CONSTITUTIONAL PROVISION OF JUDICIAL REVIEW IN INDIA: AN EVALUATION

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ABSTRACT

The aim of this paper is to study the different provisions of constitution of India which deals with Judicial review. Under the constitution of India, the scope of judicial review has been extremely widened. Judicial review in India is based on the assumption that the constitution is the supreme law of the land and all the governmental organs, which owe their origin to the constitution and derive their powers from its provisions, must function within the framework of the constitution. Unlike the U.S.A., the constitution of India has not made express provision for judicial review. The scope of judicial review is present in several articles of the constitution, such as Article 13, 32, 141, 226 and 227. Thus, the doctrine of judicial review is firmly rooted in India and in this sense it is on a more solid footing than it is in America.

Keywords: Judicial review; constitution; executive; legislature; judiciary.

1. INTRODUCTION

Judicial review is a process under which executive and legislative actions are subject to review by the judiciary. It is basically an aspect of judicial power of the state which is exercised by the courts to determine the validity of a rule of law or an action of any agency of the state. A court with judicial review power may invalidate laws and decisions that are incompatible with a higher authority; an executive decision may be invalidated for being unlawful or a statute may be invalidated for violating the terms of a written constitution. Judicial review is one of the checks and balances in the separation of powers; the power of the judiciary to supervise the legislative and executive branches when the latter exceed their authority.

2. CONSTITUTIONAL PROVISION OF JUDICIAL REVIEW IN INDIA

Unlike the U.S.A., the constitution of India has made express provision for judicial review. The scope of judicial review is present in several articles of the constitution, such as Article 13, 32, 141, 226 and 227. Under the Indian constitution there is a specific provision in Article 13(2) that “the state shall not make any law which takes away or abridges the rights conferred by Part III of the constitution containing fundamental rights and any law made in contravention of this clause shall, to the extent of the contravention, be void”. If state makes such a law then it will be ultra vires and void to the extent of the contravention. It is still born law and cannot be revived by removal of the constitutional prohibition by subsequent amendment of the Constitution. Though post Constitution laws

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inconsistent with fundamental rights are void from their very inception yet a declaration by the Court of their invalidity will be necessary. Article 13 (2) makes the inconsistent laws void ab initio and even conviction made under such unconstitutional laws shall have to be set aside. Anything done under such a law, whether closed, completed or inchoate will be wholly illegal and person adversely affected by it will be entitled to relief.

Article 32 deals with fundamental right of constitutional remedies. Declaration of fundamental rights is meaningless unless there is effective machinery for the enforcement of the rights. It is remedy which makes the right real. If there is no remedy there is no right at all. It was, therefore, in the fitness of the things that our Constitution makers having incorporated a long list of fundamental rights have also provided for an effective remedy for the enforcement of these rights under Article 32 of the Constitution. Dr. Ambedkar in this context wrote following lines about this Article: - “If I was asked to name any particular Article in the Constitution as the most important- an Article without which this Constitution would be a nullity- I Could not refer to any Article except this one. It is the very soul of the constitution and very heart of it.”

Article 141 provides that the law declared by the Supreme Court is binding on all Courts in India. The expression all courts within the territory of India clearly means all courts other than the Supreme Court. Thus the Supreme Court is not bound by its own decisions and may reverse its previous decisions in proper cases. However, in Bengal Immunity Co. v. State of Bihar [1], the court held that “there is nothing in the Indian Constitution which prevents the Supreme Court departing from its previous decision if it is convinced of its error and its beneficial effect on the general interest of the public. In Golaknath v. State of Punjab [2], the Supreme Court reversed two of its previous decisions i.e. Shankari Prasad’ case [3] and Sajan singh Case [4]. In both the cases, the court held that the power to amend the Constitution was contained in Article 368 and the law in Article 13 did not include amendment of the Constitution which is made in exercise of constituent power of parliament. In Aruna Ramchandra Shanbaug v. Union of India [5], it was held that the foreign decisions have only pervasive value in our Country and are not binding authorities on indian courts.

In Golaknath case, however, the Supreme Court reversed its decisions in the above case and held that the power to amend the fundamental Rights is not found in Article 368 but in residuary power of Legislation. In that case, the Court had applied the rule of prospective overruling. And again in Fundamental Rights case, the Supreme Court reconsidered its decision in Golaknath case and overruled it. The majority held that the Golaknath’s case was wrongly decided and the law in Article 13 did not include an amendment of the Constitution passed under Art. 368. Thus, it is clear that the doctrine of precedent is followed in India to a limited extent. The Court will not reconsider a binding precedent every now and then and merely on new discovery or argumentative novelty. It is fundamental that the nation’s Constitution is not kept in constant uncertainty by judicial review every season because it paralyses all legislative and administrative actions on vital views. It should only be done when there is a national crisis of great movement to the life, liberty and safety of the country and its nations are at stake, or the basic direction of the nation itself is in peril.

