Castes and Tribes, as ultra vires, as it violated the right to equality guaranteed under Article 29(2)\(^2\). The Court justified its decision on the ground that the fundamental

\^1 A.I.R. 1951 S.C. 226.

\^2 Article 29(2) lays down: No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of origin, race, caste, language or any of them.
rights were justiciable and the directive principles were not, consequently in an eventuality of clash between the two, the former had precedence over the latter.

To enforce the said directive principle as against the decision of the Court, the Parliament added clause (4) to Article 15 by the First Amendment, which empowers the Government to pass discriminatory legislation. Article 15(4) now lays down:

"Nothing in this article or in Clause (2) of Article 29 shall prevent the State from making any provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes."

The addition of this Clause clearly negatives the effect of Article 15(1) and Article 29(2), that is, it sets aside the prohibition imposed upon the State not to discriminate against any citizen on grounds of religion, race, caste, sex, place of birth or any of them. It is considered not merely as undesirable but undemocratic as well.

Again clause (2) and (6) of Article 19 were amended to restrict the freedom of speech and expression and the freedom to carry on any trade or business, to negate the wide interpretation placed on the provisions of Article 19(2) and (6) by the Supreme Court in many cases. The words 'Security of State' in Article 19(2) were interpreted to exclude expressions like 'public order' and 'public safety'. Consequently, Parliament thought it necessary to amend Article 19(2). The Law Minister of the Union complained

to the Parliament that the Courts had unleashed an avalanche of ultra vires decisions making the maintenance of order and security of life against wanton preaching of murder and violence impossible. To meet this situation, the word 'public order' was included in the text of Article 19(2). The word 'public order' has not however, been defined and Parliament and the State Legislatures have thus been invested with unfettered power to affect the fundamental right of freedom of speech and expression.

Again clause (6) of Article 19 was amended to reverse the decision of a High Court, which declared the government monopoly of transport as unconstitutional in view of Article 19(1)(g) which guarantees the freedom to the citizen to practise any profession or to carry on any trade or business. The amended clause (6) of Article 19, empowers the State to make any law to carry on trade or business, industry or service, whether to the exclusion complete or partial of citizens or otherwise and to that effect Article 19(1)(g) could not be evoked. The effect of this amendment was explained by Justice Mukherjea in Sagir Ahmad v State of U.P., wherein he observed: "The result of the amendment is that the State would not have to justify such action as reasonable at all in a court of law and no objection could be taken in it on the ground that it is an infringement of the right guaranteed under Article 19(1)(g) of the Constitution."

Article 31 of the Constitution was another important Article, the text of which was found inadequate by the Parliament, in face

of the land reforms being brought about by the States. The
language of this Article was however, not disturbed but Articles
31(A) and 31(B) along with Schedule IX were inserted under Section
4 of the First Amendment. The insertion was thought necessary
after the Patna High Court had declared the Bihar Land Reforms
Act as null and void on the ground that it was discriminatory in
nature and violated Article 14 of the Constitution. Article 31A
was headed as "Saving of Laws providing for acquisition of estates
etc.", and Article 31(B) was headed as "Validation of certain
Acts and Regulations." The Ninth Schedule to be read with Article
31(B) contained therein thirteen acts of the State Legislatures.
These Articles were given retrospective effect.

This part of the First Amendment is again considered as
unnecessary, because the decision had come from a High Court. The
matter could have been righted, as indeed it was, by an appeal to
the Supreme Court. Article 31(A), writes Munikanniah, is set in
defiance of not only Article 31, but of the entire provisions in
Part III and herein are found the germination of 'Gendarme' or
obstruction to the operation of guarantees solemnly pledged.

Further the insertion of Article 31(B) alongwith Schedule IX,
raises a moot point, that is, can the amending power be exercised
by the Parliament to incorporate anything and everything in the
Constitution. The Schedule has grown since then, the Constitution
(Fourth Amendment)Act, 1955, increased the number of Acts in the

2. For details see Hidayatullah's views in Golak Nath v State of
Schedule from thirteen to twenty and the Constitution (Seventeenth Amendment) Act, 1964, further raised this number to sixty-four.

