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Judicial Control of Administrative Action

It is a admitted fact that the administrative authorities now a days are conferred on wide administrative powers which are required to be controlled otherwise they will become new despots. The Administrative Law aims to find out the ways and means to control the powers of the administrative authorities.

In the context of increased powers for the administration, judicial control has become an important area of administrative law, because Courts have proved more effective and useful than the Legislature or the administration in the matter. "It is an accepted axiom" observed Prof. Jain & Jain that "the real kernel of democracy lies in the Courts enjoying the ultimate authority to restrain all exercise of absolute and arbitrary power. Without some kind of judicial power to control the administrative authorities, there is a danger that they may commit excess and degenerate into arbitrary authorities, and such a development would be inimical to a democratic Constitution and the concept of rule of law. "

Judicial Control (Judicial Remedies).

Judiciary has been given wide powers for controlling the administrative action. The Courts have been given power to review the acts of the legislature and executive (administration) and declare them void in case they are found in violation of the provisions of the Constitution.

In India the modes of judicial control of administrative action can be conveniently grouped into three heads:

(A) Constitutional;

(B) Statutory;

(C) Ordinary or Equitable.

JUDICIAL REVIEW & ITS EXCLUSION

Judicial review, in short, is the authority of the Courts to declare void the acts of the legislature and executive, if they are found in the violation of the provisions of the Constitution. Judicial Review is the power of the highest Court of a jurisdiction to invalidate on Constitutional grounds, the acts of other Government agency within that jurisdiction.

The doctrine of judicial review has been originated and developed by the American Supreme Court, although there is no express provision in the American Constitution for the judicial review. In Marbury v. Madison the Supreme Court made it clear that it had the power of judicial review.

In England there is supremacy of Parliament and therefore, the Act passed or the law made by Parliament cannot be declared to be void by the Court. The function of the judiciary is to ensure that the administration or executive function conforms to the law.

The Constitution of India expressly provides for judicial review. Like U.S.A., there is supremacy of the Constitution of India. Consequently, an Act passed by the legislature is required to be in conformity with the requirements of the Constitution and it is for the judiciary to decide whether or not the Act is in conformity with the Constitutional requirements and if it is found in violation of the Constitutional provisions the Court has to declare it unconstitutional and therefore, void because the Court is bound by its oath to uphold the Constitution.

The Constitution of India, unlike the American Constitution expressly provides for the judicial review. The limits laid down by the Constitution may be express or implied. Articles 13, 245 and 246, etc. provide the express limits of the Constitution.

The provisions of Article 13 are:

Article 13 (1) provides that all laws in force in the territory of India immediately before the commencement of the Constitution of India, in so far as they are inconsistent with the provision of Part III dealing with the fundamental rights shall, to the extent of such inconsistency, be void. Article 13 (2) provides the State Shall not make any law which takes away or abridges the fundamental rights and any law made in contravention of this clause shall, to the extent of the contravention, be void.

Article 245 makes it clear that the legislative powers of Parliament and of the State Legislatures are subject to the provisions of the Constitution. Parliament may make laws for the whole or any part of the territory of India and the legislature of State may make laws for the whole or any part of the State. No law made by Parliament shall be deemed to be invalid on the ground that it would have been extra-territorial operation. The State Legislature can make law only for the State concerned and, therefore, the law made by the state Legislature having operation outside the State would be beyond its competence and, therefore ultra vires and void.

The doctrine of ultra vires has been proved very effective in controlling the delegation of legislative function by the legislature and for making it more effective it is required to be applied more rigorously. Sometimes the Court's attitude is found to be very liberal.

Supreme Court has held that the legislature delegating the legislative power must lay down the legislative policy and guideline regarding the exercise of essential legislative function, which consists of the determination of legislative policy and its formulation as a rule of conduct. Delegation without laying down the legislative policy or standard for the guidance of the delegate will amount to abdication of essential legislative function by the Legislature. The delegation of essential legislative function falls in the category of excessive delegation and such delegation is not permissible.

The power of judicial review controls not only the legislative but also the executive or administrative act. The Court scrutinizes the executive act for determining the issue as to whether it is within the scope of the authority or power conferred on the authority exercising the power. For this purpose the ultra vires rules provides much assistance in the Court. Where the act of the executive or administration is found ultra virus the Constitution or the relevant Act, it is declared ultra virus and, therefore, void. The Courts attitude appears to be stiffer in respect of the discretionary power of the executive or administrative authorities. The Court is not against the vesting of the discretionary power in the executive, but it expects that there would be proper guidelines or normal for the exercise of the power. The Court interferes when the uncontrolled and unguided discretion is vested in the executive or administrative authorities or the repository of the power abuses its discretionary power.