Article 32 confers power on the Supreme Court to issue appropriate directions or order or Writs including Writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari for the enforcement of any of the rights conferred by Part III of the Constitution. High courts are also authorized to issue Writs under Article 226 of the Constitution. However, the jurisdiction of the High Court’s under Art 226 is wider than that of the Supreme Court under Art 32. The jurisdictions under Art 32 and 226 are concurrent and independent of each other so far as the fundamental rights are concerned. A person has a choice of remedies. He may move either the Supreme Court under Art 32 or an appropriate High Court under Art 226. If his grievance is that a right other than a fundamental right is violated, he will have to move the High Court having jurisdiction. He may appeal to the Supreme Court against the decision of the High Court. After being unsuccessful in the High Court, he cannot approach the Supreme Court under Art 32 for the same cause of action because as said earlier, such a petition would be barred by res judicata. Similarly, having failed in the Supreme Court in a petition filed under Art 32, he cannot take another chance by filing a petition under Art 226 in the High Court having jurisdiction over his matter because such a petition would also be barred by res judicata. The interim arrangement can not be made unless the operation of the impugned operation is stayed (Desia MD Kazhagam v. Medical Council of India) [6].

Under Article 227, every High Court has the power of superintendence over all courts and tribunals throughout the territory in relation to which it exercises jurisdiction. The power of superintendence conferred on the High Court by this Article is a very wide power. This power is wider than the power
conferred on the high Court to control inferior courts through writs under Article 226. It is not confined only to administrative superintendence but also judicial superintendence over all subordinate courts within its jurisdiction. The power of superintendence conferred on the High Court by article 227 being extraordinary to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts, within the bounds of their authority and not for correcting mere error of facts, however, erroneous those may be. The main grounds on which the high Court usually interferes are when the inferior courts act arbitrarily or act in excess of jurisdiction vested in them or fail to exercise jurisdiction vested in them or act in violation of principles of natural justice or if there is error of law apparent on the face of record.

In exercise of jurisdiction under Article 227, the High Court can go into the question of facts or look into the evidence if justice so requires. However, the High Court should not interfere with a finding within the jurisdiction of the inferior tribunal or court except where the finding is perverse in law in the sense that no reasonable person properly instructed in law could have come to such finding or there is misdirection in law or view of the fact has been taken in the teeth of preponderance of evidence or the finding is not based on any material evidence or it resulted in manifest injustice.

In D. N. Banerjee v. P. R. Mukherjee [7], the Supreme Court held that the high Court cannot interfere with the decision of the Tribunal. The Supreme Court said that unless there was grave miscarriage of justice or flagrant violation of law calling for intervention it was not for the high court under Article 22 and 227 to interfere. The power should not ordinarily be exercised if some alternative remedy is available.

However, the existence of alternative remedy is no bar if without High court’s interference flagrant violation of law is likely to result if the alternative remedy is not effective or speedy.

There are certain differences between jurisdictions under article 226 to issue a writ of certiorari and supervisory jurisdiction under article 227. Firstly, the writ of certiorari is in exercise of its original jurisdiction by the high Court but supervisory jurisdiction is akin to appellate revisional or corrective jurisdiction. Secondly, in a writ of certiorari the record of proceedings certified by the inferior court or tribunal is sent to the High Court and if it wishes to exercise its jurisdiction it may simply annul or quash the proceedings and then do no more. However, in supervisory jurisdiction, the high court may also give such directions as the facts and circumstances may warrant to the inferior courts or tribunal to proceed further or afresh.

The courts in India are thus under a constitutional duty to interpret the constitution and declare the law as unconstitutional if found to be contrary to any constitutional provisions. It can be appreciated that the protection of the judicial review is crucially inter-connected with that of protection of Fundamental Rights, for depriving the court of its power of judicial review would be tantamount to making Fundamental Rights non-enforceable ‘a mere paper provision’ as they will become rights without remedy. The following cases vividly demonstrate the nature, extent and importance of the role played by the Supreme Court of the Indian Union in protecting the supremacy of the constitution.

3. JUDICIAL REVIEW BY ISSUE OF WRITS

Article 32 (1) guarantees the right to move the Supreme Court by appropriate proceedings for the enforcement of the fundamental rights conferred by Part III of the Constitution. Clause (2) of article 32 confers power on the Supreme Court to issue appropriate directions or order or Writs including Writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari for the enforcement of any of the rights conferred by Part III of the Constitution. Under Clause (3) of article 32 parliament may by law empower any other court to exercise within the local limits of its jurisdiction all of the powers exercisable by the Supreme Court under clause (2). Clause (4) says that the right guaranteed by Article 32 shall not be suspended except as otherwise provided for the Constitution. Article 32, thus, provides for an expeditious and inexpensive remedy for the protection of fundamental rights from legislative and executive interferences.

