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Paper : ADVANCED CONSTITUTIONAL LAW

Module : FUNDAMENTAL RIGHTS AND THEIR ENFORCEABILITY



Component - I - Personal Details

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Component - I (B) Description of Module

	Description of Module
Subject Name	Law
Paper Name	Advanced Constitutional Law
Module Name/Title	Fundamental Rights and their Enforceability
Pre-requisites	Basic awareness of the concept of Fundamental Rights as enshrined in the Constitution of India.
Objectives	To elaborate the concept of Fundamental Rights with specific reference to their enforcement
Keywords	Fundamental Rights, Constitution of India



Module : 6- Fundamental Rights and their Enforceability

Structure:

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- 3. Origin of the Concept of Fundamental Rights**
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1. Introduction

Fundamental Rights are essential for the moral and material development of the people. It is fundamental rights which help develop the people's best self and personality. These rights are



guaranteed by the Constitution of India. Moreover, these rights are justifiable too. The Constitution provides for the courts to protect and safeguard them in case of any infringement. The concept of Fundamental Rights, being indispensable for the full and complete development of the human personality, has been discussed at length under this Chapter.

2. Learning Outcomes

After going through this unit, you will be able to:

- Understand the history behind Fundamental Rights as incorporated in the Indian Constitution and the need for incorporation of Fundamental Rights in the Constitution of India.
- Discuss the concept of Fundamental Rights.
- Analyse the question of enforceability of Fundamental Rights.
- Understand the situations as to when Fundamental Rights may not be invoked.

3. Origin of the Concept of Fundamental Rights

The *Magna Carta*, which traces its origin in as early as 1215, is the first written document assuring the then ancient liberties to the English people. Thereafter, from time to time, the King had to accede to many rights to his subjects. Since the 17th century, human thinking has been veering round the theory that man has certain essential, basic, natural and inalienable rights or freedoms and it is the function of the State, in order that human liberty may be preserved, human personality developed, and an effective social and democratic life promoted, to recognize these rights and freedoms and allow them a free play.¹ In France, the *Declaration of the Rights of Man and the Citizen* (1789), which was a fundamental document pertaining to the history of human rights, declared the natural, inalienable and sacred rights of man. The modern trend of guaranteeing fundamental rights to the people may be traced to the Constitution of the United States of America drafted in 1787.² Therefore, following the spirit of the *Magna Carta* of the British and the *Declaration of the Rights of Man and the Citizen*, America incorporated the *Bill of Rights* in its Constitution. The United States Constitution was the first modern Constitution to give concrete shape to the concept of human rights by putting them in to the Constitution and making them justiciable and enforceable through the instrumentality of the courts.³ The Government of India Act, 1935, on which the present Indian Constitution is substantially based, embodied several prohibitions against discrimination; but they fell short of a comprehensive *Bill of Rights*, the enactment of which was, indeed, expressly rejected when the Bill was before

¹ M.P.Jain, *Indian Constitutional Law* (5th Edition, Wadhwa and Company Nagpur 2007) 827.

² Jain (n 1) 828.

³ Jain (n 2).



Parliament.⁴ What was rejected by the United Kingdom Parliament in 1935 commended itself to the framers of the Constitution of independent India.⁵ The framers of the Indian Constitution took inspiration from the *Bill of Rights* of U.S.A and incorporated a full chapter in the Constitution dealing with Fundamental Rights. But, the declaration of the Fundamental Rights in the Indian Constitution is the most elaborate and comprehensive yet framed by any State. The inclusion of a Chapter of Fundamental Rights in the Constitution of India is in accordance with the trend of modern democratic thought, the idea being to preserve that which is an indispensable condition of a free society.

4. Concept of Fundamental Rights

Fundamental rights are regarded fundamental because they are the most essential for the attainment of the full intellectual, moral and spiritual well-being of a person. Any negation of such rights will result in under-development of the potentialities of the citizens. The declaration of human rights in the Constitution serves as a reminder to the government in power that certain liberties assured to the people by the Constitution are to be respected and given due consideration.

Speaking about the importance of fundamental rights in the historic judgment of *Maneka Gandhi vs. Union of India*⁶, Bhagwati, J., observed: “These fundamental rights represent the basic values cherished by the people of this country (India) since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a ‘pattern of guarantee’ on the basic structure of human rights, and impose negative obligations on the State not to encroach on individual liberty in its various dimensions”.

5. Object behind Incorporation of Fundamental Rights in the Constitution

In modern times, it is widely accepted that the right to liberty is the very essence of a free society and it must be safeguarded at all times. The idea of guaranteeing certain rights is to ensure that a person may have minimum guaranteed freedom.

In India, a few good reasons made the enunciation of the Fundamental Rights in the Constitution rather inevitable.⁷ For one thing, the main political party, the Congress having suffered long incarceration during the British regime, had long been demanding these rights. Secondly, the Indian society was fragmented into many religious, cultural and linguistic groups, and it was necessary to declare fundamental rights to give to the people a sense of security and confidence. Therefore, it was considered necessary that people should have some rights which may be enforced against an arbitrary government. There was a danger that the majority in the legislature

⁴Alan Gledhill, ‘Fundamental Rights in India’ Review by: S. A. de Smith’ (1957) Vol. 20, No. 1 The Modern Law Review <<http://www.jstor.org/stable/1091694>> accessed 3 June 2014.