The First Amendment of the Constitution, it may be said, opened the vista to Parliament to commit rape on the sanctity of Fundamental Rights enshrined in the Constitution. By this device, observes Justice Hidayatullah, "The Fundamental Rights can be completely emasculated by a 2/3 majority, even though they can not be touched in the ordinary way by a unanimous vote of the same body of men. The State Legislatures may drive a coach and pair through the Fundamental Rights and the Parliament by 2/3 majority will then put them outside the jurisdiction of the Courts."¹ It also escaped the memory of the Court that it was a 'sentinel on the qui vive' vis-a-vis the Fundamental Rights, when it upheld the validity of the said Amendment of the Constitution in Shankari Prasad v Union of India². The competence of Parliament to amend Fundamental Rights was challenged in the above case, in consequence of a mandatory directive contained in Article 13(2), that no law shall be made by the State which takes away or abridges the rights guaranteed by Part III of the Constitution. The Supreme Court interpreted the word 'law' in a narrow sense and held that constitutional amendments were beyond the ambit of Article 13(2). Accordingly, it upheld the First Amendment of the Constitution³. This decision of the Supreme Court paved the way for Parliament to

3. Justice Hidayatullah observed in the Golak Nath case: "If I was free I should say that the amendment was not legal and certainly not justified by the reasons given in the earlier cases of this Court (A.I.R. 1967 S.C. 1643)."
further amend the Constitution, to make further inroads into Part III of the Constitution. The amendments to Part III continued till the Supreme Court overruled this decision in Golak Nath v State of Punjab. 

Fourth Amendment: This is another important amendment which was brought to meet the challenge that judiciary had posed to the legislature by widely interpreting Articles 31(1) and 31(2) in many cases. By this amendment the Parliament ventured to oust the jurisdiction of the Court in matters of compensation, as contemplated in Article 31(2) and to do away with the distinction made by the Court between Article 19(1)(f) and Article 31.

Before this Amendment was passed by the Parliament, the Supreme Court had ruled that the adequacy of compensation was justiciable and that it meant 'just equivalent' of the property appropriated. In State of West Bengal v Bela Banerjee, the Court observed that "while it is true that the legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated, such principles must ensure that what is determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full indemnification of the expropriated owner, the Constitution allows free play to the legislative judgment as to what principles should guide the

This decision of the Court provoked the Parliament which refused to let the judges sit on its judgment. Consequently, an amendment to that effect was moved in the Parliament. The Home Minister who piloted the Amendment Bill, stated in the Rajya Sabha that the framers of the Constitution thought "from the outset that Parliament would alone have all the necessary material and data for determining the compensation in such cases. Large projects meant for the uplift of the community in general in fulfilment of the objectives which form part of the process of reconstruction of the new order in the country cannot come within the limited purview of Courts and tribunals. That was the intention but the language did not fully convey the intentions that were belied it. The Courts were in these circumstances unable to carry out the intentions of the authors. It becomes necessary, therefore, to amend the language so that the Courts might be relieved of the embarrassing necessity of having to interpret the clause in a manner which did not quite conform to the wishes, intentions or objects of the authors of the Constitution."  

Accordingly Article 31 was amended and the language clause (2) was modified to provide that no such law which either fixes the compensation or specifies the principles and the manner in which compensation is to be determined, shall be called in question in any Court on the ground that the compensation provided by that law is not adequate.

In addition to avoiding the concept of just compensation, the amendment added a new clause (2-A), which provides that where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation which is owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property. This clause narrowed the field in which compensation was payable.

Article 31A was also amended and clause (1) further enlarged the powers of the Government to expropriate estates, extinguish private rights or interests in mines, mineral oil and corporations or companies.

The Fourth Amendment was also given retrospective effect. Justice Hidayatullah criticising this tendency of the Parliament in his judgment in Golak Nath case observed: "A Constituent Assembly makes a new Constitution for itself. Parliament is not even a Constituent Assembly and to abridge fundamental rights in the name of Constituent Assembly appears anamolous."¹ He further quoted the conversation between Napoleon and Abe Sieyes, the great jurist whose ability to draw up one Constitution after another has been recognised and none of whose efforts lasted for long. When Napoleon asked him "What has survived?" Abe Sieyes answered "I have survived." "I wonder" said the Justice in this context, "if the Constituent Assembly will be able to say the same thing."²

2. Ibid.

*Emphasis is mine.
The Fourth Amendment brought sweeping changes in respect of the right to property which except in cases of acquisition or requisition by the State became, like the right to personal liberty under Article 21, a right only against the executive and not against the legislature. But the Amendment has never challenged before the Supreme Court.

Seventeenth Amendment: The Seventeenth Amendment was the culmination of the process begun with the First Amendment, to obliterate Article 31. Article 31A, which has been a protean Article and which has changed its face many a time, was again amended under the Seventeenth Amendment, to widen the meaning of the expression 'estate'.