Under article 32 (1) the Supreme Court’s power to enforce fundamental right is widest. There is no limitation in regard to the kind of proceedings envisaged in Article 32(1) except that the proceedings must be appropriate and thus requirement must be judged in the light of the purpose for which the proceedings is to be taken namely enforcement of fundamental rights. It is not obligatory for the Court to follow adversary system. The Constitution makers deliberately did not lay down any particular form of proceeding for enforcement of fundamental right nor did they stipulate that such proceedings should confirm to any rigid pattern or a strait jacket formula because they knew that in a country like India where there is so much of poverty, ignorance, illiteracy, deprivation and exploitation, any insistence on a right
formula of proceeding for enforcement of fundamental right would become self-defeating.

Article 226 of the constitution of India confers power on the high court to control inferior courts through writs. Article 226 provides that notwithstanding anything in Article 32 every high court shall have power, throughout the territorial limits in relation to which it exercises jurisdiction to issue to any person or authority including the appropriate cases, any government, within those territories, dictions, orders of writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them

(a) For the enforcement of fundamental rights conferred by part III
(b) For any other purpose

Thus, the jurisdiction of a High Court is not limited to the protection of the fundamental rights but also other legal rights as is clear from the words ‘any other purpose’. These words make the jurisdiction of the High Court more extensive than that of the Supreme Court which is confined to only for the enforcement of fundamental rights. The words ‘for any other purpose’ refer to enforcement of a legal right or legal duty. They do not mean that a High Court can issue Writs for any purpose it please.

The Writs mentioned in Article 226 are known as prerogative writs because they had their origin in the prerogative power of superintendence over its officers and subordinate courts. These Writs are among the great safeguards provided by British judicial system for upholding the rights and liberties of the people. In India, before the commencement of the constitution only three Presidency high Courts of Calcutta, Bombay and Madras had power to issue Writs. Their Writ jurisdiction was limited to presidency towns within which they had original jurisdiction. This Article now invests all High courts in India with the power to issue prerogative writs for the enforcement of fundamental rights. The makers of the Constitution having provided certain basic rights for the people whom they called fundamental rights evidently thought it necessary to provide also quick and inexpensive remedy for the enforcement of such rights and vested High Courts with jurisdiction.

The High Court’s jurisdiction in respect of ‘other purposes’ is however, discretionary. The courts have laid down rules in accordance with which such discretion is to be exercised.

The jurisdiction of the High Court under Art 226 cannot be invoked:

- If the petition is barred by res judicata;
- If there is an alternative and equally efficacious remedy available and which has not been exhausted;
- If the petition raised questions of facts which are disputed; and
- If the petition has been made after an inordinate delay.

These rules of judicial restraint have been adopted by our courts from the similar rules developed by the English courts in the exercise of their jurisdiction to issue the prerogative writs. Where a civil court had dealt with a matter and the High Court had disposed of an appeal against the decision of the civil court, a writ petition on the same matter could not be entertained. This was not on the ground of res judicata as much as on the ground of judicial discipline, which required that in matters relating to exercise of discretion, a party could not be allowed to take chance in different forums. Withdrawal or abandonment of a petition under Art 226/227 without the permission of the court to file a fresh petition there under would bar such a fresh petition in the High Court involving the same subject matter, though other remedies such as suit or writ petition under Art 32 would be open. The principle underlying Rule 1 of Order 23 of the CPC was held to be applicable on the ground of public policy.

It is a general rule of the exercise of judicial discretion under Art 226 that the High Court will not entertain a petition if there is an alternative remedy available. The alternative remedy however, must be equally efficacious. Where an alternative and efficacious remedy is provided, the Court should not entertain a writ petition under Art 226. Where a revision petition was pending in the High Court challenging the eviction degree passed against a tenant by the court of the Small Causes, it was held that the High Court should not have entertained a writ petition filed by the cousins of the tenants. The petitioners should have exhausted the remedies provided under the Code of Civil procedure before filing the writ petition. Petitions were dismissed on the ground of the existence of an alternative remedy in respect of elections to municipal bodies or the Bar Council.

When a law prescribes a period of limitation for an action, such an action has to be brought within the prescribed period. A court or a tribunal has no jurisdiction to entertain an action or proceeding after the expiration of the limitation period. It is necessary to assure finality to administrative as well as judicial decisions. Therefore, those who sleep over their rights have no right to agitate for them after the lapse of a reasonable time. Even writ petitions under Art 226 are
not immune from disqualification on the ground of delay. Although the law of limitation does not directly apply to writ petitions, the courts have held that a petition would be barred if it comes to the court after the lapse of a reasonable time. This is however, not a rule of law but is a rule of practice. Where the petitioner shows that illegality is manifest in the impugned action, and explains the causes of delay, the delay may be condoned.

Supreme Court and high courts issue following writs for the enforcement of fundamental rights guaranteed under the constitution.