The judicial review is not an appeal from a decision but a review of the manner in which the decision has been made. The judicial review is concerned not with the decision but with the decision making process.

The Supreme Court has expressed the view that in the exercise of the power of judicial review the Court should observe the self-restraint and confine itself the question of legality. Its concern should be:

1. ***Whether a decision making authority exceeding its power?***
2. ***Committed an error of law.***
3. ***Committed a breach of the rules of natural justice.***
4. ***Reached a decision which no reasonable tribunal would have reached, or***
5. ***Abused its power.***

It is not for the Court to determine whether a particular policy or a particular decision taken in the furtherance of the policy is fair. The Court is only concerned with the manner in which those decisions have been taken. The

extents of the duty to act fairly vary from case to case. The aforesaid grounds may be classified as under:

(i) ***Illegality***
(ii) ***Irrationality***
(iii) ***Procedural impropriety.***

Mala fide exercise of power is taken as abuse of power : Mala fides may be taken to mean dishonest intension or corrupt motive. In relation to the exercise of statutory power it may be said to comprise dishonesty (or fraud) and malice. A power is exercised fraudulently. If its repository intends to achieve an object other than that for which he believes the power to have been conferred. The intention may be to promote another public interest or private interest. The burden to prove mala fide is on the person who wants the order to be quashed on the ground of mala fide.

The judicial review is the supervisory jurisdiction.

It is concerned not with the merit of a decision but with the manner in which the decision was made. The court will see that the decision making body acts fairly. It will ensure that the body acts in accordance with the law. Whenever its act is found unreasonable and arbitrary it is declared ultra vires and, therefore, void. In exercising the discretionary power the principles laid down in article 14 of the Constitution have to be kept in view. The power must be only be tested by the application of Waynesburg's principle of reasonableness but must be free from arbitrariness not affected by bias or actuated by mala fides.

The administrative action is subject to judicial review on the ground of **procedural impropriety** also. If the procedural requirement laid down in the statute is mandatory and it is not complied, the exercise of power will be bad. Whether the procedural requirement is mandatory or the Court decides directory. Principles of natural justice also need to be observed. If the order passed by the authority in the exercise of its power affected any person adversely. It is required to observe the principles of natural justice. In case of violation of the principles of natural justice, the order will be held to be void.
The principles of natural justice are treated as part of the constitutional guarantee contained by Article 14 and their violation is taken as the violation of Article 14.

Key points on judicial review

- The jurisdiction of the Supreme Court under Articles 32 and 136 and of High Court under Articles 226 and 227 have been proved of tremendous importance in the preservation and enforcement of the rule of law in India. Any statute cannot exclude the jurisdiction under these Articles.

- In several cases, the Supreme Court has observed that the jurisdiction under Articles 32, 136, 226 and 227 cannot be excluded even where the action of the administration is made final by the Constitutional amendment.

- Judicial review is an unavoidable necessity wherever there is a constant danger of legislative or executive lapses and appealing erosion of ethical standards in the society.

- The judicial review is the basic feature of the Constitution, which has been entrusted to the Constitutional Courts, namely, the Supreme Court of India and High Courts under Article 32 and Articles 226 and 227 respectively. It is the Constitutional duty and responsibility of the Constitutional Courts as assigned under the Constitution, to maintain the balance of power between the Legislature, the Execution, and the judiciary.

- The judicial review is life-breath of constitutionalism. Judicial review passes upon constitutionality of legislative Acts or administrative actions. The Court either would enforce valid Acts/actions or refuse to enforce them when found unconstitutional.

- Judicial review does not concern itself with the merits of the Act or action but of the manner in which it has been done and its effect on constitutionalism. It, thereby, creates harmony between fundamental laws namely, the Constitution and the executive action or legislative Act.

The Supreme Court of India has played significant role in the Constitutional development. The Scope of judicial review in India is sufficient to make the Supreme Court a powerful agency to control the activities of both the legislature and the executive.

In Indira Nehru Gandhi v. Raj Narain, **(A.I.R. 1975 S.C. 2299)** the Supreme Court has held that even where the Constitution itself provides that the action of the administrative authority shall be final. The judicial review provided under Articles 32, 136, 226 and 227 is not barred. Judicial review is the part of the basic structure of the Constitution.