This Amendment came in the wake of the Supreme Court decisions in which it held that the 'ryotwari lands' were not 'estates' within the meaning of Article 31A. On this interpretation of Article 31A Court struck down the Kerala Agrarian Relations Act (No. 4 of 1961) and the Madras Land Reforms (Fixation of Ceiling on Land) Act (No. 58 of 1961). This necessitated the amendment of Article 31A, to widen the expression 'estate.' By Seventeenth Amendment the operation of Article 31A was broadened to include ryotwari lands, pastures, forests, buildings and structures. The effect of this amendment is that except the land which is within the ceiling, all other land can be acquired or rights therein can

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be extinguished or modified without compensation and such an act can not be challenged before the Court as violative of Articles 14, 19 or 31 of the Constitution. The same is also true of the taking over of property amalgamation of corporations, extinguishment or modification of rights in companies and mines.

Further fortyfour more State Acts were added to the Ninth Schedule which increased the number of statutes in the Schedule to Sixtyfour. Giving protection to statutes of State Legislatures which offend the Constitution in its most fundamental part can hardly be called amendment of the Constitution. The intent is to silence the Courts and not to amend the Constitution.

The validity of the Seventeenth Amendment was, however, challenged twice before the Supreme Court, first in Sajjan Singh v State of Rajasthan and second time in Golak Nath v State of Punjab. It was argued once again and emphatically, that in view of Article 13(2), an amendment relating to Part III was void. In the first case, the Supreme Court applied the doctrine of stare decisis to uphold the validity of the Seventeenth Amendment and held that the decision given in Shankrl Prasad v Union of India was good law.

In Golak Nath case again the point whether Parliament could amend fundamental rights or not, was discussed at some length and the majority of the judges found the decision in the earlier two cases to be erroneous. The doctrine of stare decisis was rejected

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5. The decision in Sajjan Singh case not unanimous, it was by a majority of three to two.
in regard to such constitutional matters. It was held by the Supreme Court that constitutional law could not be divorced from 'Law' in Article 13(2) and that Article 13(2) shields fundamental rights from attacks from any quarter of State authorities. The Supreme Court thus reversed its earlier decision. Nonetheless, the validity of the Seventeenth Amendment was upheld by the Court by not giving retrospective effect to its decision. Chief Justice Subba Rao evolved the doctrine of prospective overruling to sustain the Amendment in the economic interests of the country.

Before the reversal of the decision of the Supreme Court it had been suggested earlier that the Supreme Court should declare that no future amendments could effect any further changes in Part III of the Constitution as it now stands, but let it also be clearly realised that "to attack the existing structure would be to wield a mere lawyer's idea of the Constitution as a knife to tear up the living body of the constitutional polity." However, it was considered doubtful, if the Supreme Court would be tempted by the device of 'prospective overruling.'

Perhaps the above suggestion may be said to have influenced the mind of the Chief Justice who held that there was no provision

1. Chief Justice Subba Rao observed that "the agrarian structure of our country has been revolutionised on the basis of the said laws. Should we give retrospection to our decision it would introduce chaos and unsettle the conditions in our country. Should we hold that because of the consequences Parliament had power to take away Fundamental Rights, a time might come when we would gradually and imperceptibly pass under a totalitarian rule." A.I.R. 1967 S.C.1643 (1965).


3. Ibid p. 175.
in the Constitution which expressly or impliedly restricted the application of this doctrine and that this was a modern doctrine suitable for a fast moving society. In the opinion of Chief Justice Subba Rao "It was really a pragmatic solution, reconciling the two conflicting doctrines namely that a Court finds law and that it does make law. It enables the Court to bring about a smooth transition by correcting its errors without disturbing the impact of those errors on the part transactions."¹

Justice Hidayatullah though concurred with the ratio decidendi of the majority decision, he sustained the Seventeenth Amendment on a sociological doctrine viz. the doctrine of 'acquiescence', which implies that the judges should acquiesce in a particular change, if it has been acquiesced in by the people. In other words if the people have submitted themselves or approved of and assimilated that change which violates their constitutional rights; further on that basis if they make their many more rights dependent, injustice is inevitable if such a state is to be disturbed. It is in the interest of administration of justice that Courts should sustain such a change. "It is good sense and sound policy" observes Justice Hidayatullah, "for the Courts to decline to take up an amendment for consideration after a considerable lapse of time when it was not challenged before or was sustained on earlier occasion after challenge."² It is with this logic that Justice Hidayatullah sustained the Seventeenth Amendment which he considered similar to the First, Fourth and Seventh Amendments which had been acquiesced in by the people.