4. WRITS OF HABEAS CORPUS

Habeas corpus is a prerogative writ, which was granted to a subject of His Majesty, who was detained illegally in jail. It is an order of release. The words habeas corpus subi di cendum literally mean ‘to have the body’. The writ provides remedy for a person wrongfully detained or restrained. By this a command is issued to a person or to jailor who detains another person in custody to the effect that the person imprisoned or the detenu should be produced before the Court and submit the day and cause of his imprisonment or detention. The detaining authority or person is required to justify the cause of detention. If there is no valid reason for detention, the Court will immediately order the release of the detained person.

The personal liberty will have no meaning in a constitutional set up if the writ of habeas corpus is not provided therein. The writ is available to all the aggrieved persons alike. It is the most effective means to check the arbitrary arrest by any executive authority. It is available only in those cases where the restraint is put on the person of a man without any legal justification.

When a person has been subjected to confinement by an order of the Court, which passed the order after going through the merits of the case the writ of habeas corpus cannot be invoked, however erroneous the order may be. Moreover, the writ is not of punitive or of corrective nature. It is not designed to punish the official guilty for illegal confinement of the detenu. Nor can it be used for devising a means to secure damages.

An application for habeas corpus can be made by any person on behalf of the prisoner as well as by the prisoner himself, subject to the rules and conditions framed by various High Courts. Thus the writ can be issued for various purposes e.g.

1) Testing the validity of detention under preventive detention laws;
2) Securing the custody of a person alleged to be lunatic;
3) Securing the custody of minor;
4) Detention for a breach of privileges by house;
5) Testing the validity of detention by the executive during emergency, etc.

4.1 When the Writ does not Lie

The writ will not lie in the following circumstances:-

1) If it appears on the face of the record that the detention of the person concerned is in execution of a sentence on indictment of a criminal charges. Even if in such cases it were open to investigate the jurisdiction of the court, which convicted the petitioner, but the mere jurisdiction would not justify interference by habeas corpus.
2) In habeas corpus proceedings the court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of institution of the proceedings. It was, thus, held in Gopalan v. State that if a fresh and valid order justifying the detention is made by the time to the return to the writ, the court couldn’t release the detenu whatever might have been the defect of the order in pursuance of which he was arrested or initially detained.
3) There is no right to habeas corpus where a person is put into physical restraint under a law unless the law is unconstitutional or the order is ultra vires the statute.
4) Under Article 226 a petition for habeas corpus would lay not only where he is detained by an order of the State Government but also when another private individual detains him.
5) In Indian Council for Enviro Legal Action v. Union of India, [8] it was held that a writ petition under Article 32 of the Constitution assailing the correctness of the decision of the Supreme Court on merits or claiming reconsideration would not be maintainable.
6) In Gopal Das v. Union of India [9], it was held that the Supreme court cannot give directions to the Pakistani authorities as it has no jurisdiction over them.

4.2 Grounds of Habeas Corpus

The following grounds may be stated for the grant of the writ:-

1) The applicant must be in custody;
2) The application for the grant of the writ of habeas corpus ordinarily should be by the
husband or wife or father or son of the detenu. Till a few years back the writ of habeas corpus could not be entertained if a stranger files it. But now the position has completely changed with the pronouncements of the Supreme Court in a number of cases. Even a postcard written by a detenu from jail or by some other person on his behalf inspired by social objectives could be taken as a writ-petition.

3) In Sunil Batra v. Delhi Administration [10], the court initiated the proceedings on a letter by a co-convict, alleging inhuman torture to his fellow convict. Krishna Iyer, J., treated the letter as a petition for habeas corpus. He dwelt upon American cases where the writ of habeas corpus has been issued for the neglect of state penal facilities like over-crowding, in sanitary facilities, brutalities, constant fear of violence, lack of adequate medical facilities, censorship of mails, inhuman isolation, segregation, inadequate rehabilitative or educational opportunities.

4) A person has no right to present successive applications for habeas corpus to different Judges of the same court. As regards the applicability of res judicata to the writ of habeas corpus the Supreme Court has engrafted an exception to the effect that where the petition had been ejected by the High Court, a fresh petition can be filed to Supreme Court under Article 32.

5) All the formalities to arrest and detention have not been complied with and the order of arrest has been made mala fide or for collateral purpose. When a Magistrate did not report the arrest to the Government of the Province as was required under Section 3(2) of the Punjab Safety Act, 1947, the detention was held illegal.

6) The order must be defective in substance, e.g., misdescription of detenu, failure to mention place of detention etc. Hence complete description of the detenu should be given in the order of detention.

7) It must be established that the detaining authority was not satisfied that the detenu was committing prejudicial acts, etc. It may be noted in this connection that the sufficiency of the material on which the satisfaction is based cannot be subject of scrutiny by the Court.

Where the detaining authority did not apply his mind in passing the order of detention, the court will intervene and issue the order of release of the detenu. Vague and indefinite grounds of detention, where the detaining authority furnishes vague and indefinite grounds, it entitles the petitioner to release.