Exclusion of Judicial Review (Ouster clause or finality clause)

Finality clause may be taken to mean a section in the statute, which bars the jurisdiction of the ordinary Courts. The modern legislative tendency is to insert such clause to preclude the Courts from reviewing the law. On account of such tendency the danger of infringing the rights of the individuals is increasing. The rule of law requires that the aggrieved person should have right to approach the court for relief and, therefore, Courts do not appear to have accepted the Court or ouster clause in its face value and have evolved

several rules to waive such clauses for providing justice to the aggrieved person.

Extent of Judicial Exclusion.

The jurisdiction of the Courts is excluded in several ways. Exclusive may be express or implied.
For example S.2 of the Foreigners act, 1946 may be mentioned as an example of express exclusion. It provides that the action taken under the act shall not be called in question in any legal proceeding before any Court of law.

In India the position on the **finality clause** is not well settled. It is extremely complex issue. For this purpose the judicial review may be divided into two categories-

Constitutional modes of judicial review and Non-Constitutional modes of judicial review.

The judicial review available under article 32, 136 226 and 227 is taken as Constitutional mode of judicial review, 1.e. the judicial review available under Articles 32, 136, 226, 227 cannot be excluded by the finality clause contained in the statute and expressed in any languages. Any statute or ordinary laws cannot take the jurisdiction of the Court under article 32, 136, 226 and 227 as the Constitution of India provides them. Thus, any ordinary law cannot bar the jurisdiction of the Supreme Court under Article 32 and 136 and of the High Court under Articles 226 and 227.

In Keshava Nanda Bharti v. State of Kerala, **(A.I.R. 1973 S.C. 1461**) the Supreme Court has held the Parliament has power to amend the Constitution but it cannot destroy or abrogate the basic structure or framework of the Constitution. Article 368 does not enable Parliament of abrogate or take away Fundamental right or to completely alter the fundamental features of the Constitution so as to destroy its identity. Judicial review therefore it cannot be taken away.

In Indra Nehru Gandhi v. Raj Narain, the validity of Clause (4) of Article 329 – A inserted by the Constitution (39 the Amendment) Act, 1975 was challenged on the ground that it destroyed the basic structure of the Constitution. The said Clause (4) provided that notwithstanding any Court order declaring the election of the Prime Minister or the Speaker of Parliament to be void, it would continue to be void in all respects and any such order and any finding on which such order was based would be deemed always to have been void and of no effect. This clause empowered Parliament to establish by law some

authority or body for deciding the dispute relating to the election of the Prime Minister or Speaker. It provides that the decision of such authority or body could not be challenged before the Court. This clause was declared unconstitutional and void as being violation of free and fair election, democracy and rule of law, which are parts of the basic structure of the Constitution. In case judicial review, democracy, free and fair election and rule of law were included in the list of the basic features of the Constitution. Consequently any Constitutional amendment, which takes away, any of them will be unconstitutional and therefore void.

The non-constitutional mode of judicial review is conferred on the civil Courts by statute and therefore it may be barred or excluded by the statute. S. 9 of the Civil Procedure Code, 1908 confers a general jurisdiction to Civil Courts to entertain suits except where its jurisdiction is expressly or impliedly excluded.

Implied exclusion of the jurisdiction of the Civil Courts is usually given effect where the statute containing the exclusion clause is a self contained Code and provides remedy for the aggrieved person or for the settlement of the disputes.

When not excluded.

However, it is to be noted that the exclusion clause or ouster clause or finality clause does not exclude the jurisdiction of the Court in the condition Stated below:

1. Unconstitutionality of the statute : Exclusion clause does not bar the jurisdiction of the Court to try a suit questioning the constitutionality of an action taken there under. If the statute, which contains the exclusion clause, is itself unconstitutional, the bar will not operate. The finality should not be taken to mean that unconstitutional or void laws be enforced without remedy.

2. Ultra vires Administrative action : The exclusion clause does not bar the jurisdiction of the Court in case where the action of the authority is ultra vires. If action is ultra vires the powers of the administrative authority; the exclusion clause does not bar the jurisdiction of the Courts. The rule is applied not only in the case of substantive ultra vires but also in the case of procedural ultra vires. If the authority acts beyond its power or jurisdiction or violates the mandatory procedure prescribed by the statute, the exclusion or finality clause will not be taken as final and such a clause does not bar the jurisdiction of the Court.