This means that though the Supreme Court has upheld the validity of the Seventeenth Amendment, it has put an impediment on the power of the Parliament to amend Part III in future. To remove this impediment a bill was moved in the Lok Sabha by Nath Pai, seeking to empower the Parliament to amend fundamental rights. The bill however, remained pending till the Lok Sabha was dissolved. Thus the decision of Supreme Court in Golak Nath case stands.

Elaboration and Interpretation of the Clauses of the Constitution: Articles 105 and 194 (Parliamentary Privileges): Maintenance of dignity and independence of the legislature is as important as the maintenance of the independence of the judiciary. Accordingly certain privileges and immunities of the legislature are recognised in every democratic country to enable the representatives of the people to function without any fear restraint. Articles 105 and 194 of the Constitution recognise the privileges and immunities of the members of Parliament and State Legislatures, respectively. The two Articles which are couched in the same language do not enumerate the privileges in detail. Clause (1) of above two Articles guarantees the freedom of speech in the Parliament and

1. Former Chief Justice Subba Rao who was responsible for the overruling in the Golak Nath case, is of the view that such an amendment by the Parliament to empower itself to amend Part III, would be void ab initio. He made this observation at an International Seminar on Human Rights held in Bombay in December 1968.

2. The Lok Sabha was dissolved on December 27, 1970. See The Tribune, December 28, 1970, 1:1.
State Legislature. This freedom however, is subject to the provisions of the Constitution and to the rules and standing orders regulating the procedure of the House. The words provisions of the Constitution, here have been interpreted by the Supreme Court, to mean only those provisions which regulate the procedure of the legislature.

In M.S.M. Sharma v Sri Krishna Sinha, the Court held that Article 19^(1) which conferred freedom of speech on the legislator, was independent of Article 19(1)(a) and the freedom conferred under the former Article could not be curtailed by any law as contemplated by clause (2) of Article 19. This view was affirmed by the Supreme Court in its opinion on a Presidential reference under Article 105(2) 19(2). It held that Article 19^(1) was subject only to that provision of the Constitution which regulated the procedure of the Legislature and Articles 19(1)(a) and 19(2) were not of such a nature. It further held that if all that the legislators were entitled to claim was the freedom of speech and expression enshrined in Article 19(1)(a) then it would have been unnecessary to confer the same right specifically in the manner adopted in Article 19^(1).

Further members are immune from proceedings in any court of law for anything said or any vote given by him in the House or any committee. A member of the House is also not liable for publication of any report, paper, votes or proceedings, by or under the authority of either House. 2

3. Article 105(2), Article 19^(2)
These are the only privileges and immunities which have been expressly recognised by the Constitution. In other respects, Articles 105(3) and 194(3) lay down that the powers, privileges and immunities of each House, its members, and committees, shall be such as may from time to time be defined by Parliament and State Legislature as the case may be, by law and till that time, these shall be those of the House of Commons of England, at the commencement of the Constitution. It is here that the Courts are called upon to determine whether a particular privilege or immunity claimed by the Parliament or the State Legislature, was enjoyed by the House of Commons or not at the commencement of the Constitution.

The language of Articles 105(3) and 194(3) is very vague and the framers of the Constitution did not realise that the privileges in England which are undefined have had a history behind them and with the extinction of such reasons which have been responsible for certain privileges, such privileges have fallen into disuse though categorically never denied. It is thus a moot point whether the Court should strictly apply the privileges of the House of Common as such or should make an enquiry if they are in fact enjoyed by the House of Commons.

In M.S.M. Sharma's case, the Supreme Court held by a majority opinion that the House of Commons had at the commencement of 1.

1. In the Constituent Assembly there was opposition to the use of the words House of Commons. H.V.Kamath enquired: "Is it necessary or desirable when we are drafting our own Constitution that we should lay down explicitly in an article that the provisions as regards this matter will be like those of the House of Commons in England?" Constituent Assembly Debates, Vol. VIII, p. 144. K.T. Shah also opposed this move. He observed: "A sovereign legislature is the sole judge of the privileges of its members as well as of the body collectively. Hence any breach thereof should be dealt with by the House concerned." Constituent Assembly Debates, Vol. VIII, p. 145.

the Constitution, the power of prohibiting the publication of even a true and faithful report of the debates or proceedings that take place within the House and to deny this power to the legislatures in India, will be not to interpret the Constitution, but to remake it. Justice Subba Rao, however, dissented from this view and held that such a power existed with the House of Commons in England in the seventeenth century and that in 1950 the House of Commons had no privilege to prevent the publication of the correct and faithful reports of its proceedings save those in the case of secret sessions held under exceptional circumstances and had only a limited privilege to prevent malafide publication of garbled, unfaithful or expunged reports of the proceedings.

