CONCLUSION & SUGGESTIONS
CONCLUSION AND SUGGESTIONS

Judicial review is an integral part of the Constitution of India\textsuperscript{1}. The scheme of the present constitution of India is based on the structure of judicial review. If one part of it is extricated the other part cannot be sustained. In India, the majority which governs the country quickly changes and the public opinion is also not very progressive and efficacious. In such circumstances it is not always possible for the majority in power to correctly fathom the needs and urgency of law which is enacted and the executive enactments in the state of tension, haste and variety of power do not represent the free will of the sovereign people. In such circumstances, judicial review has a great necessity. The legislature and executive cannot only act through a majority. "The majority goes on changing from time to time on the swing of the Pendulum of public opinion. The changing majority cannot be easily expected to render a consistent interpretation of the Constitution"\textsuperscript{2}. This is why the people of India are in favour of strengthening the doctrine of judicial review in the Indian Democracy to protect the right liberty and freedom of the individual to have socio-economic development in the right way and to avoid executive tyranny.

\textsuperscript{2} Shriram Sharma, How India is Governed ?, Central Book Depot, Allahabad, p.146.
The courts in India and specially the Supreme Court has assumed a unique position by discharging the function of judicial review and giving constitutional decisions of wider importance to the nation. The court in India has to shape the destiny of the nation by its constitutional decisions which have great impact on the individual and the social life. "The tendency to view the court as unique and relatively isolated body is largely the result of its power of judicial review".¹ The court in order to give relief to the aggrieved party through judicial review has to visualise the will of the sovereign people in relation to the liberty and freedom of the individual. The court alone is competent to determine the nature and extent of the good or evil effect, on the fundamental rights of administrative action. The function of the court is to make the Executive realise its Limitations.

In this connection S.A. de Smith also remarks- "To the extent that court do justice to the individual citizen while giving due weight to the requirements of the public interest they act as a major instrument of social equilibrium and with their sphere of jurisdiction fulfil function that cannot adequately be performed by any other organ of Government".²

---

The court in India has larger problems to solve through judicial review. It should work as a social service instrument. An awakened court is a desiderata. One of the difficult problem is regarding fundamental rights. Rights guaranteed to the citizens of India by the constitution cannot be violated by the executives and when the executive actions are violative of fundamental rights, the court has to strike a just balance between social justice and rights of citizens. In India, the majority which governs the country quickly changes and the public opinion is also not very progressive and efficacious. In such circumstances it is not always possible for the majority in power to correctly fathom the needs and urgency of law which is enacted and the legislative enactments in the state of tension, haste and vanity of power do not represent the free will of the sovereign people. In such circumstances, judicial review has a great necessity. The people of India are in favour of strengthening the doctrine of judicial review in the Indian Democracy to protect the right, liberty and freedom of the individual, to have socio-economic development in the right way and to avoid executive tyranny. The age through which India is passing is the age of fluidity of life which is surrounded with extreme complexities and multitudinous diversities. India has evolved an indigenous system of constitutional polity, which has adopted judicial review of administrative actions as a
weapon of effective censor over constitutional lapses by the executive.

Article 356 of our constitution which was expected by our founding fathers to remain a dead letter has been indiscriminately utilised by the President of India to extinguish the lives of 101 state assemblies and every party at centre has yielded to this temptation. Power conferred by Article 356 can be exercised only when a situation has arisen in which the government of the state cannot be carried on in accordance with the provisions of the Constitution. What is that situation? The Supreme Court has ruled that President's rule cannot be imposed in situation which can be remedied or do not create an impasse, or do not disable or interfere with the governance of the state according to the constitution. The Supreme Court further held that, except in urgent situations which cannot brook delay, a warning should be issued to the errant state and the President should use all other measures to restore the constitutional machinery in the state before having recourse to his drastic power. The majority consisting of Justices Pandian, Sawant, Kuldip Singh, Jeevan Reddy and Agarwal, enlarged the scope of judicial review. It held that the validity of the Presidential proclamation is judicially reviewable to the extent of examining whether it was issued on the basis of any material at all or whether the material
was relevant or whether the proclamation was issued *mala fide* or was based on wholly irrelevant and extraneous grounds. The role played by the governor of Karnataka in recommending dissolution of the Karnataka assembly in 1989 on the basis of unverified information about defections from the ruling Janta Dal and his refusal of the Chief Minister, Mr. Bommai's request for proving his majority within a week on the floor of the House has been severely criticised. The court held that all canons of propriety were breached by the governor and his undue haste in inviting President's rule "clearly smacked of *mala fide* . . . . A duly constituted ministry was dismissed on the basis of material which was neither tested or allowed to be tested and was no more than the *ipse dixit* of the governor". The court laid down that a ministry's strength should be tested on the floor of the House which "alone is the constitutionally ordained forum" and not by private opinion of any individual be the governor or the President". Applying this principle the presidential proclamations dissolving Karnataka and Nagaland assemblies were declared unconstitutional by the majority. However, since fresh elections had taken place in both the states and new legislative assemblies and governments had come into existence no further relief was granted and which was not prayed for before the Supreme Court.
The courts have invalidated what appeared to them to be genuinely arbitrary conferrals of discretionary power, although it must be said that in a very large number of situations vast conferral of discretionary powers have also been sustained. But in these situations courts have attempted to maintain strict invigilation over the exercise of discretionary power. A malafide exercise of discretionary power is not to be countenanced. The stringent standards of proof and the refusal to invoke the doctrine of judicial notice has led to many difficulties in proving malafides; naturally, there are very few cases in this category and those which have upheld charges of malafide throw much light on how far power can be abused. Exercise of discretionary power can be struck down if it is based on 'irrelevant considerations'. There is an emerging requirement that administrative action must be reasonable. The Indian courts have held, after some initial hesitation, that a law may be valid as reasonable against the test of fundamental rights and yet a discretionary exercise of power under the law may not be valid being reasonable. Persons invested with discretionary powers may not transfer these to some other persons; they may not act under dictation or mechanically and without due care or without proper application of mind.