4.3 Delay in Furnishing Ground may Entitle Detenu to be Released

The Court has consistently shown great anxiety for personal liberty and refused to dismiss a petition merely on the ground that it does not disclose a prima facie case invalidating the order of detention. It has adopted the liberal attitude in view of the peculiar socio-economic conditions prevailing in the country. People in general are poor, illiterate and lack financial resources. It would therefore be not desirable to insist that the petitioner should set out clearly and specifically the ground on which he challenges the order of detention.

The scope of writ of habeas corpus has considerably increased by virtue of the decision of the Supreme Court in Maneka Gandhi v. Union of India [11] and also by the adoption of forty-fourth amendment to the Constitution. Hence the writ of habeas corpus will be available to the people against any wrongful detention.

5. WRIT OF MANDAMUS

A writ of mandamus is in the form of command directed to the inferior Court, tribunal, a board, corporation or any administrative authority, or a person requiring the performance of a specific duty fixed by law or associated with the office occupied by the person. Mandamus in England is “neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of public duty and specially affects the right of an individual provided there is no other appropriate remedy.

The writ is issued to compel an authority to do his duties or exercise his powers, in accordance with the mandate of law. The authority may also be prevented from doing an act, which he is not entitled to do. The authority, against which the writ is issued, may be governmental or semi-governmental, or judicial bodies. Its function in Indian Administrative Law is as general writ of justice, whenever justice is denied or delayed and the aggrieved person has no other suitable the defects of justice. An order in the nature of mandamus is not made against a private individual. The rule is now well established that a writ of mandamus cannot be issued to a private individual, unless he acts under some public authority. A writ can be issued to enforce a public duty whether it is imposed on private individual or on a public body.

The Court laid down that public law remedy mandamus can be availed of against a person when he is acting in a public capacity as a holder of public office and in the performance of a public duty. It is
not necessary that the person or authority against which mandamus can be claimed should be created by a statute. Mandamus can be issued against a natural person if he is exercising a public or a statutory power of doing a public or a statutory duty.

5.1 Grounds of the Writ of Mandamus

The writ of mandamus can be issued on the following grounds:

I. That the petitioner has a legal right.
II. The existence of a right is the formation of the jurisdiction of a Court to issue a writ of mandamus. The present trend of judicial opinion appears to be that in the case of non-selection to a post, no writ of mandamus lies.
III. That there has been an infringement of the legal right of the petitioner;
IV. That the infringement has been owing to non-performance of the corresponding duty by the public authority;
V. That the petitioner has demanded the performance of the legal duty by the public authority and the authority has refused to act;
VI. That there has been no effective alternative legal remedy.

The applicant must show that the duty, which is sought to be enforced, is owed to him and the applicant must be able to establish an interest in the invasion of which has been given rise to the action.

The writ of mandamus is available against all kinds of administrative action, if it is affected with illegality. When the action is mandatory, the authority has a legal duty to perform it. Where the action is discretionary, the discretion has to be exercised on certain principles; the authority exercising the discretion has mandatory duties to decide in each case whether it is proper to exercise its discretion. In the exercise of its mandatory powers as well as discretionary powers it should be guided by honest and legitimate considerations and the exercise its discretion should be for the fulfilment of those purposes, which are contemplated by the law. Where the duty is not mandatory but it is only discretionary, the writ of mandamus will not be issued. The principles are illustrated in Vijaya Mehta v. State [12]. There a petition was moved in the high Court for directing the state Government to appoint a Commission to inquire into change in climate cycle, flood in the State etc. Refusing to issue the writ, the Court pointed out that under Section 3 of the Commission of Inquiry Act, the Government is obligated to appoint a commission if the Legislature passes a resolution to that effect. In other situation, the government’s power to appoint a commission is discretionary and optional as a commission could only be appointed by the State Government if, in its opinion it is necessary to do so. The petitioner, therefore has no legal right to compel the State Government to appoint a Commission of Inquiry even when there is a definite matter of public importance for the government may not feel inclined to appoint a Commission if it is of the opinion that is not necessary to do so. If the public authority neglects to discharge mandatory duty he would be compelled by mandamus to do it. The refusal to refer to the High Court questions under statutory provision like section 57 of the Stamp Act may be included in the class of mandatory duties in the light of the decision of the Supreme Court in Maharashtra Sugar Mills case [13].

Mandamus was issued to compel the government to fill the vacant seats in a Medical College as Article 41 of the Constitution, which is a directive principle of State policy, includes the right to medical education. In Bhopal sugar Industries Ltd. v. Income Tax Officer, Bhopal [14], it was held by the supreme Court that, where the Income Tax Officer had virtually refused to carry out the clear and unambiguous directions which a superior tribunal like the Income tax appellate Tribunal had given to him by its final order in exercise of its appellate power in respect of an order of assessment made by him, such refusal is in effect a denial of justice, and is furthermore destructive of one of the basic principles in the administration of justice based on as it is the hierarchy of Courts. In such a case a writ of Mandamus should issue ex-debits justifiable to compel the Income-tax Officer to carry out the directions given to him by the Income-tax Appellate Tribunal. The High Court will be clearly in error if it refused to issue a writ on the ground that no manifest injustice has resulted from the order of the Income-tax Officer in view of the error committed by the tribunal itself in its order. Such a view is destructive of one of the basic principles of the administration of justice. Thus we find that the Court will not tolerate the omission of mandatory duties by the police authority and it would compel the authority by the writ of mandamus to do what it must.