The same view was expressed by Justice Gajendragadkar in another case. While interpreting Article 194(3) he held that all the powers vested in the House of Commons at the relevant time, vest in the House (in India), can not be accepted in its entirety for there are many privileges vested in the House of Commons that can not be claimed by the legislature in India. For instance the privilege of access which is exercised by the House of Commons as a body and through its speaker "to have at all times the right to petition, counsel or remonstrate with their sovereign through their chosen representative and have a favourable construction placed on his words was justly regarded by the Commons a fundamental privilege - a privilege which the House can not claim in India."

Further the Supreme Court's opinion in re Under Article 143 of the Constitution\(^1\), that whatever may be the extent of the powers and privileges conferred on the House by the latter part of Article 194(3), the power to take action against a judge for contempt alleged to have been committed by him by his act in the discharge of his duties cannot be included in them, has evoked strong protests from the legislatures\(^2\). The facts of the case are that a person, who was not a legislator was sentenced to imprisonment for a period of seven days for committing contempt of the House by the Uttar Pradesh Legislature. He filed a writ of habeas corpus before the High Court alleging that his fundamental right had been infringed. He applied to the High Court for bail. The Court granted an interim order for bail. The legislature considered this action of the two judges hearing the petition as contempt of the legislature and summoned the two judges, the advocate and the person concerned to the legislature to explain their conduct. The judges, however refused to do so and a Constitution bench of the same High Court justified their action. There was thus a deadlock and the President preferred to refer the matter to the Supreme Court for its advisory opinion. The Supreme Court held that the High Court had the jurisdiction to entertain the petition and accordingly to pass the interim order in cases where the fundamental right of the individual is alleged to have been invaded.

The opinion of the Court was misunderstood and some legislators took it as an a front to the legislature. They complained

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2. This case has been dealt in detail in Chapter IV, pp.88-91.
that there was "a deep erosion" into the privileges of the legis­
latures. In some quarters a demand was made for the amendment of
the Constitution to restore to the legislature the privileges which
were supposed to have been lost by reason of this opinion

The import of the opinion of the Court as already pointed
out was misconstrued. The Court did not jeopardise the privileges
and immunities of the legislature. It simply upheld the fundamen­
al rights of the citizen, put 'them on proper pedestal.'

It can not however, be conceded that the legislatures should
be free to arrogate to themselves any privileges they choose to
claim, even at the cost of fundamental rights. The Constitution
clearly vests the Courts with the power of judicial review, to
examine the nature and the extent of privileges claimed. Article
194(3) contemplates the interference of the Courts to determine,
whether the privilege in question, was enjoyed by the House of
Commons at the Commencement of the Constitution or not. Consequen­
tly, so long as the Parliament or the State Legislatures do not
crystallise the legal position by their own legislation, the

1. See Proceedings of the symposium: Privileges of Legislatures,

2. N.C.Chatterjee speaking at the Symposium organised by the Bar
Association of India, on the Privileges of Legislatures, obser­
ved, that the 'Erosion' theory is not correct. "There has
been really no inroad, no aggression, no erosion of the rights
and privileges and immunities of the Legislature. The only
thing that has happened is that you allow the humble citizen
to have access to a Court of law....when you have got the Bill
of Rights and when you make the Bill of Rights sacrosanct, and
when you place it on a high pedestal, no power in India, nei­
er the Legislature nor the Parliament, nor the Executive, can
in any way encroach upon these basic rights."
privileges, powers and immunities shall be subject to the review of the Courts. And any law enacted to this effect, would be law within the meaning of Article 13(2) and will have to satisfy the test prescribed therein, otherwise such law shall be void if it abridges or contravenes the fundamental rights guaranteed by Part III of the Constitution.

Article 226: Article 226 of the Constitution confers jurisdiction on the High Court of a State to issue to any person or authority, including in appropriate cases any government, directions, orders or writs, for the enforcement of rights enshrined in Part III or for any other purpose, within its jurisdiction.

The reasons which weighed with the framers of the Constitution to confer such a jurisdiction on a High Court were explained by the Supreme Court in Election Commission v Venkata Rao. The Court observed "The makers of the Constitution, having decided to provide for certain basic safeguards for the people in the new set up, which they called fundamental rights, evidently thought it necessary to provide also a quick and inexpensive remedy for the enforcement of such rights and, finding that the prerogative writs, which the courts in England had developed and used whenever urgent necessity demanded immediate and decisive interposition, were peculiarly suited for the purpose, they conferred, in the States' sphere, new and wide powers on the High Courts of issuing directions, orders or writs primarily for the enforcement of fundamental

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rights, the power to issue such directions, etc. 'For any other purpose' being also included with a view apparently to place all the High Courts in this country in somewhat the same position as the Court of King's Bench in England.'¹

A very large number of cases come before the Supreme Court in which it is called upon to answer the various implications of Article 226. It was contended in a case before the Supreme Court, that the word 'authority' in Article 226, 'can not' and 'does not' include government². Chief Justice Sinha refuted this contention and held that on the plain construction of Article 226, the word 'authority' may include any government in an appropriate case.