⁵ *Ibid.*

⁶ AIR 1978 SC 597 at 619.

⁷ Jain (n 1) 831.



may enact laws which may be oppressive to individuals or minority groups and such a danger could be minimized by having a Bill of Rights in the Constitution.⁸

In other words, the decision of the framers of the Constitution to incorporate Fundamental Rights was influenced by factors such as-consciousness of the massive character of minority problems in India, memories of the protracted struggle against government under British rule, acknowledgment of Gandhian ideals, of the climate of international opinion and of American experience.⁹

The Supreme Court has observed¹⁰, the purpose of enumerating fundamental rights in the Constitution “is to safeguard the basic human rights from the vicissitudes of political controversy and to place them beyond the reach of the political parties, who, by virtue of their majority may come to form the government at the centre or in the State”. Therefore, the underlying idea in entrenching certain basic and fundamental rights is to take them out of the reach of transient political majorities. It has, therefore, come to be regarded as essential that these rights be entrenched in such a way that they may not be violated, tampered or interfered with by an oppressive government. With this end in view, some written Constitutions guarantee a few rights to the people and forbid government organs from interfering with the same.¹¹

The object behind the inclusion of the Chapter on Fundamental Rights in the Indian Constitution is to establish rule of law. Fundamental Rights are a necessary consequence of the declaration in the Preamble to the Constitution that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and a secure to all its citizens justice, social, economic, and political; liberty of thought, expression, belief, faith and worship; equality of status and opportunity.¹²

6. Enforcement of Fundamental Rights

Article 13 gives teeth to the fundamental rights and makes them justiciable. The effect of Article 13 is that the fundamental rights cannot be infringed by the Government by enacting a law.

Article 13(1) declares that all pre-Constitution laws shall be void to the extent of their inconsistency with the Fundamental Rights. The said Article deals with pre-Constitution laws; if any such law is inconsistent with a Fundamental Right, it becomes void with effect from 26-1-50, the date on which the Constitution of India came into force.

According to Art.13(2), the State ‘shall not make any law’ which takes away or abridges the Fundamental Rights; and a law contravening a Fundamental Right is, to the extent of the contravention, void.

Article 13(2) is a crucial constitutional provision which deals with the post-Constitution laws. If any such law violates any Fundamental Right it becomes void *ab initio*, i.e., from its inception. The effect of Article 13(2), thus, is that no fundamental right can be infringed by the State either

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Chairman, Rly. Board vs. Chandrima Das*, AIR 2000 SC 988, 997.

¹¹ *Jain* (n 1) 827.

¹² *Jain* (n 1) 831.



by legislative or administrative action. Therefore, Article 13 makes the judiciary, and especially the Apex Court, as the guardian, protector and interpreter of Fundamental Rights. The judiciary has been given the power to declare unconstitutional and void, any law which comes in conflict with a Fundamental Right. The Supreme Court has figuratively characterized this role of the courts as that of a ‘sentinel on the *qui vive*’.¹³ The Supreme Court has further bolstered its protective role under Article 13(2) by laying down the proposition that judicial review is the ‘basic feature’ of the Constitution.¹⁴ This means that the power of judicial review cannot be curtailed or evaded by any future Constitutional amendment. Protection of the institution of judicial review is crucially inter-connected with the protection of fundamental rights, for depriving the Supreme Court and other courts of their power of judicial review would mean that the fundamental rights become non-enforceable, “a mere adornment”, as they will become rights without remedy.¹⁵

7. Remedy for the Enforcement of Fundamental Rights: Article 32



A mere enumeration of rights, even in the most elaborate and meticulously worded form, is not enough.¹⁶ A declaration of fundamental rights is meaningless unless there is an effective machinery for the enforcement of the rights. It is the remedy which makes the right real. If there is no remedy there is no right at all. It was, therefore, in the fitness of 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. Article 32 confers one of the “highly cherished rights”.¹⁷ It confers the right to move the Supreme Court for the enforcement of the Fundamental Rights. Article 32 provides for the last of the fundamental rights. Unlike other rights, it is remedial and not substantive in nature. So, if and when a person feels that he is unduly deprived of any of the fundamental rights, he can, under Article 32 of our Constitution, move the Supreme Court for a legal remedy.¹⁸ Article 32 is itself a fundamental right. Article

¹³ *State of Madras vs. V.G.Row*, AIR 1952 SC 196

¹⁴ See *Kesavananda Bharti vs. State of Kerala* AIR 1973 SC 1461; *Minerva Mills vs. Union of India* AIR 1980 SC 1789.

¹⁵ Jain (n 1) 835.

¹⁶ Nirmalendu Bikash Rakshit, ‘Right to Constitutional Remedy: Significance of Article 32’ (1999) Vol. 34, No. 34/35 Economic and Political Weekly <<http://www.jstor.org/stable/4408327>> accessed 3 June 2014.