3. Jurisdictional error : The exclusion or ouster or finality clause does not bar the jurisdiction of the Court in case the administrative action is challenged on the ground of the jurisdictional error or lack of jurisdiction. The lack of jurisdiction or jurisdictional error may arise where the authority assumes jurisdiction, which never belongs to it or has exceeded its jurisdiction indicating the matter or has misused or abused its jurisdiction. The lack of

jurisdiction also arises where the authority exercising the jurisdiction is not properly constituted.

4. Non compliance with the provisions of the statute : the exclusion clause will not bar the jurisdiction of the Court if the statutory provisions are not complied with. Thus if the provisions of the statute are not complied with, the Court will have jurisdiction inspite of the exclusion or finality clause.

5. Violation of the Principles of natural Justice : If the order passed by the authority is challenged on the ground of violation of the principles of natural justice; the ouster clause or exclusion clause in the statute cannot prevent the Court from reviewing the order

6. When finality clause relates to the question of fact and not of law : Where the finality clause makes the finding of a Tribunal final on question of facts, the decision of the Tribunal may be reviewed by the Court on the question of law.

(A) CONSTITUTIONAL REMEDIES

The judicial control of administrative action provides a fundamental safeguard against the abuse of power. Since our Constitution was built upon the deep foundations of rule of law, the framers of the Constitution made sincere efforts to incorporate certain Articles in the Constitution to enable the courts to exercise effective control over administrative action. Let us discuss those articles of the constitution: -

(a) Under article 32, the Supreme Court has been empowered to enforce fundamental rights guaranteed under Chapter III of the Constitution.

Article 32 of the Constitution provides remedies by way of writs in this country. The Supreme Court has, under Article 32(2) power to issue appropriate directions, or orders or writs, including writs in the nature of *habeas corpus, certiorari, mandamus, prohibition and quo- warranto* The court can issue not only a writ but can also make any order or give any direction, which it may consider appropriate in the circumstances. It cannot turn down the petition simply on the ground that the proper writ or direction has not been prayed for.

(b) Under article 226 concurrent powers have been conferred on the respective High Courts for the enforcement of fundamental rights or any other legal rights. It empowers every High Court to issue to any person or authority including any Government, in relation to which it exercises jurisdictions, directions, orders or writs including writs of habeas corpus,. mandamus, prohibition, quo warranto and certiorari.

In a writ petition, High Court cannot go into the merits of the controversy. For example, in matters of retaining or pulling down a building the decision is not to be taken by the court as to whether or not it requires to be pulled down and a new building erected in its place.

(c) Under Article 136 the Supreme Court has been further empowered, in its discretion, to grant special leave to appeal from any judgment, decree, determination, sentence or order by any Court or tribunal in India. Article 136 conferred extraordinary powers on the Supreme Court to review all such administrative decisions, which are taken by the administrative authority in quasi-judicial capacity.

The right to move the Supreme Court in itself is a guaranteed right, and Gajendragadkar, J., has assessed the significance of this in the following manner:

"The fundamental right to move this Court can therefore be appropriately described as the cornerstone of the democratic edifice raised by the Constitution. That is why it is natural that this Court should in the words of ***Patanjali Sastri, J.,*** regard itself as the protector and guarantor of fundamental rights and should declare that it cannot consistently with the responsibility laid upon it, refuse to entertain applications seeking protection against infringement of such rights.

Since Article 32 is itself fundamental right, it cannot be whittled down by a legislation. It can be invoked even where an administrative action has been declared as final by the statute.

An order made by a quasi-judicial authority having jurisdiction under an Act which is intra virus is not liable to be questioned on the sole ground that the provisions of the Act on the terms of the notification issued there under have been misinterpreted.

The rule of maintainability of petition under Article 32 held above is subject to three exceptions.

First, if the statute for a provision thereof *ultra vires* any action taken there under by a quasi-judicial authority which infringes or threatens to infringe a fundamental right, will give rise to the question of enforcement of that right and petition under Article 32 will lie.

Second, if a quasi-judicial authority acts without jurisdiction or wrongly assumes jurisdiction by committing error as to a right, the question of enforcement of that arises and a petition under Article 32 will lie even if the statute is *intra vires*.

Third, if the action taken by a quasi-judicial authority is procedurally *ultra virus*, a petition under Article 32 would be competent.