The jurisdiction of the High Court under Article 226 is couched in very wide terms and the exercise of it is not subject to any restrictions except the twofold limitation placed on its power in regard to its territorial jurisdiction. Firstly, the power of the Court is to be exercised throughout the territories in relation to which it exercises jurisdiction. Secondly, the person or authority to whom the High Court is empowered to issue writs must be "within those territories", which clearly implies that they must be amenable to its jurisdiction either by residence or location within those territories³.

Article 226, however, does not refer to the residence or location of a person affected by the order to determine the jurisdiction of the High Court. "It would be wrong to introduce in

Article 226," the Court held, "the concept of the place where the order passed has the effect in order to determine the jurisdiction, it would rather give rise to confusion and conflict of jurisdiction."\(^1\)

It may be further pointed out that prior to the Fifteenth Amendment of the Constitution, the Supreme Court had held that Article 226 did not refer to the 'accrual of cause of action'.\(^2\) This caused inconvenience to persons residing far away from New Delhi, who were aggrieved by some order of the Government of India. Consequently, the Constitution was amended to extend the jurisdiction of the High Court to the territories within which the cause of action wholly or in part, arises for the exercise of such power, not withstanding that seat of such government or authority.\(^3\)

The Supreme Court also maintains that the jurisdiction under Article 226 having been conferred by the Constitution, limitations can not be placed on it except by the Constitution itself. Thus the jurisdiction of the High Court to examine the decisions of all tribunals, to see whether they have acted illegally, can not be taken away by a legislative device that purports to confer power on a tribunal to act illegally by enacting a statute that its illegal acts shall become legal the moment the tribunal chooses to say they are legal.\(^4\)

The powers of the High Court under this Article are purely

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2. Ibid.
3. Article 226(IA) inserted by the Constitution (Fifteenth Amendment) Act, 1963, Section 8.
discretionary and though no limits can be placed upon that discretion, the Supreme Court has held that it must be exercised along recognised lines and not arbitrarily. The Supreme Court has further observed that the High Courts (under Article 226) do not and should not act as Courts of appeal or revision to set right mere errors of law. They should exercise their jurisdiction in cases where substantial injustice has ensued or is likely to ensue. Again if alternate and equally efficacious remedy is available, the Supreme Court has held that it will be a sound exercise of discretion to refuse to interfere in a petition under Article 226, unless there are good grounds therefor. Thus it is a rule of discretion and not a rule of law and in cases where the aggrieved person comes to the High Court with an allegation his fundamental right has been infringed and seeks relief under 226, the Court shall not refuse to entertain his petition, not withstanding the fact that an alternate remedy, equally efficacious does exist.

Articles 301-304: (Freedom of Trade, Commerce and Intercourse) In the maintenance of economic unity of the country, especially with a federal set up, trade and commerce provisions have great constitutional significance. The American as well as the Australian

Constitution provide for freedom of trade and commerce. But the 'Commerce Clause' in the two Constitutions has occasioned much case law because of vague and ambiguous language of the provisions for this freedom. The framers of the Indian Constitution realised the need of incorporating this freedom in the Constitution, but they were conscious of the drawbacks of the 'Commerce Clause' in the Constitutions of the above mentioned two countries and accordingly Articles 301-304 (Part XIII) deal at great length with the freedom of trade, commerce and intercourse, so as to avoid any ambiguity.

Article 301 lays down that subject to the other provisions of Part XIII, trade, commerce and intercourse throughout the territory of India shall be free. Article 302 empowers the Parliament to impose restrictions on the said freedom in public interest. Article 303(1) however denies the power both to the Parliament and the State Legislature to enact any legislation which is discriminatory in nature or which gives preference to one State over the other. Under sub-clause(2) of this Article, the Parliament is free from this restriction in case there is scarcity of goods in part of the territory of India. Article 304 empowers a State Legislature to impose taxes on the imported goods from other States and also impose reasonable restrictions on the freedom of trade and commerce in public interest.