A writ of mandamus will not be issued unless an accusation of non-compliance with a legal duty or a public duty is leveled. It must be shown by concrete evidence that there was a distinct and specific demand for performance of any legal or public duty cast upon the said party declined to comply with the demand. When an original legislation by the Union or State exceeds its legislative orbit and injuries private interests, the owner of such interests can have a mandamus directing the States not to enforce the
impugned law “against the petitioners in any manner whatsoever.” The duty of this writ becomes more onerous as it attempts to face different phases and types of ultra vires administrative action, whether with regard to internment or election, taxation or license fees, evacuee property or dismissal of public officers.

5.2 Grounds on Which Writ of Mandamus may be Refused

The relief by way of the writ of mandamus is discretionary and not a matter of right. The Supreme Court has held in Daya v. Joint Chief Collector [15], that where the act against which mandamus is sought has been completed, the writ if issued, will be in fructuous. On the same principle, the Court would refuse a writ of mandamus where it would be meaningless, owing to lapse or otherwise. In NOIDA Entrepreneurs association v. NOIDA, it was held that the hearing opportunity can not be denied to a complaining delinquent officer on the ground that she has no locus standi in the matter, but has previously been given an opportunity under the supreme court order [16].

5.3 Who may Apply for Writ of Mandamus?

It is only a person whose rights have been infringed who may apply for mandamus. It is interesting to note that the rule of locus stand has been liberalized by the Supreme Court so much as to enable any public spirited man to move the court for the issue of the writ on behalf of others.

General principles relating to mandamus to enforce public duties in considering general principles the following points have to be considered:

(a) That the duty is public. In this connection an important case, Ratlam Municipality v. Vardli Chand [17] came to be decided by the Supreme Court in 1980, in which it compelled a statutory body to exercise its duties to the community. Ratlam Municipality is a statutory body. A provision in law constituting the body casts a mandate on the body “to undertake and make reasonable and adequate provision” for cleaning public streets and public places, abating all public nuisances and disposing of night soil and rubbish etc. duties. The Ratlam Municipality neglected to discharge the statutory duties.

(b) That it is a duty enforced by rules having the force of law. Thus:

1. Where an administrative advisory body is set up (without the sanction of any statute) mandamus will not be issued against such body even through the functions of the body relate to public matters;

II. Though executive or administrative directions issued by a superior authority are enforceable against an inferior authority by departmental action, they have no force of law and are, accordingly not enforceable by mandamus.

III. An applicant for mandamus must take the position that the person against whom an order is sought is holding a public office under some law, and his grievance is that he is acting contrary to the provisions of that law.

In short, mandamus will be issued when the Government or its officers either overstep the limits of the power conferred by the statute, or fails to comply with the conditions imposed by the statute for the exercise of the power.

5.4 Against whom Writ of Mandamus cannot be Issued?

A writ of mandamus is issued generally for the enforcement of a right of the petitioner. Where the applicant has no right the writ cannot be issued. It cannot lie to regulate or control the discretion of the public authorities. The writ of mandamus will not be issued if there is mere omission or irregularity committed by the authority. It will not lie for the interference in the internal administration of the authority. In the matters of official judgment, the High Court cannot interfere with the writ of mandamus.

6. WRIT OF CERTIORARI

Certiorari is a command or order to an inferior Court or tribunal to transmit the records of a cause or matter pending before them to the superior Court to be dealt with there and if the order of inferior Court is found to be without jurisdiction or against the principles of natural justice, it is quashed. “Certiorari is historically an extraordinary legal remedy and is corrective in nature. It is issued in the form of an order by a superior Court to an inferior civil tribunal which deals with the civil rights of persons and which is public authority to certify the records of any proceeding of the latter to review the same for defects of jurisdiction, fundamental irregularities of procedure and for errors of law apparent on the proceedings.”

The jurisdiction to issue a writ of certiorari is a supervisory one and in exercising it, the Court is not entitled to act as a Court of appeal. That necessarily means that the findings of fact arrived at by the
inferior Court or tribunal are binding. An error of law apparent on the face of the record could be corrected by a writ of certiorari, but not an error of fact; however grave it may appear to be. Certiorari is thus said to be corrective remedy. This is, of course, its distinctive feature. The very end of this writ is to correct the error apparent on the face of proceedings and to correct the jurisdictional excesses. It also corrects the procedural omissions made by inferior courts or tribunal. If any inferior court or tribunal has passed an order in violation of rules of natural justice, or in want of jurisdiction, or there is an error apparent on the face of proceeding, the proper remedy so through the writ of certiorari.