Under Article 32 of the Constitution the following person may complain of the infraction of any fundamental rights guaranteed by the Constitution:

Any person including corporate bodies who complains of the infraction of any of the fundamental rights guaranteed by the Constitution is at liberty to move the Supreme Court except where the languages of the provision or the nature of the right implies the inference that they are applicable only to natural person.

The right that could be enforced under article 32 must ordinarily be the rights of the petitioner himself who complains of the infraction of such rights and approaches the Court for relief. An exception is as held in the Calcutta Gas Case,**(AIR 1962 SC 1044)** that in case of habeas corpus not only the man who is or detained in confinement but any person provided he is not an absolute stranger, can institute proceeding to obtain a writ of habeas corpus for the purpose of liberation.

The Constitution of India assigns to the Supreme Court and the High Courts the role of the custodian and guarantor of fundamental rights. Therefore, where a fundamental right is involved, the courts consider it to be their duty to provide relief and remedy to the aggrieved person. In matters other than the fundamental rights, generally the jurisdiction of the courts to grant relief is considered to be discretionary. The discretion is, however, governed by the broad and fundamental principles, which apply to the writs in England.

A petition under Art 32 may be rejected on the ground of inordinate delay However, a writ petition made after 12 years by a person belonging to lower echelons of service against the Department which and not counted his service in the officiating capacity, was entertained because the Department had not given reply to his representations.

It was held in one of the decided case **(A.I.R 1964 S.C. 1013; Supreme Court Employees Welfare Association verses union of India A.I.R 1990 334**) that a petition under Art 32 would be barred by res judicata if a petition on the same cause of action filed before the High Court was earlier rejected.

The Court went further and said that the principle of **res judicata** did not apply to successive writ petitions in the Supreme Court and the High Court under Arts 32 and 226 respectively. The Court observed that a petition based on fresh or additional grounds would not be barred by res judicata. A petition under Artic 32, however, will not lie against the final order of the Supreme Court under art 32 of the constitution. It was held that a petition would not lie under Art 32 challenging the correctness of an order of the Supreme Court passed on a special leave petition under Art 136 of the Constitution setting aside the award the award of enhanced solarium and interest under the land acquisition Act, 1894.

Existence of alternative remedies

When statutory remedies are available for determining the disputed questions of fact or law, such questions cannot be raised through a petition under Art 32.

The Supreme Court would not undertake a fact-finding enquiry in the proceedings under Art 32. If the facts are disputed, they must be sorted out at the appropriate forum. In *Ujjam Bai v. State of UP* **(AIR 1962 SC 1621)** the Supreme Court held that a petition under Art 32 could not impugned error of law or fact committed in the exercise of the jurisdiction conferred on an authority by law. The Court here made a distinction between acts, which were ultra vires, or in violation of the principles of natural justice and those, which were erroneous though within jurisdiction. While the former could be impugned, the latter could not be impugned in a writ petition under art 32.
This dictum was, however, narrowed down by subsequent decisions. It was held that where an error of law or fact committed by a tribunal resulted in violation of a fundamental right; a petition under Art 32 would be maintainable.

The fact that the right to move the Supreme Court for the enforcement of fundamental rights under Art 32 is a fundamental right should not bind us to the reality that such a right in order to be meaningful must be used economically for the protection of the fundamental rights. However, in recent years, with the expansion of the scope of art 21 of the Constitution and the growth of public interest litigation, the threshold enquiry regarding the violation of fundamental rights has become rare. Article 32 has almost become a site for public interest litigation where fundamental rights of the people are agitated. It is under this jurisdiction that the human rights jurisprudence and environmental jurisprudence have developed.

The Court has given such expansive interpretation of art 21 of the Constitution that the question, which seemed to be alien to Art 32, became integral part of it. The right to life and personal liberty came to comprehend such diverse aspects of human freedom such as the right to environment, or the right to gender justice or the right to good governance that questions such as whether the ordinance making power was exercised to defraud the Constitution or whether judges were appointed in such a way as to enhance the indepenence of the judiciary or who and how should a social service organization undertake the giving of Indian children in adoption to foreigners became matters involving fundamental rights. Since the rights to live guaranteed by Art 21 included the right to live with dignity the right to unpolluted environmental jurisprudence has emerged. With the growth of the public interest litigation, which we will discuss separately, Art 32 has become an important site for the vindication of various group human rights. The Court has even incorporated some of the directive principles of state policy within the compass of the fundamental rights. For example, it declared that the right to primary education was a fundamental right. The Supreme Court entertained a writ petition under Art 32 seeking the implementation of the Consumer Protection Act and appointment of district forums as required there under. The Court

also entertained a petition which said that due to large backlogs, the under-trail prisoner remained for an inordinately long periods in jail.

