

# Constitutional Remedies: A Constitutional Authority Exercised by the Constitutional Courts in India

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## ABSTRACT

Rights and remedies are really the two sides of the same coin and they cannot be dissociated from each other. Therefore, if an individual is aggrieved by any illegal action of an authority, certain remedies shall be available to him. This very object of protection of fundamental and legal rights of aggrieved individuals is done by the constitutional Courts through constitutional remedies provided under various provisions of the Indian Constitution and most prominently under Articles 32 and 226. The object of these constitutional remedies is that it guarantees the right to move the constitutional Courts (Supreme Court and High Court) by appropriate proceedings for the enforcement of fundamental and legal rights guaranteed by the Indian Constitution.

**KEYWORDS:** Constitutional Remedies; Constitutional Courts; Writ; Fundamental Rights; Legal Rights

## INTRODUCTION

Thursday, the twenty-sixth, January, 1950, was a red letter day in the long and chequered history of India. For, on that day the present Constitution of India was brought into force which announced birth of a new republic to the world. A Constitution means a document having a special legal sanctity which sets out the frame-work and the principle functions of the organs of the government of any State and declare the principles governing the operation of those organs.<sup>1</sup>

Now the question arises as to what is constitutional. Constitutional is what which owes its origin to constitutional. In other words, the thing or the subject-matter in question that has its origin in the provisions of a respective constitution.

Our Indian Constitution possesses all the essential characteristics of a federal Constitution. The Constitution establishes a system of double Government with the Central Government at one level and the State Government at the other. There is division of powers between the Central and the State Governments. The Constitution of India is written and is supreme law of the land. The Constitution establishes a Supreme Court as an apex constitutional Court under Article 124<sup>2</sup> to decide the disputes which has the legal supremacy and it is the final interpreter of the provisions of the India Constitution.

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<sup>1</sup> Wade and Phillips, *Constitutional Law* 1 (4th edn.) cited in J. N. Pandey, *Constitutional Law of India* 1 (Central Law Agency, Allahabad, 52nd edn., 2015).

<sup>2</sup> The Constitution of India, 1950.

The incorporation of a formal declaration of “fundamental rights” in Part III of the Indian Constitution is the distinguishing feature of our Indian Constitution. These rights are prohibitions against the State and are considered as a check upon the exercise of executive powers of the State. The Indian Constitution besides fundamental rights guarantees to the people certain basic human rights and freedoms, such as, inter alia, equal protection of laws, freedom of speech and expression, freedom of worship and religion, freedom of assembly and association, freedom to move freely and to reside and settle anywhere in India, freedom to any occupation, trade or business, freedom against double jeopardy and ex post facto laws. A person can enforce his fundamental rights in the event of its breach against the state subject to the state imposing some permissible restrictions in the interests of social control.<sup>3</sup>

But mere declaration of certain fundamental rights will be of no use if there is no constitutional remedy for their enforcement. Our Constitution has, thus, conferred on the constitutional Courts, namely, the Supreme Court and High Courts the power to grant most effective remedies in the nature of writs: Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari whenever these rights are violated. The Indian Constitution provides effective machinery under Articles 32 and 226 for the enforcement of these rights through the power exercised by the constitutional Courts. Without due enforcement, rights of citizens will be of no use. Thus, these constitutional Courts established by the Constitution of India ensure an effective and speedy enforcement of citizen’s rights.

Since the inauguration of the Indian Constitution, many significant legal battles have been fought for restoration of rights of people. Our Supreme Court has taken the position that the fundamental rights should be interpreted broadly and liberally and not narrowly as the Court observed in the case of *Maneka Gandhi v. Union of India*<sup>4</sup> that:

*“The attempt of the Court should be to expand the reach and ambit of the Fundamental Rights rather than to attenuate their meaning and content by a process of judicial construction.”*