¹⁷ *Fertilizer Corporation Kamgar Union vs. Union of India*, AIR 1981 SC 344.

¹⁸ Rakshit (n 16).



226 also empowers all the High Courts to issue the writs for the enforcement of fundamental rights.

In the words of Dr. Ambedkar:¹⁹

“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.”

Clause (1)

Article 32 (1): The right to move the Supreme Court by appropriate proceedings for the enforcement of rights conferred by this Part is guaranteed.

Under the above Clause, the Supreme Court’s power to enforce fundamental rights is the widest. There is no limitation in regard to the kind of proceedings envisaged in Art. 32(1) except that the proceeding must be “*appropriate*” and this requirement must be judged in the light of the purpose for which the proceeding is to be taken, namely, enforcement of the fundamental rights. Therefore, the word ‘appropriate’ does not refer to any form but to the purpose of the proceeding. Hence, so long as the purpose of the proceeding is enforcement of a fundamental right, it is appropriate and when it relates to the enforcement of the fundamental rights of poor, disabled or ignorant by a public spirited person “even a letter addressed by him (to the Court) can legitimately be regarded as an ‘appropriate’ proceeding.”²⁰ Moreover, it is not obligatory for the Court to follow adversary system; they can be inquisitorial proceedings also.²¹ The Constitution-makers deliberately did not lay down any particular form of proceeding for enforcement of fundamental right nor did they stipulate that such proceeding should conform 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 rigid formula of proceeding for enforcement of fundamental right would become self – defeating.²²

What should be the appropriate remedy to be given to the petitioner for the enforcement of the fundamental right sought to be vindicated is a matter for the Court to decide under Article 32.²³ Article 32 gives very wide discretion in the matter of framing writs to suit the exigencies of particular cases and the application of the petitioner cannot be thrown out simply on the ground that the proper writ or direction has not been prayed for.²⁴

The Supreme Court has emphasized in *Romesh Thappar*²⁵ that “this Court is thus constituted the protector and guarantor of the Fundamental Rights, and it cannot consistently with the responsibility so laid upon it, refuse to entertain application seeking protection against infringement of such rights.”

¹⁹ Constituent Assembly Debates, Vol.VII, 953.

²⁰ *Bandua Mukti Morcha vs. Union of India*, AIR 1984 SC 802.

²¹ *Ibid.*

²² *S.P.Gupta & Others. vs. President of India and Others*, AIR 1982 SC 149.

²³ *Kanu Sanyal vs. Distt. Magistrate, Darjeeling*, AIR 1973 SC 2684.

²⁴ *Chiranjeet Lal Chowdhury vs. Union of India*, AIR 1951 SC 41,53.

²⁵ *Romesh Thappar vs. State of Madras*, AIR 1950 SC 124.



The Supreme Court under Art. 32(1) can, while considering a petition for the enforcement of a Fundamental Right, declare an Act to be *ultra vires*, or beyond the competence of the enacting legislature, if it adversely affects a Fundamental Right.²⁶

Clause (2)

Article 32(2): the Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo-warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

Clause (2) of Article 32 confers power on the Supreme Court to issue appropriate directions or orders 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. The five writs specifically mentioned in Clause (2) are known as prerogative writs in English Law. The language of Clause (2) is wide and does not confine the power of the Court to issuing of prerogative writs only.

It is to be noted here that the power has been given to issue appropriate directions, orders or writs. The writs which the Supreme Court can issue include the writs in the nature of the five writs mentioned in Article 32- *habeas corpus*, *mandamus*, *prohibition*, *quo-warranto* and *certiorari*. The power of the Supreme Court in Clause(2) is not confined only to these five writs only. It extends to issuing of any directions or orders that may be appropriate for the enforcement of any of the fundamental rights.

Clause (3)

Art.32(3): Without prejudice to the powers conferred on the Supreme Court, Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under Clause (2).

Article 32 provides for an expeditious and inexpensive remedy for the protection of fundamental rights from legislative and executive interference.²⁷ It is important to note that the Constitution itself empowers every High Court throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority within those territories, directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo-warranto* and *certiorari* or any of them for the enforcement of the rights conferred by Part III. The power conferred on the High Courts or to be conferred on any other Court under this Clause is not in derogation of the power conferred on the Supreme Court by Clause (2) of Article 32.

Clause (4)

Art.32(4): The right guaranteed by this Article shall not be suspended except as otherwise provided for by this Constitution.

²⁷ Constitution Assembly Debates(C.A.D) Vol. VII at 953.