Principles Regarding Writ Jurisdiction Under Article 226

Article 226 empowers the High Courts to issue writs in the nature of habeas corpus, mandamus, prohibition, certiorari and quo warranto or any of them for the enforcement of any of the fundamental rights or for any other purpose. It has been held that the words 'for any other purpose' mean for the enforcement of any statutory or common law rights. The jurisdiction of the High Courts 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 **resjudicata.** 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 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 jusicata;
- 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.

Scope of the High court's Jurisdiction under Article 226

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.

Power to Review Its Own Judgments

It was held that the High Court had power to review its own judgments given under Art 226. This power, however, must be exercised sparingly and in cases, which fell within the guidelines provided by the Supreme Court. However, review by the High Court of its own order in a writ petition on the ground that two documents which were part of the record were not considered by it at the time of the issuance of the writ under Art 226, especially when the documents were not even relied upon by the parties in the affidavits filed before the High Court was held to be impermissible.

On the death of the petitioner during the pendency of his writ petition against removal from service, the petition abates. The successor cannot continue the petition.

If the petitioner were guilty of mala fide and calculated suppression of material facts, which if disclosed, would have disentitled him to the extra ordinary remedy under Art 226 or in any case materially affected the merits of the case, he would be disentitled to any relief. Where the writ petitioners had themselves invoked the review jurisdiction of the competent officer under the Evacuee Interest (Separation) Act, 1950, to their advantage and to the disadvantage of the appellant, it was held that the petitioner could not be heard to say that the review orders of the authority were void for want of jurisdiction.

(Rights of the Armed Forces)

The Constitution provides two exceptions to the availability of the constitutional remedies given in Art 32, 226 227 and 136. Art 33 of the Constitution says that Parliament may by law determine to what extent any of the rights conferred by Part III shall, in their application to the members of the Armed Forces or the Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

Suspension of Judicial Review during Emergency

The right to move the court for the enforcement of the fundamental rights be suspended during the emergency. This is the second exception to the availability of constitutional remedies.

Under Art 359 of the Constitution the President may declare that the right to move any court for the enforcement of such of the fundamental rights as may be mentioned in the order and all proceedings pending in any court for the enforcement of those rights shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the Order. By the Constitution (Forty- fourth) Amendment Act, 1978, the words 'except Arts 20 and 21' were added to the above Article. It means that the right to move any court for the enforcement of any of the fundamental rights except the rights guaranteed by Art 20 and the President may suspend 21 during the proclamation of emergency.

The jurisdiction under Art 227 is narrower than that under Art 226 because while under art 226, the High Court can quash any administrative action, under Art 227, it can act only in respect of judicial or at the most quasi- judicial actions. By giving wider meaning to the word 'tribunal' in this Article as well as in Art 136, the courts have included various administrative authorities within the power of superintendence. Clause (4) of art 227, however, excludes the tribunals constituted by or under any law relating to the armed forces from the supervisory jurisdictions of the High Courts. The court martial proceedings under the Military law are not within the power of superintendence of the High Court, though they are subject to judicial review under Art 226.

A petition under Art 227 is not maintainable if there is an adequate alternative remedy. In this matter the same principles will apply as are applicable to petitions filed under the Consumers protection act dismissing a petition for non-appearance would not lie under Art 227 to the High Court since the statutory remedy of appealing under sec. 15 or applying for revision under sec. 17 to the State Commission under that Act was available.

Remedy through Special Leave to appeal under article 136.

Articles 132 to 135 of the Constitution deal with ordinary appeals to the Supreme Court in constitutional, civil and criminal matters. Article 136 deals with a very special appellate jurisdiction conferred on the Supreme Court. Under this provision the Supreme Court has power to grant in the discretion, special leave to appeal from

(a) Any judgment, decree, determination or order;
(b) In any cause or matter;
(c) An order passed or made by any court or tribunal in the territory of India.

The scope of the Article is very extensive and it invests the Court with a plenary jurisdiction to hear appeals. Since the Court has been empowered to hear appeals from the determination or orders passed by the tribunal including all such administrative tribunals and bodies which are not Courts in the strict sense, this has become most interesting aspect of this provision from the point of administrative law. Under the provision, the Court may hear appeals from any tribunal even where the legislature declares the decision of a tribunal final.

