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Right to Constitutional Remedies: The Heart and Soul of Constitution

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ABSTRACT

The Constitution of India is undoubtedly supreme law of India. Part III (Article 12-35) of the act deals with the Fundamental Rights. Specifically Article 32, i.e. Right to Constitutional Remedies is a fundamental right while vests a very wide power to approach to the Supreme Court for breach of any of the Fundamental right by the state or institutions or individuals. This Article is an approach to critically examine the Right of Constitutional Remedies and how this Fundamental Right won the race amongst others, in being the most important right one can have, in eyes of Dr. B.R. Ambedkar. As said by him- “the Constitution will be nullity without this Article”. Afterward the article discuss about the Public Interest Litigation; a modern approach to litigation.

Keywords: *Constitution, constitutional remedy, writs, PIL, Supreme Court.*

I. INTRODUCTION

Part III of The Constitution of India deals with the Fundamental rights. It consist a long list of rights. This chapter is described as the *Magna Carta* of India. Fundamental Rights are essential for protection of right and liberties of people.

Dr. B.R. Ambedkar had once said, “*If I was asked to name any particular article in this Constitution as the most important — an article without which this Constitution would be a nullity — I could not refer to any other article except this one (Article 32). It is the very soul of the Constitution and the very heart of it.*”

Any fundamental right without machinery for its enforcement is of no use. It is only the remedy which keeps the right alive. It is said that if there is no remedy there is no right. Therefore Article 32 is considered as an effective remedy for the enforcement of fundamental rights. Along with being the remedy for the rights Article 32 is itself also a Fundamental right.

The right of Constitutional remedies is dealt under Article 32 to Article 35.

Article 32. *Remedies for enforcement of rights conferred by this part*

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Article 33. *Power of Parliament to modify the right conferred by this part*

Article 34. *Restriction on right conferred by this part while martial law is in force*

Article 35. *Legislation to give effect to provisions of this part*

Under Article 32 any person whose rights are violated can move to the Supreme Court and the apex court can issue the writ.

Clause (1) of Article 32 guarantees the right to move to the Supreme Court by “appropriate proceedings”

Clause (2) confers the power to Supreme Court to issue directions or orders or writs in nature of *habeas corpus, mandamus, prohibition, quo-warranto, certiorari*.

These writs are borrowed from English law where they are called as ‘Prerogative Writs’

It is not mandatory for the court to only issue any of these five writs as the word in the clause “*in nature of*” gives a wider scope to this section.

Similarly a person can move to the High Court under Article 226 as the High court also has the power to issue writ not only for the purpose of enforcement of fundamental writs but also for other purposes.

The Parliament may by law empower any of the Court under clause (3) to exercise all or any of the power conferred by the Supreme Court under clause (2).

Clause (4) says that right conferred under Article 32 shall not be suspended otherwise mentioned in the constitution.

II. WHAT IS A WRIT?

It is a formal written document issued by a judicial body either by Supreme Court or High Court commanding remedies for violation of Fundamental rights.

A writ petition can be filled under Supreme Court through Article 32 and under High Court through Article 226.

Only Calcutta, Bombay, and Madras High Court had the power to issue writ before 1950. Afterwards Article 226 empowered all the High Courts to issue writ within their territorial jurisdiction.

III. TYPE OF WRITS

The Supreme Court and High Court are empowered by the Constitution to issue writs.

The types of writs are:

- i. Habeas Corpus
- ii. Certiorari
- iii. Prohibition
- iv. Mandamus
- v. Quo-warranto

(A) Habeas Corpus

“You may have the body” is the English term of the Latin term “Habeas Corpus”. This writ is issued by the court to call upon a person who has detained any other person to check by what authority that person has been detained. The main purpose of this writ is to provide quick and prompt relieve to a person who is illegally detained by another person. The detention can be in a prison or a private custody.

The application of this writ petition can be made by the person who is illegally detained but in case the person is unable to file the writ any other person on behalf of the prisoner can file the writ , i.e., a friend or a relative.

(B) Mandamus

It is an order issued by the superior court to the subordinate court or to a public authority or a government official to do something or to forbid doing something in nature of a public duty.

Unlike Habeas Corpus it does not apply to a private body, the order of Mandamus can only be issued for the duty cast by law.