It is to be noted that emergency has a debilitating effect on the rights of the people in a democratic country. For example, in the U.S.A., which has constitutionally guaranteed Fundamental Right comparable to those in India, the privilege of the writ of *habeas corpus* can be suspended when in case of rebellion or invasion, public interest requires it.²⁸ The courts can, however, determine whether conditions have arisen to justify the suspension of *habeas corpus*. No other Fundamental Right can be suspended in the U.S.A., but during an emergency, courts do give somewhat restrictive interpretation to these rights than do during the normal days.²⁹

In Britain, during the two world wars, drastic discretionary powers were conferred on the Executive to interfere with the rights of property and person of the people. This drastic interference with people's rights received judicial sanction in several cases. The theory is that when the country is engaged in a war of survival, the people also go down.³⁰

In India, Clause (4) of Article 32 of the Constitution of India also provides for an exception to the right guaranteed under Article 32(1). When the President proclaims an emergency under Article 352, the provision for guaranteed remedy of fundamental rights remains suspended.³¹ In such times, the President may, under Article 358, make a separate proclamation by which Article 32 remains suspended.³² In other words, an individual cannot, during such emergency, move the Supreme Court, even if he feels that he has been unduly deprived of the Fundamental Right guaranteed by the Constitution.³³ Obviously, it is a black spot on the fair face of the Constitution which claims to stand for democracy and freedom.³⁴ But, B R Ambedkar, the chief architect of the Constitution, observed in the constituent assembly that the interests of the state as a whole are of much greater importance than those of the individual and, hence, individual liberty cannot be allowed to destroy the very fabric of national security. He observed, "...it is equally clear that in certain cases, where, for example, the state's very life is in jeopardy, these rights must be subject to a certain amount of limitations". Particularly, the Constitution was drafted during a period of horrid ordeal marked by war, infiltration, partition, communal riots and other subversive activities.³⁵ This is why, the makers felt that during an emergency, the enforcement of fundamental rights should remain suspended because the unrestrained right of the individual might, in such times, endanger the security of the nation as a whole.³⁶ But, in normal times, fundamental rights seem to be 'fundamental'.³⁷

In India, a proclamation of emergency under Art. 352 effects the Fundamental Rights of the people very drastically. The impact of emergency on the Fundamental Rights is much more pervasive in India than is the case in the U.S.A.³⁸

²⁸ Art.I, S.9, Cl.2 of the U.S.Constitution.

²⁹ *Schenck vs. U.S.*, 246 U.S. 47; *Korematsu vs. U.S.*, 323 U.S. 214.

³⁰ *Rex vs. Halliday*, (1917) AC 260; *Liversidge vs. Anderson*, (1942) AC 206.

³¹ Rakshit (n 16).

³² H H Das, *Principles of Indian Constitution and Government* (Himalaya Publishing House 1996) 136.

³³ Rakshit (n 16).

³⁴ M V Pylee, *An Introduction to the Constitution of India* (5th Edition, Vikas Publication House Pvt Ltd 2007) 117.

³⁵ D.D.Basu, *Introduction to the Constitution of India* (21st Edition, Lexis Nexis 2013) 100.

³⁶ Rakshit (n 16).

³⁷ *Ibid.*

³⁸ Jain (n 1) 1340.



It is clear from the above discussion that whenever there is a violation of a fundamental right, any person can move the Court for an appropriate remedy. Under Art. 32, the Supreme Court enjoys a broad discretion in the matter of framing the writs to suit the exigencies of a particular case and the application of the Court's power is not confined to issuing writs only: it can make any order including even a declaratory order, or give any direction, as may appear to it to be necessary to give proper relief to the petitioner.³⁹

The purpose for which Art. 32 can be invoked is to enforce Fundamental Rights. Violation of a Fundamental Right is *sine qua non* of the exercise of the right conferred by Art. 32.⁴⁰ Therefore, Art 32 can be invoked only when there is an infringement of a Fundamental Right. In order to enforce a Fundamental Right, judicial review of administrative, legislative and governmental action or non-action is permissible. But, Art. 32 cannot be invoked simply to adjudge the validity of any legislation or an administrative action unless it adversely affects petitioner's Fundamental Rights.⁴¹

Thus, as the judicial sentinel of fundamental rights, the Supreme Court is equipped with some constitutional weapons, known as 'writs', for the enforcement of the following such rights.

(i) First, the writ of *Habeas Corpus* (meaning 'you may have the body') may be issued in order to set free a person who is, in the opinion of the court, arbitrarily arrested or detained by the executive authority. It is a process by which a person who is confined without legal justification may secure a release from his confinement. This writ is, in form, an order issued by the High Court calling upon the person by whom a person is alleged to be kept in confinement to bring such person before the Court and to let the Court know on what ground the person is confined. If there is no legal justification for the detention, the person is ordered to be released.

(ii) Secondly, there is the writ of *Mandamus*. The Latin word '*Mandamus*' means 'we order'. It is issued against a public authority who is under a legal duty to do or forbear to do something, in the performance of which the petitioner has a legal right. The Supreme Court can issue this writ for the reason of directing an inferior court or department to do the needful for protecting or maintaining a Fundamental Right. It is normally used for public purposes to enforce performance of public duties. But the court often enforces some private rights when they are withheld by the public officers. The writ actually demands some activity on the part of the body or person to whom it is addressed. Whenever a public officer or the government has done an act which violates the Fundamental Right of a person, the court can issue this writ restraining that officer or the government from enforcing that order. A writ of *Mandamus* is, thus, a command issued by a Court asking a public authority to perform a public duty belonging to his office.