6.1 Certiorari is a Proceeding in personam

Unlike the writ of habeas corpus the petition for certiorari should be by the person aggrieved, not by any other person. The effect of the rule of personam is that if the person against whom the writ of certiorari is issued does not obey it, he would be committed forthwith for contempt of court. Certiorari is an original proceeding in the superior Court. It has its origin in the court of issue and therefore the petition in India is to be filed in the High Court under Article 226 or before the Supreme Court under Article 32 of the Constitution.

6.2 Against whom Certiorari can be Issued

As regards the question against whom the writ can be issued, it is well settled that the writ is available against any judicial or quasi-judicial authority, acting in a judicial manner. It is also available to any other authority, which performs judicial function and acts in a judicial manner. Any other authority may be Government itself. But the conditions allied with it are that Government acts in a judicial manner and the issue is regarding the determination of rights or title of a person. Previously the question was in doubt whether it was available against Central and Local Governments. The majority of judgment is there, when the grant of certiorari against the Government has been denied. The Madras High Court in 1929 and again in 1940 in Chettiar v. Secretary to the Government of Madras [18] held that a writ of certiorari would not lie against Madras Government. The Assam High Court has held that the writ of certiorari will be issued to an authority or body of persons who are under a duty to act judicially. It will not be available against the administrative order or against orders of non-statutory bodies.

6.3 Necessary Conditions for the Issue of Writ

When anybody or person: -

(a) Having legal authority.
(b) To determine questions affecting rights of subjects,
(c) Having duty to act judicially,
(d) Acts in excess of their legal authority, writ of certiorari may be issued.

Unless all these conditions are satisfied, mere inconvenience or absence of other remedy does not create a right to certiorari.

6.4 Grounds of Writ of Certiorari

The writ of certiorari can be issued on the following grounds: -

1) Want of jurisdiction, which includes the following:
   (a) Excess of jurisdiction.
   (b) Abuse of jurisdiction
   (c) Absence of jurisdiction.

2) Violation of Natural justice.
3) Fraud.
4) Error on the face of records.

Explanation: -

1) Want of Jurisdiction: - The Supreme Court has stated in Ebrahim Abu Bakar v. Custodian-General of Evacuee Property [19] that want of jurisdiction may arise from.

   a) The nature of subject matter.
   b) From the abuse of some essential preliminary, or
   c) Upon the existence of some facts collateral to the actual matter, which the Court has to try, and which is the conditions precedent to the assumption of jurisdiction by it.
   d) The character and constitution of the tribunal

There have been a good number of cases in Indian Administrative Law where the use of jurisdiction has been corrected through the writ of certiorari. Thus the orders of tribunals which did not wait even for 15 minutes to hear a party and which resorted to its own theories to assess the premises of people and acted under the influence of political considerations have been quashed. The Court does not interfere in the cases where there is a pure exercise of discretion, and which is not arbitrary if it is done in good faith. They do not ignore the legislative intention in the statute which might give a wide aptitude of powers to the administrative authority or the social needs, which demand the bestowal of some wider jurisdiction, or the historical circumstances under which a certain
tribunal got exclusive jurisdiction of a particular subject-matter.

2) Violation of Natural Justice:- The next ground for the issue of writ of certiorari is the violation of natural justice and has a recognized place in Indian legal system as discussed in the earlier part of the reading material.

3) Fraud:- There are no cases in India where certiorari has been asked on account of fraud. The cases are found in British Administrative law where on the ground of fraud the Court has granted the writ of certiorari. The superior Courts have an inherent jurisdiction to set aside orders of convictions made by inferior tribunals if they have been procured by fraud or collusion a jurisdiction that now exercised by the issue of certiorari to quash Where fraud is alleged, the Court will decline to quash unless it is satisfied that the fraud was clear and manifest and was instrumental in procuring the order impugned.

4) Error of Law Apparent on The Face of Record

“An error in decision or determination itself may also be amenable to a writ of certiorari but it must be a manifest error apparent on the face of the proceeding e.g., when it is based on clear ignorance or disregard of the provision of law.” In other words; it is a patent error, which can be corrected by certiorari but not a mere wrong decision. It was for the first time when the Supreme Court issued the writ of certiorari on the only ground that the decision of the election tribunal clearly presented a case of error of law, which was apparent on the face of the record. The error must be apparent on the face of the records.

7. WRIT OF QUO WARRANTO

The term quo warranto means “by what authority.” Whenever any private person wrongfully usurps an office, he is prevented by the writ of quo warranto from continuing in that office. The basic conditions for the issue of the writ are that the office must be public, it must have been created by statute or Constitution itself, it must be of a substantive nature and the holder of the office must not be legally qualified to hold the office or to remain in the office or he has been appointed in accordance with law.