Thus, mere enumeration of a number of fundamental rights in a Constitution without any provision for their proper safeguards is not going to serve any purpose. Indeed, the very existence of a right depends upon the remedy for its enforcement and for this pious purpose an independent and impartial judiciary with a power of judicial review has been established under the Constitution of India which is the custodian of the rights of citizens. So, a notable feature of the Indian Constitution is that it accords a dignified and crucial position to the constitutional Courts with the Supreme Court at the apex and High Courts for each State and Union Territories. The most significant aspect of their jurisdiction is the power to exercise constitutional authority sanctioned by the Indian Constitution as a matter of constitutional remedy besides issuing writs to enforce fundamental rights. Thus, the judicial organ of the government in India has been assigned a significant role to play i.e. to provide constitutional remedies in the form of writ jurisdiction under Articles 32 and 226 and exercise of other constitutional measures for the enforcement of certain rights. This power of Constitutional Courts to provide “constitutional remedies” has literally given teeth for rights of citizens.

## **CONSTITUTIONAL AUTHORITY OF CONSTITUTIONAL COURTS TO EXERCISE CONSTITUTIONAL REMEDIES UNDER INDIAN CONSTITUTION**

Constitutional remedies are those remedies which are provided under the Constitution of any country which are enshrined under the various provisions of the Constitution. In other words the Constitution is

<sup>3</sup> M. P. Jain, *Indian Constitutional Law* 17 (LexisNexis Butterworths Wadhwa, Nagpur, 6th edn., 2010).

<sup>4</sup> AIR 1978 SC 597.

the source and birthplace of these remedies. Likewise, under our Indian Constitution also there are certain remedies which are available and are exercised by our constitutional Courts (Supreme Court and High Court) under various provisions. Our Constitution does not only afford Article 32 and Article 226 as a writ constitutional remedy, but it also provides various other constitutional remedies.<sup>5</sup> Such constitutional remedies along with writ jurisdiction of constitutional Courts available to a person aggrieved are discussed as below.

### **1. Extraordinary Remedies**

An aggrieved party has a fundamental right under Article 32 and constitutional right under Article 226 to approach Supreme Court and High Court, respectively of the Indian Constitution for an appropriate writ, direction or order against enforcement of their fundamental and legal rights. Besides, the Supreme Court apart from Article 32 has been conferred with privilege of power to issue directions, orders or writs under Article 139<sup>6</sup> for any other purpose also other than those mentioned under Article 32 (2) if the parliament makes law in this behalf. The conferment of power upon the Supreme Court under Article 139 is extraordinary or prerogative remedies.

### **2. Appeals to Supreme Court**

Article 132, Article 133 and Article 134 of the Indian Constitution deals with the appellate powers of the Supreme Court to entertain appeals from High Courts, in civil matters and in criminal matters, respectively.

### **3. Special Leave Petitions**

Article 136 of the Indian Constitution confers extraordinary powers on the Supreme Court to grant special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed or made by any Court or tribunal in the territory of India.

### **4. Review**

Article 137 of the Indian Constitution provides that, the Supreme Court shall have power to review any judgement pronounced or order made by it. Though the provisions of the Code of Civil Procedure, 1908 do not apply to the provisions of the Constitution, general principles relating to review apply to writ jurisdiction as well.<sup>7</sup> An application for review of a judgement rendered by the Supreme Court or by a High Court may be made on the following grounds<sup>8</sup>:

- Discovery of new and important matter or evidence; or
- Mistake or error apparent on the face of the record; or
- Any other sufficient cause.

### **5. Curative Petitions**

Article 137 of the Indian Constitution enables the Supreme Court to review any judgement or order made by it. But if an aggrieved party feels that there is a gross miscarriage of justice and the review petition has been rejected by the Court then what will happen as we know that no second review lies. This question was raised in, *Rupa Ashok Hurra v. Ashok Hurra*<sup>9</sup> and after analysing the historical background of prerogative remedies in England, the apex Court held that:

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<sup>5</sup> C. K. Takwani, *Lectures on Administrative Law* 403 (EBC, Lucknow, 5th edn., 2012).

<sup>6</sup> The Constitution of India, 1950.

<sup>7</sup> The Code of Civil Procedure, 1908 (Act No. 5 of 1908), Explanation to Section 141.

<sup>8</sup> The Code of Civil Procedure, 1908 (Act No. 5 of 1908), Order 47, Rule 1.

<sup>9</sup> AIR 2002 SC 1771.