(iii) Thirdly, the Supreme Court sometimes issues the writ of '*prohibition*' for preventing an inferior court from doing something which it is not legally competent to do. It prevents a tribunal possessing judicial or *quasi-judicial* powers from assuming or threatening to assume jurisdiction

³⁹ *Kochunni vs. State of Madras*, AIR 1959 SC 725 at 733.

⁴⁰ *Federation of Bar Association of Karnataka vs. Union of India*, AIR 2000 SC 2544.

⁴¹ *Shantabai vs. State of Maharashtra*, AIR 1958 SC 532.



which it does not possess. Thus, the writ lies both for excess of jurisdiction and absence of jurisdiction.⁴²

(iv) Fourthly, there is another writ known as '*certiorari*' which literally means "to certify". It is a remedial writ and is issued to quash an order or decision which has been made without jurisdiction or in violation of the principles of natural justice. It is, therefore, issued after the completion of the proceeding. With the weapon of *Certiorari*, the Supreme Court has the power to remove a case from an inferior court to a superior court in order to protect a Fundamental Right. Both *certiorari* and *prohibition* have much in common, both in their scope and in rules by which they are governed. Both these writs lie against a judicial or quasi-judicial body but not against an executive body. However, there is one fundamental distinction between the two writs. They are issued at different stages of the proceedings. When an inferior Court takes up for hearing a matter over which it has no jurisdiction, the person against whom the proceedings are taken can move the superior Court for a writ of *prohibition*, and on that, an order will issue forbidding the inferior Court from continuing the proceedings. On the other hand, if the Court hears that case or matter and gives a decision, the party aggrieved will have to move the superior Court for a writ of *certiorari*, and on that, an order will be made quashing the decision on the ground of want of jurisdiction. Sometimes, the two writs may overlap. Thus, it may happen that in a proceeding before an inferior Court, a decision might have been passed which does not completely dispose of the matter, in which case it might be necessary to apply both for *certiorari* and *prohibition* – *certiorari* for quashing what has been decided, and *prohibition* for arresting the further continuance of the proceedings.

(v) Lastly, with the help of '*quo warranto*', the Supreme Court can protect a Fundamental Right from being violated by a government order based upon favouritism. The object of this writ is to prevent a person who has wrongfully usurped an office from continuing in that office.⁴³ For instance, if a person is unduly promoted by superseding his seniors, the Supreme Court can, by such writ, quash the order of such appointment for protecting the Right to Equality as guaranteed by Article 14 and Article 16. The aggrieved person, may, however, seek a particular writ to be issued, but it is the Supreme Court which will decide what writ will be appropriate in a particular case. In other words, it is the judges, and not the petitioner, who will actually determine the nature of the writs to be issued in a particular case.⁴⁴

8. Alternative Remedy

Article 32 is in itself, a fundamental right and therefore the existence of an alternative remedy is no bar to the Supreme Court entertaining a petition under Article 32 for the enforcement of a Fundamental Right.⁴⁵

⁴² S.Govinda Menon vs. Union of India, AIR 1967 SC 1274.

⁴³ *University of Mysore vs. Govinda Rao*, AIR 1965 SC 491.

⁴⁴ Rakshit (n 16).

⁴⁵ Jain (n 1) 1310.



Where once the Court is satisfied that the petitioner's Fundamental Right has been infringed, it is not only its right but also its duty to afford relief to the petitioner and he need not establish either that he has no other alternative remedy, or that he has exhausted all the remedies provided by law, but had not obtained proper redress. Where the petitioner establishes infringement of his Fundamental Right, the Court has no discretion but to issue an appropriate writ in his favour.⁴⁶

9. Against Whom A Writ Can Be Issued?

The rights which are conferred upon the citizens by way of fundamental rights as included in Part III of the Constitution are a guarantee against State action as distinguished from violation of such rights by private persons. Article 12 of the Constitution defines the term 'State' as used in different Articles of Part III of the Constitution. It states that unless the context otherwise requires, the term 'State' includes the following:

1. The Government and Parliament of India, i.e., the Executive and Legislature of the Union.
2. The Government and the Legislature of each State, i.e., Executive and Legislature of States.
3. All local or other authorities within the territory of India.
4. All local and other authorities under the control of Government of India.

The term 'State' thus includes the executive as well as the legislative organs of the Union as well as the States as well as all local and other authorities within the territory of India or under the control of Government of India. It is, therefore, the actions of these bodies that can be challenged before the Courts as violating Fundamental Rights.

The most significant expression used in Art.12 is "other authorities". This expression is not defined in the Constitution. It is, therefore, for the Supreme Court as the Apex Court to define this term. It is obvious that wider the meaning attributed to the term "other authorities" in Art.12, wider will be the coverage of the Fundamental Rights, i.e., more and more bodies can be brought within the discipline of Fundamental Rights.⁴⁷

The interpretation of the term 'other authorities' in Art.12 has caused a good deal of difficulty, and judicial opinion has undergone changes over time.