The Supreme Court analysed the scope and significance of Part XIII, especially Article 301 in Atiabari Tea Co. Ltd. v State of Assam. The Court observed that the provision contained in

Article 301 guaranteeing the freedom of trade, commerce and intercourse is not a declaration of a mere platitude, or the expression of a pious hope of a declaratory character, it is not also a mere statement of a directive principle of state policy; it embodies and enshrines a principle of paramount importance that the economic unity of the country will provide the main sustaining force for the stability and progress of the political and cultural unity of the country. It was realised that in course of time different political parties believing in different economic theories or ideologies may come in power in several constituent units of the Union and they may conceivably give rise to local and regional pulls and pressures in economic matters. Local or regional fears or apprehensions raised by local or regional problems may persuade the State Legislatures to adopt remedial measures intended solely for the protection of regional interests without due regard to their effect on the economy of the nation as a whole. The object of Part XIII was to avoid such a possibility.

Article 301 it has been held by the Court applies not only to inter-State trade, commerce and intercourse but also to intra-State trade, commerce and intercourse. Further the freedom of trade under this Article is free from all restrictions except those which are provided by other Articles in Part XIII. All obstructions or impediments, whatever shape they may take, to the free flow or movement of trade or non-commercial intercourse offend Article 301 of the Constitution. But measures which are purely

regulatory and compensatory, which in reality facilitate trade and commerce are not considered as violative of the freedom of trade and commerce. "The concept of freedom of trade, commerce and intercourse postulated by Article 301," the Court has held, "must be understood in the context of an orderly society and as a part of the Constitution which envisages a distribution of powers between the States and the Union, and if so understood, the concept must recognise the need and the legitimacy of some degree of regulatory control, whether by the Union or by the States. This is irrespective of the restrictions imposed by the other Articles in Part XIII of the Constitution."¹

Further the Court has held that the freedom of trade does not mean unrestricted, unrestrained freedom. The Constitution itself provides in Article 302 and 304(b) how reasonable restrictions can be imposed and it would be improper to hold that restrictions can be imposed 'aliunde' these provisions in the Constitution². The Court has also ruled out its intervention to examine whether the restrictions imposed are in the public interest or not³. The Court has held that the Parliament is given the sole power to decide what restrictions can be imposed in the public interest as authorised by Article 302⁴.

Article 304 of the Constitution has been liberally interpreted to include the taxation power of the State provided it is

4. Ibid.
not discriminatory in nature. In A.T. Mahtab Majid and Co v State of Madras, the Sales Tax imposed by the State, which had the effect discriminating between the goods of one State and the goods of another State was declared as invalid by the Court. In Andhra Sugars Ltd. v State of Andhra Pradesh, the Court held that "a non-discriminatory tax on goods does not offend Article 301 unless it directly impedes the free movement or transport of goods."

It would not be out of place here to point out that the Court has held only those activities as trade and commerce which are lawful and are not against the public policy. In State of Bombay v R.M.D.C the question arose whether the restrictions on gambling and lotteries amounted to restrictions on trade and commerce or not as contemplated in Article 301. The Court examined the case law of Australia and America on the subject at great length. In Australia, the High Court has interpreted the term commerce as not to include gambling in its ambit thus enabling the Commonwealth to impose restrictions. The Supreme Court of the United States has interpreted the term commerce to include gambling, but has declared it as antisocial to enable the Congress to impose restrictions. The interpretations given in the two countries by the highest judicial bodies are different, though the conclusion reached and the purpose achieved is the same, the reason being constitutional expediency. Section 92 of the Australian Constitution provides for absolute freedom of trade and commerce. If the

interpretation had not been given in the manner it is given now, it would not have been possible for the Commonwealth to impose restrictions. And in the United States, the Congress is empowered to regulate commerce, consequently if gambling were not included in commerce, the Congress would have found difficulty in imposing restrictions to curb the evil. The Constitution of India also provides for the imposition of reasonable restrictions on this freedom of trade and commerce, but the Supreme Court preferred to follow the line of reasoning of the High Court of Australia. The Court refused to test the validity of the impugned Act by the yardstick of reasonableness and public interest laid down in Articles 19(6) and 304. On the other hand it declared that gambling activities by their very nature "are extra commercium." It further observed that to control and restrict gambling is not to interfere with trade, commerce or intercourse as such, but to keep the flow free and unpolluted and to save it from antisocial activities.