*“In order to prevent abuse of process of law and to cure gross miscarriage of justice, it is open to the Court to reconsider its decision in the exercise of its inherent jurisdiction.”*

Thus, for this purpose the apex Court derived a method of filing “curative petitions” to cure gross defects. However, the Court was conscious of inherent dangers of floodgates being opened under the name and style of “curative petitions” and therefore allowed such petitions only on the ground of violation of the principles of natural justice, i.e., audi alteram partem and nemo debet esse iudex in propria causa.

## **6. Transfer of Cases to Supreme Court and High Court**

Article 139-A<sup>10</sup> provides that if the Supreme Court is satisfied on its own motion or on an application made by the Attorney-General of India or by a party to any such case that in such case substantial questions of general importance are involved, then the Supreme Court may withdraw the case or cases pending before one or more High Courts and dispose of all those cases itself.

In similar terms Article 228 of the Indian Constitution empowers High Court also to transfer a case pending in any Subordinate Court involving substantial question of law as to interpretation of the Constitution and the determination of which is necessary for the disposal of the case, then a High Court will withdraw the case to itself and may decide the same.

## **7. Plenary Powers of Supreme Court**

Article 142 of the Indian Constitution confers plenary power to the Supreme Court to pass such decree or make such order as may be necessary for doing “complete justice” in any cause or matter pending before it. Such decree passed or order made by the Supreme Court can be enforced throughout the territory of India.

## **8. Advisory Jurisdiction of Supreme Court**

The Constitution of India does not only provide remedy to common citizens but it also seeks to address the executive head of the Union of India<sup>11</sup>, the President of India. Article 143 of the Indian Constitution enables the President of India to consult the Supreme Court and seek its opinion on any question of law or fact of public importance.

But most important mentioned among above is writ remedies under Article 32 and 226 of our Constitution.

## **ARTICLES 32 AND 226: AN EXTRAORDINARY REMEDIES**

Article 32, clause 2 and Article 226, clause 1 speaks about the writ jurisdiction of the Supreme Court and High Courts, respectively which empowers them to issue writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. These writs are extraordinary in the sense that they are quick and effective. They are quick remedies because if any body’s fundamental rights are infringed then individual can directly approach the apex Court in this regard. They are effective as for the enforcement of the fundamental rights the writ jurisdiction under Article 32 has been made and envisaged as one of the fundamental rights in our Indian Constitution.

Historically, writ jurisdiction came into existence in England in the 13th century and by the end of the 13th century it was a well settled law. In British India, they were established by, the Regulating Act, 1773 which were further amended by, the Act of Settlement, 1781. In the beginning, the writ jurisdiction was exclusively with the Supreme Court at Calcutta but when High Courts were established under the

<sup>10</sup> The Constitution of India, 1950.

<sup>11</sup> The Constitution of India, 1950, art. 14.

Indian High Courts Act, 1861 then in 1913, the Code of Criminal Procedure, 1873 was amended whereby all the existing High Courts were confirmed with the writ jurisdiction. Here the significant point is that the writ jurisdiction of the Supreme Court and High Courts in India is much wider than the English Courts.

Rights and remedies cannot be dissociated and therefore, whenever an individual is aggrieved certain remedies should be available to him. This very object is achieved by the constitutional Courts through constitutional remedies under Articles 32 and 226 of Indian Constitution. Their importance is such that Article 32 is itself a fundamental right under Part III of the Indian Constitution.<sup>12</sup> Article 226 is also equally important as it enables the High Courts to issue writs for the enforcement of fundamental rights and for any other purposes as well. Its importance in *Devilal Modi v. STO*<sup>13</sup> was stated in following words:

*“There can be no doubt that the Fundamental Rights, guaranteed to the citizens are a significant feature of our Constitution and the High Courts under Article 226 are bound to protect these Fundamental Rights.”*

The language used in Article 32 (2) is wide enough and the power of the Supreme Court is not confined to issuing only writs, but any direction on order or writ whichever is appropriate to enforce the fundamental rights. On the scope of Article 226 the Supreme Court in *D. R. Enterprises Ltd. v. Assistant Collector of Customs and Ors.*<sup>14</sup> said that:

*“The powers of the High Courts under Article 226 of the Constitution while issuing appropriate writs are very wide even if there is an alternative remedy that may not preclude the High Court from exercising the jurisdiction in a particular case. In the face of alternate statutory remedies, when the High Court declines to exercise the jurisdiction under Article 226 of the Constitution, it is a self imposed restriction only.”*

The scope of High Courts under Article 226 is much wider than the Supreme Court under Article 32 in the respect that writs under Article 226 can be issued for any other purpose as well as opposed to Article 32, where writs can only be issued for the purpose of the enforcement of fundamental rights only. However, the writ jurisdiction of the Supreme Court can be enlarged by the parliament under Article 139.

The Supreme Court under Article 32 has no discretion in cases where the fundamental right has been infringed. In the context of Article 226 in *Manjula Manjari Dei v. Director of Public Instructions*<sup>15</sup> was held that:

*“As at present advised, I am of the opinion that the proper interpretation Article 226 would be that in enforcing a Fundamental Right guaranteed under the Constitution the Court is under a duty to exercise its power under that Article while in exercising this power for any other purpose it has a discretion.”*

The availability of an alternative remedy is one of such considerations which a writ Court may take into account to refuse to exercise its discretion. However, in *K. K. Kochuni v. State of Madras*<sup>16</sup> the Court held that:

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<sup>12</sup> Dr. Ashok K. Jain, *Constitutional Law of India (Part-II)* 235 (Axcnt Publications, Delhi, 2nd edn., 2009).

<sup>13</sup> AIR 1965 SC 1150.

<sup>14</sup> 2015 (7) JT 253.

<sup>15</sup> AIR 1952 Ori. 344.

<sup>16</sup> AIR 1960 SC 1080.

*“Article 32 itself being a fundamental right the Court will give relief notwithstanding the existence of an alternative remedy.”*

In 1993, in *S. A. Khan v. State of Haryana*<sup>17</sup> the apex Court held that:

*“When a statutory alternative remedy is available to the petitioner against the suspension order, the writ petition under Article 32 is not maintainable.”*

In *Union of India v. Major General Shri Kant Sharma*<sup>18</sup> it was held that:

*“In our opinion, therefore the Bombay High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellant under Section 17 of the Act (SARFASI Act). It is well settled that ordinary relief under Article 226 of Constitution of India is not available where any alternative efficacious remedy is available to any aggrieved person.”*

The principle of Res Judicata embodied in Section 11 of the Code of Civil Procedure, 1908 is applicable on writ jurisdiction. Thus, if a question has been once decided by the Supreme Court under Article 32 the same question cannot be reopened, again under Article 226 and vice versa. In *Daryo v. State of U.P.*<sup>19</sup> it was held that:

*“Where the matter had been heard and decided by the High Court under Article 126 the writ under Article 32 is barred by the rule of res judicata and could not be entertained.”*

There is an important exception to this rule of res judicata and in, *Gulam Sarvar v. Union of India*<sup>20</sup> the Court held that:

*“The rule of res judicata is not applicable in the writ of habeas corpus and where the petitioner has been refused a writ from the High Court he may file a petition for the same writ under Article 32.”*

The constitutional remedy under Article 32 must usually be sought within a reasonable time. In, *Trilokchand Motichand v. H. B. Munshi*<sup>21</sup> the petitioner filed the petition in the Supreme Court after the lapse of 10 years after his petition under Article 226 was dismissed by High Court. The Court rejected the petitioner's writ petition on the ground of delay and held:

*“The question is one of discretion for this Court to follow from case to case. There is no upper limit and there is no lower limit. It will all depend on what the breach of the fundamental right and the remedy are and why the delay arose.”*

Since the Limitation Act, 1963 does not apply to writ petitions and no period of limitation is prescribed by the Indian Constitution to move under Article 32 or Article 226, the matter is more or less left to judicial discretion.