Any autonomous body may be a statutory body, i.e., a body set up directly by a statute, or it may be a non-statutory body, i.e., a body registered under a general law. Questions have been raised whether such bodies may included within the coverage of Art.12. The Supreme Court has developed the concept of an "instrumentality" of the State. Any body which can be regarded as an "instrumentality" of the State falls under Art.12. The reason for adopting such a broad view of Art.12 is that Constitution should, whenever possible, "be so construed as to apply to arbitrary application of power against individuals by centres of power. The emerging principle appears to be that a public corporation because a creation of the State is subject to the constitutional limitation as the State itself".⁴⁸ Further, that "the governing power wherever located must be subject to the fundamental constitutional limitations".⁴⁹

⁴⁶ *Daryao v. State of U.P.*, AIR 1961 SC 1457.

⁴⁷ Jain (n 1) 837.

⁴⁸ Mathew, J., in *Sukhdev vs. Bhagatram*, AIR 1975 SC 1331.

⁴⁹ *Ibid.* p.1352.



The question was considered more thoroughly in *Ramanna D. Shetty v. International Airport Authority*,⁵⁰ in which the International Airport Authority, a statutory body, was held to be an “authority”. The Supreme Court also developed the general proposition that an ‘instrumentality’ or ‘agency’ of the government would be regarded as an ‘authority’ or ‘state’ within Art.12 and laid down some tests to determine whether a body could be regarded as an instrumentality or not. Where a corporation is an instrumentality or agency of the government, it would be subject to the same constitutional or public law limitation as the government itself. In this case, the Court was enforcing the mandate of Art.14 against the Corporation.

In *Ajay Hasia*,⁵¹ the Supreme Court laid down the following tests to adjudge whether a body is an instrumentality of the government or not:

- (1) If the entire share capital of the body is held by the government, it goes a long way towards indicating that the body is an instrumentality of the government.
- (2) Where the financial assistance given by the government is so large as to meet almost the entire expenditure of the body, it may indicate that the body is impregnated with governmental character.
- (3) It is a relevant factor if the body enjoys monopoly status which is conferred or protected by the State.
- (4) Existence of deep and pervasive state control may afford an indication that the body is a State instrumentality.
- (5) If the functions performed by the body are of public importance and closely related to governmental functions, it is a relevant factor to treat the body as an instrumentality of the government.

The expression ‘local authority’ in Art.12 refers to a unit of local self-government like a municipal committee or a village panchayat.⁵² The Supreme Court in *Union of India vs. R.C.Jain*,⁵³ has ruled that to be characterized as a ‘local authority’, the authority concerned must have a separate legal existence as a corporate body, it must not be merely a government agency but must be legally an independent entity; it must function in a defined area and must ordinarily, wholly or partly, directly or indirectly, be elected by the inhabitants of the area. It must enjoy a certain degree of autonomy, either complete or partial, must be entrusted by Statute with such governmental functions and duties as are usually entrusted to municipal bodies such as those connected with providing amenities to the inhabitants of the locality. Finally, such a body must have the power to raise funds for furtherance of its activities and fulfillment of its objectives by levying taxes, rates, charges or fees. In the instant case, the Delhi Development Authority, a statutory body was held to a ‘local authority’ because it was constituted for the specific purpose of development of Delhi according to plan which is ordinarily a municipal function.⁵⁴

Therefore, by and large Fundamental Rights are enforceable against the state. There are a few Fundamental Rights, such as, under Arts. 17, 21, 23, or 24 which are also available against

⁵⁰ AIR 1979 SC 1628.

⁵¹ *Ajay Hasia vs. Khalid Mujib*, AIR 1981 SC 487.

⁵² *Ajit Singh vs. State of Punjab*, AIR 1967 SC 856.

⁵³ AIR 1981 SC 951.

⁵⁴ Also see, *Premjibhai Parmar vs. Delhi Development Authority*, AIR 1980 SC 738.



private persons. In case of violation of any such right, the Court can make appropriate orders against violation of such rights by private persons.

10. Who Can Apply?

Art. 32 does not prescribe the persons or classes of persons who can invoke the Supreme Court's jurisdiction for the redressal of their grievances. The matter of 'standing' thus lies within the realm of the Supreme Court.⁵⁵

The general principle is that a person whose Fundamental Right has been infringed has *locus standi* to move the Supreme Court under Art. 32 for the enforcement of his right. A person whose Fundamental Right is affected has standing to file a petition under Art. 32.⁵⁶ Therefore, the traditional rule is that the right to move the Supreme Court is only available to those whose fundamental rights are infringed. The power vested in the Supreme Court can only be exercised for the enforcement of fundamental rights. The writ under which the remedy is asked under Article 32 must be correlated to one of the fundamental rights sought to be enforced. The remedy must be sought through appropriate proceedings.