A large number of ad judicatory bodies outside the regular judicial hierarchy have sprung up in modern times and it was deemed highly desirable that the Supreme Court should be able to keep some control over such bodies through the technique of hearing appeal there from. Prof. Jain and Jain have rightly observed it in this connection:

" It is extremely desirable that there should be some forum correct misuse of power by such bodies. To leave these bodies outside the place of any judicial control would be to create innumerable tiny despots, which could negative the rule of law. The ambit of Supreme Court's jurisdiction under Article 136 is in some respects broader than that under Article 32. Article is confined to the enforcement of fundamental rights only whereas Article 136 is not so. The appellate jurisdiction of the court gives more scope to the Court to intervene with ad judicatory bodies and provides grounds of judicial control. But from another point of view the jurisdiction of the Court under Article 136 is narrower than that under Article 32. Article 136 is available only in cases of tribunals while Article 32 can be invoked when any authority whatsoever infringes a fundamental right. It has been found that the Court has been extremely reluctant to intervene with quasi- judicial bodies. As regard the points of difference between the writ jurisdiction of the High Courts under Article 226 any appellate jurisdiction of the Supreme Court under Article 136, it can be said that a high court can issue a writ to any authority whether quasi-jurisdiction or administrative; whereas the supreme Court under Article 136 can hear appeal only from a court or tribunal. In this respect writ jurisdiction of a High Court is broader than the appellate scope of the Supreme Court under Article 136. But from another point of view the scope of Article 226 is narrower than Article 136. The Supreme Court can interfere with a decision of a tribunal on wider form than the High Court in its writ jurisdiction, are not so flexible it does not enter into questions of facts while there is no restriction on the powers of the Supreme Court."

General principles relating to the grant of special leave to appeal. The following principles have been evolved on the basis of cases decided by the Court, in connection with the grant of special leave to appeal:

(1) The Court has imposed certain limitations upon its own powers under Article 136, e.g., it has laid down that the power is to be exercised sparingly

and in exceptional cases only. The power shall be exercised only where special circumstances are shown to exist.

(2) Ordinarily, the Supreme Court would refuse to entertain appeal under Article 136 from the order of an inferior tribunal where the litigant has not availed himself of the ordinary remedies available to him by law, e.g., a statutory right of appeal or revision or where he has not appealed from the final order of an Appellate Tribunal from the decision of the inferior tribunal.

This may be allowed only in exceptional cases e.g., breach of the principles of natural justice by the order appeal to the Supreme Court is on a point, which could not have been decided in the appeal under ordinary law.

(3) The reserve power of the court cannot under Article 136 be exhaustively defined but it is true that the Court has acted arbitrarily or has not given a fair deal to the litigant, will not be handicapped in the exercise of its findings of facts or otherwise.

(4) It is quite plain that the Supreme Court reaches the conclusion that the tribunal or the Court has acted arbitrarily or has not given a fair deal to the litigant, will not be handicapped in the exercise of its findings of facts or otherwise.

(5) The Supreme Court would not permit a question to be raised before it for the first time, if the same has not been raised before the tribunal. But where the question raised for the first time involves a question of law and it arose on admitted facts, then the court may allow the same to be argued before it.

The court again said that the point was neither raised in the written statement filed by the appellant in the trail Court nor in the grounds of appeal filed by him in the appellate court cannot be canvassed before the Supreme Court for the first time on appeal by special leave.

(6) In an appeal under this provision, the Supreme Court will not interfere with the award of a Tribunal unless some erroneous principle has been invoked or some important piece of evidence has been overlooked or misapplied.

Remedy against the administrative tribunal under Article 227 : According to Article 227 (1) as it existed before the 42nd amendment of the Constitution every High Court had the power of superintendence over all Courts and tribunals within its territorial jurisdiction except those which are constituted under a law relating to armed forces. Here the word tribunal was read in the same connotation as it has been used in Article 136. The power of superintendence included the power to call returns from such courts, to make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts and prescribe forms in which books, entries, and accounts were to be kept by the officers of such Courts. Now under Forty-forth Amendment act of the Constitution the jurisdiction of the High Court over

administrative tribunals has been restored and accordingly the power of superintendence and supervision of the High Courts over them exists as before.

The high Courts were thus empowered to exercise broad powers of superintendence over Courts and tribunals. The power extended not only to administrative but also even to judicial superintendence over judicial or quasi-judicial bodies. The power of the High Court under Article 226 differed from power of superintendence exercised by it under Article 227

Firstly, where it could quash orders of inferior court or tribunal, but the court under Article 226 may quash the order as well as issue further directions in the matter.