A writ of quo warranto is never issued as a matter of course and it is always within the discretion of the Court to decide. The Court may refuse to grant a writ of quo warranto if it is vexatious or where the petitioner is guilty of larcies, or where he has acquiesced or concurred in the very act against which he complains or where the motive of the relater is suspicious. As to the question that can apply for writ to quo warranto, it can be stated that any private person can file a petition for this writ, although he is not personally aggrieved in or interested in the matter. Ordinarily, delay and laches would be no ground for a writ of quo warranto unless the delay in question is inordinate.

An unauthorized person issues the writ in case of an illegal usurpation of public office. The public office must be of a substantive nature. The remedy under this petition will go only to public office private bodies the nature of quo warranto will lay in respect of any particular office when the office satisfies the following conditions:

1) The office must have been created by statute, or by the Constitution itself;
2) The duties of the office must be of public nature.
3) The office must be one of the tenure of which is permanent in the sense of not being terminable at pleasure; and
4) The person proceeded against has been in actual possession and in the user of particular office in question.

Another instance of granting the writ of quo warranto is where a candidate becomes subject to a disqualification after election or where there is a continuing disqualification. In cases of office of private nature the writ will not lay. In Jamalpur Arya Samaj Sabha v. Dr. D. Rama [20], the High Court of Patna refuse to issue the writ of quo warranto against the members of the Working Committee of Bihar Raj AryaSamajPratinidhi Sabha- a private religious association. In the same way the writ was refused in respect of the office of a doctor of a hospital and a master of free school, which were institutions of private charitable foundation, and the right of appointment to offices therein was vested in Governors who were private and don’t public functionary.

It will not lie for the same reason against the office of surgeon or physician of a hospital founded by private persons. Similarly, the membership of the Managing Committee of a private school is not an office of public nature; therefore writ of quo warranto will not lie. In Niranjan Kumar Goenka v. The University of Bihar, Muzaffarpur [21] the Patna High Court held that writ in the nature of quo warranto cannot be issued against a person not holding a public office. Acquiescence is no ground for refusing quo warranto in case of appointment to public office of a disqualified person, though it may be a relevant consideration in the case of election. When the office is abolished no information in the nature of quo warranto will lie.
The jurisdiction of the High Court under Art 226 is very vast and almost without any substantive limits barring those such as territorial limitations. Although the jurisdiction of the High Court is so vast and limitless, the courts have imposed certain limits in their jurisdiction in order to be able to cope with the volume of litigation and also to avoid dealing with questions, which are not capable of being answered judicially. There are three types of limitations:

- Those arising from judicial policy;
- Those which are procedural and
- Those because of the petitioner’s conduct.

The Supreme Court has held that the extra ordinary jurisdiction should be exercised only in exceptional circumstances. It was held that the High Court was not justified in going into question of contractual obligations in a writ petition. It was held that the jurisdiction under Art 226 should be used most sparingly for quashing criminal proceedings. The High Court should interfere only in extreme cases where charges ex facie do not constitute offence under the Terrorist and Destructive Activities Act (TADA). It should not quash the proceedings where the application of the Act is a debatable issue. In Dr. Het Ram Kalia v. Himachal Pradesh University, Shimla [22], it was held that if the holder of a public office was initially disqualified to hold that office, the writ of quo warranto would not be issued if at a subsequent stage that disqualification was removed and after the removal of the disqualification the incumbent concerned could have been appointed on the same post. The doctrine is that in cases where the initial disqualification is removed it would be open to the authorities concerned to appoint the same person immediately even if the courts grants the writ of quo warranto as desired by the petitioner. The general principle is that the court would not pass any decree which becomes futile.

8. CONCLUSION

Supremacy of the law is the spirit of the Indian Constitution. In India, the “Doctrine of Judicial review” is the basic feature of the Constitution. It is the concept of Rule of Law and it is the touchstone of Constitution of India. Though there is no express provision for judicial review in Indian Constitution but it is an integral part of our constitutional system, and without it there will be no Government of laws and Rule of law would become a mockery delusion and a promise of futility. In India, Judicial Review is a power of court to set up an effective system of check and balance between legislature and executive. The most prominent object of judicial review to ensure that the authority does not abuse its power and the individual receives just and fair treatment. The ostensible purpose of judicial review is to vindicate some alleged right of one parties to litigation and thus grant relief to the aggrieved party by declaring an enactment void, if in law it is void, in the judgment of the court. But the real purpose is something higher i.e., no statute which is repugnant to the constitution should be enforced by courts of law.

COMPETING INTERESTS

Author has declared that no competing interests exist.

REFERENCES

16. NOIDA Entrepreneurs Association v. NOIDA 2011 AIR SCW 3154.
18. Chettiar v. Secretary to the Government of Madras 1939 (2) MLJ 801.
22. Dr. Het Ram Kalia v. Himachal Pradesh University, Shimla AIR 1977 NOC 246.