The legal right to be enforced under Art 32 must ordinarily be the right of the petitioner himself. As rights are different and inhere in different legal entities, it is not competent to a person to seek to enforce the rights of another except when the law permits him to do so. This principle emanates from the theory that the remedies and rights are correlative and, therefore, only a person whose own right is in jeopardy is entitled to seek a remedy.⁵⁷

Since a corporation has a distinct legal personality of its own, with rights and duties separate from those of its individual members, a shareholder cannot complain against a law which affects the Fundamental Right of the corporation except to the extent that it infringes him own Fundamental Right as well.⁵⁸

A well – known exception to this principle, however, is a petition for a writ of habeas corpus which can be made not only by the person who is imprisoned or detained but by any person, provided he is not a complete stranger, for liberating a person from an illegal imprisonment.⁵⁹

11. Public Interest Litigation

The above-mentioned traditional rule of *locus standi* that a petition under Article 32 can only be filed by a person whose fundamental right is infringed has now been considerably relaxed by the Supreme Court in its recent rulings. The Court now permits public interest litigations or social interest litigations at the instance of 'public spirited citizens' for the enforcement of Constitutional and other legal rights of any person or group of persons who by reason of their poverty or socially or economically disadvantaged position, are unable to approach the Court for relief.

⁵⁵ Jain (n 1) 1320.

⁵⁶ *Ibid.*

⁵⁷ Jain (n 1) 1320.

⁵⁸ *Chiranjit Lal vs. Union of India*, AIR 1951 SC 41.

⁵⁹ See, *Sunil Batra vs. Delhi Administration(II)*, AIR 1980 SC 1579.



In *A.B.S.K. Sangh (Rly) v. Union of India*,⁶⁰ it was held that the Akhil Bhartiya Soshit Karmachari Sangh (Railway), though an unregistered association could maintain a writ petition under Art . 32 for the redressal of a common grievance. Access to justice through ‘class actions’, public interest litigation’ and ‘representative proceedings’ is the present constitutional jurisprudence, Krishna Iyer, J., declared.

In the *Judges Transfer case*,⁶¹ a 7-member Bench of the Supreme Court has firmly established the rule regarding public interest litigation. The Court held that any member of the public having “sufficient interest” can approach the Court for enforcing constitutional or legal rights of other persons and redressal of common grievance.

However, while expanding the scope of the ‘*Locus standi*’ rules, his Lordship Bhagwati, J. (as he then was) expressed a note of caution also. He observed:

“But we must be careful to see that the member of the public, who approaches the court in case of this kind, is acting bona fide and not for personal gain or private profit or political motivation or other oblique consideration. The court must not allow its process to be abused by politicians and others.....”

This observation makes it clear that his Lordship was aware that this liberal rule of ‘*locus standi*’ might be misused by vested interests. He, therefore, made it clear that in that case the court will not allow the remedy to be abused.

In *State of Uttaranchal v. Balwant Singh Chauhal*,⁶² the Supreme Court has reiterated the detail of the origin and development of PIL and has laid down important guidelines for checking its misuse. In order to preserve the purity and sanctity of the PIL the court issued following directions:

1. The Court must encourage genuine and *bona fide* PIL and effectively discourage and curb PIL filed for extraneous considerations.
2. Instead of every individual judge devising his own procedure of dealing with the PIL it would be appropriate for each High Court to properly formulate rules for encouraging the genuine PIL and discouraging PIL filed for oblique motives. The High Courts which have not yet framed rules should frame rules within three months. The Registrar General of each High Court must ensure that a copy of the rules prepared by the High Court is sent to the Secretary General of the Supreme Court immediately thereafter.
3. The Courts should *prima facie* verify the credentials of the petitioner before entertaining a PIL.
4. The Court should be *prima facie* satisfied regarding the correctness of the contents of the petition before entertaining a PIL.
5. The Court should be fully satisfied that substantial public interest is involved before entertaining a PIL.
6. The Court should ensure that the petition involves larger public interest, gravity and must be given priority over other petitions.

⁶⁰ AIR 1981 SC 298.

⁶¹ *S.P.Gupta & Others vs. President of India and Others*, AIR 1982 SC 149.

⁶² AIR 2010 SC 2551.



7. The Court should ensure before entertaining a PIL that it is aimed at redressal of genuine public injury. The Court should also ensure that there is no personal gain, private motive or oblique motive behind filing the PIL.
8. The Court should also ensure the petition filed by anybody for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curd frivolous petitions filed for extraneous considerations.

The range and scope of PIL is vast as it is a mechanism to agitate any socio-economic issue before the Court which can be brought within the legal and constitutional mould.⁶³ PIL is the result of judicial activism. No effective mechanism is in place for the redressal of public grievances against the Administration. Therefore, an aggrieved person has no alternative but to take recourse to the courts for the redressal of his grievance against the Administration.⁶⁴

12. Distinction Between Article 32 And 226

It is to be noted that under Article 226, the High Courts have also been given the power of issuing writs in the nature of *habeas corpus* etc. Therefore, in the matter of enforcement of fundamental rights, the High Courts under Art. 226 and the Supreme Court under Article 32, enjoy concurrent jurisdiction. The difference in the phraseology of Arts. 32 and 226 brings out the marked difference in the nature and purpose of the right conferred by these Articles. Whereas the right guaranteed by Art.32 can be exercised for the enforcement of fundamental rights only, the right conferred by Art.226 can be exercised not only for the enforcement of fundamental rights but for “any other purpose”. Thus, the power of the High Court is wider than the power to issue writs not only for the enforcement of fundamental rights, but for the enforcement of rights other than fundamental rights, whereas Art. 32 can be invoked only for the enforcement of fundamental rights and for no other purpose.