(C) Prohibition

As the name of the writ suggests, prohibiting some doing. This writ is issued by the superior court to subordinate court or tribunals to prevent them from overriding their jurisdiction or to prohibit them from violating the rules of natural justice.

Therefore this writ is an order of superior court to their inferior courts to stay within their limits; it is issued in both the cases, i.e. in excess of jurisdiction and in absence of jurisdiction.

(D) Certiorari

This writ is issued by a Superior court, i.e. Supreme Court or High Court directing any inferior or subordinate Court of any quasi-judicial body to transfer the case for reviewing or for removal of that case from their jurisdiction.

The general grounds for issuing of certiorari is excess of jurisdiction, lack of jurisdiction, violation of rules of natural justice, error of law or opposition of procedure established by law.

(E) Quo-Warranto

The literal meaning of the word quo-warranto means by what authority. Through this writ a holder of a public office can be called upon in a court and be asked that by what authority he holds the office. The purpose for this writ is to prohibit any person to hold any office which he is not legally bound to hold. The office in question should be a public office.

If a person is found ineligible to hold the office the court can cease that post and declare the office vacant but no order can be passed for recovery of amount of his rendered services.

IV. PUBLIC INTEREST LITIGATION

- The doctrine of *Locus Standi* is a traditional approach to litigation which says that only the aggrieved part can approach to the court for infringement of their rights. Public Interest Litigation or Social Interest Litigation, i.e. PIL is a modern approach to *Locus Standi* or the process to litigate. The primary objective of PIL is to deliver justice to those people of society who otherwise would not be able to seek justice due to social or economic inconsistency.
- *Judges Transfer² Case* Bhagwati, J., stated: “ *Where a legal wrong or a legal injury is caused to a person or to determine class of persons by reason of violation of any constitutional or legal right and such person or determinate class of persons is by reason of poverty, helplessness of disability or socially or economically disadvantaged position unable to approach the court for relief, any member of public can maintain an application for an appropriate direction or order writ in High Court under Article 226 and in case of breach of any Fundamental Right in this court under Article 32.* ”³
- In case of *Mohan Lal Sharma v. State Of U.P.*⁴ through a telegram it was communicated to the court that the son of petitioner was murdered in the police look-up by the police man. In that case the telegram was treated as the PIL as the petitioner was having the “*sufficient interest*” in the matter.
- In the PIL *Hussainara Khatoon v. State of Bihar*⁵ where several prisoners were kept in the different jails of Bihar without trials. Supreme Court held that Speedy trial is also a fundamental right under Article 21. The court in this case ordered to release all such prisoners forthwith.

² S.P. Gupta and others v. President of India and others, AIR 1982 SC 149

³ Dr. J.N. PANDEY- CONSTITUTIONAL LAW OF INDIA, 56TH EDITION, 2019

⁴ (1989) 2SCC 609.

⁵ AIR 1979 SC 1369.

CRITICISM OF PIL

Many criticisms were faced by this new approach along with having benefits.

- Firstly, it was said that by entertaining the fundamental rights violation through letters the court will be crowded with litigations which will result in delay of deciding some important cases which may need speedy trial.
- Secondly, through way of PIL the judiciary may somehow interfere in the other organs of government, i.e. executive and litigation which may violate the doctrine of *separation of power*.

But such criticism is already answered by Article 144

*144. Civil and judicial authorities to act in aid of the Supreme Court.—All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court.*⁶

V. CONCLUSION

Constitution of India- The law of land; is the survival for people of the country; it is by the people-to the people. In the whole of the Constitution Article 32 is called “the spirit of constitution and its heart” for some reason. If a person is privileged with a right and there is no machinery for its enforcement then that right be a mere saying written on a piece of paper with no use. Article 32 is that machinery which gives the body its soul to live. One can approach to the Supreme Court through Article 32 for the breach of Fundamental Right through the way of writ petition.

Traditionally the person who can approach the court should be the one who is the sufferer or whose right has been violated. It is known as Doctrine of Locus Standi. But in the modern approach of litigation the concept of Public Interest Litigation had been introduced which says that the person having sufficient interest in the matter can approach the court on behalf of the other person. But this should be for social or moral purpose and not for the personal or monetary benefits.

⁶ INDIA CONSTI., ART. 144