In the area of discretionary, judicial energies appear to be more dedicated to control over actual exercise of discretionary powers rather than on the validity of conferral of vast discretionary powers without adequate guidelines or standards.

It is an accepted axiom that the real Kernel of democracy lies in the courts enjoying the ultimate authority to restrain the exercise of absolute and arbitrary power. Without some kind of judicial power to control administrative authorities, there is a danger that they commit excesses and degenerate into arbitrary bodies, and such a development would be inimical to a democratic constitution. Articles 32 and 226 of the Indian Constitution make provisions for the system of writs in the country. The writs are in the nature of habeas corpus, mandamus, quo warranto, prohibition and certiorari. Articles 32 and 226 are expressed in broad language. The Supreme Court, nevertheless, ruled that in reviewing administrative action, the courts would keep to broad and fundamental principles underlying the prerogative writs in the English law without however importing all its technicalities. Under these articles the courts enjoy a broad discretion in the matter of giving proper relief if warranted by the circumstances of the case.

before them. The courts may not only issue a writ but also make any order, or give any direction as it may consider appropriate in the circumstances, to give proper relief to the petitioner.

Article 32 provides a guaranteed quick and summary remedy for the enforcement of Fundamental Rights. Any person complaining of infraction of any of his Fundamental Rights by an administrative actions can go straight to the Supreme Court for vindication of his right without being required to undergo the dilatory proceedings from the lower to a higher court as one has to do in any ordinary litigation. The writ jurisdiction conferred on the High Court by article 226 can be invoked to enforce not only a Fundamental Right but a non-fundamental right as well. Under this article the jurisdiction of the High Court to issue writs extends to the state over which it has jurisdiction and also to territories outside that state, if the government, authority or person is within those territories, and if the cause of action in relation to the government etc., wholly or in part, arises within the state.

The High Court recently has widen its jurisdiction by bringing the Indian Army Act under the subject to judicial review. The High Court brought the Indian Army's

termination policy under judicial review by holding that Army personnel cannot be dismissed without an inquiry or trial in cases where **malafide** was obvious. A full Bench of Justice Sunanda Bhandare, Justice Arun B. Saharya and Justice C.M. Nayar held that Section 18 of the Indian Army Act, hitherto treated as a holy cow by the judiciary is subject to judicial review.

Section 18 of the Army Act, "the judges said, provides that every person subject to the Act shall hold office during the pleasure of the President. Undoubtedly, the section does not provide for procedures to be followed while passing an order under the said section. However, it does not permit the passing of an order which is arbitrary, **malafide** and illegal". Legal experts term the Judgement "historic". They say that till now Section 18 of the Army Act was not put to judicial review by any court in the country.

The doctrine of judicial review, as it is obvious from the above discussion, helps the courts to perform creative functions, a legal order where human beings matter. It also enables the courts to ring out old values and ring in new values. However, in the name of judicial review, the court should not block progressive legislations. Law and life should go hand in glove. Law should not be allowed to stand independent
of social changes. As has been aptly observed, "law is not a brooding omnipotence in the sky but a flexible instrument of social order dependent upon the political values of the society it purports to regulate."