Supreme Court and the Relations Between the Union and States:

The Constitution of India demarcates legislative powers between the Union and the States in the three lists: Union List, State List, and the Concurrent List. The Parliament has exclusive power to legislate upon subjects mentioned in the Union List and the State Legislature has exclusive power to legislate upon subjects contained in the State List. The Concurrent List is like a shock absorber because both the Parliament as well as the State

2. The three lists are contained in the Seventh Schedule of the Constitution.
Legislatures are competent to enact legislation in regard to matters mentioned therein. Since the division of powers is very elaborate there is little role that the Court has to play in the relations between the Union and the States. The role of the Court in this regard was aptly explained by B.R. Ambedkar, who observed: "Courts may modify, they can not replace. They can revise earlier interpretations as new arguments, new points of view are presented, they can shift the dividing line in marginal cases, but there are barriers they can not pass, definite assignments of power they can not re-allocate. They can give a broadening construction of existing powers, but they can not assign to one authority the powers explicitly granted to another."

However, Articles 245 to 255, which provide against repugnancy and overlapping between Union and State legislation contemplate the role of the Supreme Court. Article 245 lays down:

"(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation."

Interpreting this Article the Supreme Court has held that the legislatures have undoubtedly plenary powers, but these powers are controlled by the basic concepts of the written Constitution itself and can be exercised within the legislative fields allotted to their jurisdiction by the three Lists under the

Seventh Schedule; but beyond the Lists the legislatures can not travel. If the legislatures step beyond the legislative fields assigned to them, their legislative actions are liable to be struck down by Courts in India.

Article 245 of the Constitution forbids the operation of extra-territorial legislation. The Court has however, evolved the doctrine of 'territorial nexus' for the operation of taxation laws beyond the territorial limits. This doctrine has been applied by the Court to legislation on income tax, sales tax, tax on gambling and public endowments. In State of Bombay v R.M.D.C., the Court observed that if there is a territorial nexus between the person sought to be charged and the State seeking to tax him the taxing statute may be upheld. Sufficiency of territorial nexus involves a consideration of two elements, namely; (a) the connection must be real and not illusory and (b) the liability sought to be imposed must be pertinent to that connection. If the connection is sufficient in the sense mentioned above, the extent of such connection affects merely the policy and not the validity of

the legislation.

Further the Court has also evolved the doctrine of 'pith and substance' where a piece of legislation under the subject of one list incidently enchroaches upon the subject of another list. In such cases the Court has held to ascertain the true character of legislation, the pith and substance of legislation should be determined. A well known case where the Court applied this doctrine is that of State of Bombay v F.N.Balsara, in which the validity of Bombay Prohibition Act was upheld because the pith and substance of the Act fell under the State List, though the Act incidently enchroached upon the Union power of legislation under the Union List.

In cases of 'colourable legislation' also the Court has held that the substance of legislation and not merely the form of the legislation should be looked into. The Court must take into consideration the effect of legislation and the object or purpose of legislation to determine the validity of such legislation.

It is through the instrumentalities of these doctrines that the Supreme Court works upon the provisions of the Constitution dealing with the relation between the Union and the States to keep the two within the framework of the Constitution.

Conclusion:

It follows from the above that the Supreme Court is a potent institution in the Indian polity and plays a distinguishable role in the constitutional development. The judges not only interpret the Constitution but many a time consciously or unconsciously amend the Constitution itself. The well known proverbial expression of Chief Justice Hughes that "Constitution is what the judges say it is" would be applicable to the Supreme Court of India as well but for the simple process of amending the Constitution. The Parliament, it has been seen, resorts to its power of amending the Constitution frequently in order to nullify the effect of the decision of the Court. Most of the important amendments to the Constitution have been in respect of fundamental rights, especially the right to property. Now that the Court has denied the power of amendment to the Parliament vis-a-vis the fundamental rights, it is not possible for the Parliament to negative the decisions of the Court relating to fundamental rights embodied in Part III of the Constitution. In this context it is being felt that the supremacy of the Parliament has been jeopardised and that a new Constituent Assembly should be convened to assert the principle of supremacy of the Parliament as against the judicial supremacy.

The Supreme Court however, as ultimate interpreter of the Constitution has delivered some significant judgments elaborating the provisions of the Constitution. Provisions relating to the privileges of the legislature, writ jurisdiction of the High Courts and freedom of trade and commerce, as interpreted by the Court have been discussed. A study of the case law decided by the
Court reveals that the Court has evolved many a doctrine to work out the provisions of the Constitution and ease certain complex situations. The application of the doctrine of prospective overruling by the Court in Golak Nath case, is an evidence of the bid on the part of the Court not to disturb the Socio-economic structure of the Society. In regard to the interpretation of provisions relating to the Centre-State relation also the Court has evolved various doctrines to provide for a harmonious working between the Centre and the States. Undeniably the Court has played a significant role in the constitutional development of India.