The traditional rule says that the right to move the constitutional Courts is only available to those whose fundamental rights are infringed. However, a well known exception to this rule is a writ of habeas corpus. The rule of locus standi that a petition under Article 32 can only be filed by the aggrieved has now been considerably relaxed by the Supreme Court and it now permits “public interest litigation” for the enforcement of constitutional and other legal rights. In *A.B.S.K. Sangh (Rly.) v. Union of India*<sup>22</sup> it was held that the Akhil Bhartiya Soshit Karmachari singh (Railway), though an unregistered association could maintain a writ petition under Article 32 for the redressal of a common grievance.

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<sup>17</sup> (1993)2 SCC 327.

<sup>18</sup> AIR 2015 SC 2465.

<sup>19</sup> AIR 1961 SC 1457.

<sup>20</sup> AIR 1967 SC 1335.

<sup>21</sup> AIR 1970 SC 898.

<sup>22</sup> AIR 1981 SC 298.

The same tradition of liberalising the rule of locus standi has been followed in High Courts under Article 226. For example, in *S. P. Gupta v. Union of India*<sup>23</sup> writ petitions under Article 226 by lawyers raising certain significant questions concerning High Court Judges were held maintainable.

Fundamental rights are enforceable against the State defined under Article 12<sup>24</sup>. Thus, ordinarily a writ would lie against State and statutory bodies and persons charged with public duties. Though private persons are not immune from the writ jurisdiction of the Supreme Court as well as of High Courts but issuance of writ to them would require exceptional circumstances.<sup>25</sup>

## CONCLUSION AND SUGGESTION

A body which is without teeth is of no use and is a waste as without teeth the body could not derive the required strength and stamina for its life. Similarly, the “constitutional remedies” without its implementation and enforcement mechanism is meaningless. Writs which are five as provided under Article 32 and Article 226 of our Constitution are of great significance. Our Constitution makers were aware of the importance of the constitutional remedies in a political democratic state where there exists a heterogeneous society, and that is why they with the fundamental rights also drafted the provision of constitutional remedies which is at one place is itself a fundamental right, i.e., under Article 32 and at other place in much wider form, i.e., Article 226.

The importance of constitutional remedies can be understood in the words of Dr. B. R. Ambedkar, the principal architect of the Indian Constitution as he said about writs and Article 32:

“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. It is the very soul of the Constitution and the very heart of it.”<sup>26</sup>

Such is the importance of Article 32, that it is itself a fundamental right under Part III of the Constitution, and that there is no need to resort to Article 226, before approaching the Supreme Court under Article 32. Thus, a person may directly move the Supreme Court.<sup>27</sup> Article 226 is also equally important in the sense that it enables the High Courts to issue writs for the enforcement of fundamental rights and for any other purposes also, say for other ordinary legal rights.

Discretion is a self esteemed power to do or not to do anything. As far as Article 32 is concerned the Supreme Court has no discretion in cases where the fundamental rights of an individual have been infringed. The Court has to provide a remedy. However, the care will be different where there is an infringement of some other ordinary legal rights. In the context of Article 226, when there is violation of an ordinary legal right, the jurisdiction of the High Court under Article 226 is discretionary.

Article 32 (3) of our Constitution empowers the parliament to confer by law, all or any of the powers, exercisable by the Supreme Court under Article 32, on any other Court as well. The words “any other Court” refers to Court other than High Courts because such powers are already vested them under Article 226. Thus, parliament by law can empower other Courts also to exercise writ jurisdiction. But, Article 226, does, not possess such provision. However, nothing has been done till date which in my opinion should be done.

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<sup>23</sup> AIR 1982 SC 149.

<sup>24</sup> The Constitution of India, 1950.

<sup>25</sup> C. K. Takwani, *Lectures on Administrative Law* 355 (EBC, Lucknow, 5th edn., 2012).

<sup>26</sup> III, *Constituent Assembly Debates*, 953.

<sup>27</sup> Dr. Ashok K. Jain, *Constitutional Law of India (Part-II)* 235 (Axcnt Publications, Delhi, 2nd edn., 2009).

Lastly, the writ jurisdiction of the Supreme Court shall be enlarged by the conferring upon the Supreme Court to issue writ for any other purposes also apart from cases related to infringement of fundamental rights by resorting to enabling provision under Article 139 of the Indian Constitution.

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