It may be emphasized that a PIL writ petition can be filed in the Supreme Court under Art. 32 only if a question concerning the enforcement of a Fundamental Right is involved whereas under Art. 226, a writ petition can be filed in a High Court whether or not a Fundamental Right is involved.

A question has been raised whether a petitioner seeking to enforce his fundamental rights can go straight to the Supreme Court under Art.32, or should he first go to a High Court under Art.226. As early as 1950, in *Romesh Thapar*, the Supreme Court ruled that such a petitioner can come straight to the Supreme Court without going to the High Court first. The Court stated that unlike Art.226, Art.32 confers a fundamental right on the individual and imposes an obligation on the Supreme Court which it must discharge when a person complains of the infringement of a Fundamental Right. Article 32 provides a guaranteed remedy for the enforcement of the Fundamental Rights and constitutes the Supreme Court as the “guarantor and protector of

⁶³ Some of the important PIL cases, *inter-alia*, which have come before the High Courts and the Supreme Court are: *Rural Litigation and Entitlement Kendra, Dehradun vs. State of Uttar Pradesh*, AIR 1985 SC 652; *Indra Sawhney vs. Union of India*, *Naramada Bhachao Andolan vs. Union of India*, (2000) 10 SCC 664; *S.Jagannath vs. Union of India*, AIR 1997 SC 811.

⁶⁴ Jain (n 1) 1330.



fundamental rights”. This proposition has been reiterated by the Supreme Court in a number of cases.⁶⁵

This continued to be the position till 1987 when a two Judge Bench of the Supreme Court ruled in *Kanubhai*⁶⁶, that a petitioner complaining of infraction of his fundamental right should approach the High Court first rather than the Supreme Court in the first instance. The reason given for this view was that there was a huge backlog of cases pending before the Supreme Court. Since, it is a view expressed by a two Judge Bench, it cannot be considered to be an authoritative pronouncement on an important constitutional issue, viz., inter-relationship between Arts.32 and 226. Such a vital pronouncement could be made only by a Constitution Bench consisting of at least 5 Judges, especially, when the long established position is sought to be overturned. The ruling in *Kanubhai* seeks to negate what the Supreme Court has itself said in a number of cases during the last four decades emphasizing upon the significance of Art.32, and the role assigned to it thereunder.⁶⁷

In practice, it seems that the *Kanubhai announcement* has had no effect on the existing practice and the writ petitions continue to be filed in the Supreme Court under Art. 32 without going to the High Court under Art.226.⁶⁸

13. Res Judicata

When a writ petition under Art. 226 has been dismissed by the High Court, another writ petition under Art. 32 cannot be moved in the Supreme Court, to seek redress in the same matter.⁶⁹ The principal of *res judicata* envisages that if a judgment has been pronounced by a Court of competent jurisdiction, it is binding between the parties unless it is reversed or modified in appeal, revision or other procedure prescribed by law.⁷⁰ According to the Supreme Court, the jurisdiction of a High Court in dealing with a writ petition under Art. 226 is substantially the same as that of the Supreme Court under Art. 32. The scope of the writs under both the Articles being concurrent, *res judicata* applies. The High Court’s decision can be attacked in an appeal to the Supreme Court but not through a writ petition.⁷¹

14. Military Law And Fundamental Rights

Art. 33 of the Constitution constitutes an exception to the Fundamental Rights.

A government servant is also entitled to enjoy Fundamental Rights. A person does not lose his Fundamental Rights *ipso facto* by joining government service. But, under Art. 33, Parliament is

⁶⁵ See, for example, *State of Madras vs. V.G.Row*, AIR 1952 SC 124; *K.K.Kochunni vs. State of Madras*, AIR 1959 SC 725; *Kharak Singh vs. State of U.P.*, AIR 1963 SC 1295.

⁶⁶ *Kanubhai Brahmhatt vs. State of Gujarat*, AIR 1987 SC 1159.

⁶⁷ *State of Madras vs. V.G.Row*, AIR 1952 SC 124; *K.K.Kochunni vs. State of Madras*, AIR 1959 SC 725; *Kharak Singh vs. State of U.P.*, AIR 1963 SC 1295.

⁶⁸ Jain (n 1) 1313.

⁶⁹ Jain (n 1) 1315.

⁷⁰ *Ibid.*

⁷¹ *Daryao* (n 46).



endowed with power to restrict or abrogate the Fundamental Rights of a few categories of government servants.⁷²

Art. 33 empowers Parliament to determine, by law, to what extent any of the Fundamental Right shall in its application to –

- (a) the members of the Armed Forces ; or
 - (b) the members of the forces charged with the maintenance of public order; or
 - (c) persons employed in any bureau or other organization established by the state for purpose of intelligence or counter intelligence; or
 - (d) persons employed in, or in connection with the telecommunication systems set up for the purpose of any force, bureau or organization referred to in clauses (a), (b) and (c) ,
- be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them. Art. 33 does not by itself abrogate any rights; its applicability depends upon Parliamentary legislation.

⁷² Jain (n 1) 1330.