Secondly, Under Article 227 the power of interference was limited to seeing that the tribunal function with in the limits of its authority .

Thirdly, the power under Article 227 will only be exercised where the party affected moves the court, while the superintending power under Article 227 could be exercised at the instance of High Court itself.

In exercising the supervisory power under Article 227, the High Court does not act as an appellate tribunal. It did not use to review to reweigh the evidence upon which the determination of the inferior tribunal purported to be based.

B) Statutory Review.

The method of statutory review can be divided into two parts:

i) **Statutory appeals**. There are some Acts, which provide for an appeal from statutory tribunal to the High Court on point of law.
e.g. Section 30 Workmen's Compensation act, 1923.

ii) **Reference to the High Court or statement of case.** There are several statutes, which provide for a reference or statement of case by an administrative tribunal to the High Court. Under Section 256 of the Income-tax Act of 1961 where an application is made to the Tribunal by the assessee and the Tribunal refuses to state the case the assessee may apply to the High Court and if the High Court is not satisfied about the correctness of the decision of the Tribunal, it can required to Tribunal to state the case and refer it to the Court.)

C. Ordinary Remedies or Equitable Remedies

Apart from the extra-ordinary (Constitutional Remedies) guaranteed as discuss above there are certain ordinary remedies, which are available to

person under specific statutes against the administration. The ordinary courts in exercise of the power provide the ordinary remedies under the ordinary law against the administrative authorities. These remedies are also called equitable remedies. This includes:

i) Injunction

ii) Declaratory Action

iii) Action for damages.) In some cases where wrong has been done to a person by an administrative act, declaratory judgments and injunction may be appropriate remedies. An action for declaration lies where a jurisdiction has been wrongly exercised. Or where the authority itself was not properly constituted. Injunction s issued for restraining a person to act contrary to law or in excess of its statutory powers. An injunction can be issued to both administrative and quasi-judicial bodies. Injunction is highly useful remedy to prevent a statutory body from doing an ultra vires act, apart from the cases where it is available against private individuals e.g. to restrain the commission or torts, or breach of contract or breach of statutory duty.

Before discussing these remedies let us find out what is the meaning of equity.

Meaning of Equity

Before we discuss equitable remedies, it is necessary for us to know something about equity. Since the administration of justice has begun on the basis of law in the world, a class of society has always been against the rigidity of law. This class of society is of the opinion that howsoever mature and legally skilled men may make the laws, yet they cannot experience the circumstances which the judges may have to face in future. The circumstances in which the provisions of law may prove to be unjust for the people if is necessary to make the provisions of law flexible, and injustice caused by such rigidity of law should be stopped. Equity is based on this consideration. Equity is a voice against injustice caused by rigidity of low. Equity, which is not a synonym of natural justice, demands that justice should be made in accordance with the circumstances. Equities a new and independent system of law which developed in England. It has its own history and origin. It made an important contribution in the English system of law as a supplementary of main legal system till 1873, when it was merged in the common law According to Ashburner. “Equity is a word which has been borrowed by law from morality and which was acquired in law a strictly technical meaning.”

Equitable Remedies may be discussed under following headings:

(1) Injunction

An injunction is a preventive remedy. It is a judicial process by which one who has invaded or is threatening to invade the rights of another is restrained from continuing or commencing such wrongful Act.

In India, the law with regard to injunctions has been laid down in the specific Relief Act, 1963.

Injunction may be prohibitory or mandatory.

Prohibitory Injunction. Prohibitory injunction forbids the defendant to do a wrongful act, which would infringe the right of the plaintiff. A prohibitory injunction may be interlocutory or temporary injunction or perpetual injunction.

Interlocutory or temporary injunction . Temporary injunctions are such as to continue until a specified time or until the further order of the court. **(S. 37 for the specific Relief Act)** . It is granted as an interim measure to preserve status quo until the case is heard and decided. Temporary injunction may be granted at any stage of a suit. Temporary injunctions are regulated by the Civil Procedure Code.**(Ibid)**

Temporary injunction is provisional in nature. It does not conclude or determine a right. Besides, a temporary injunction is a mere order. The granting of temporary injunction is a matter of discretion of the court.

Perpetual injunction. A perpetual injunction is granted at the conclusion of the proceedings and is definitive of the rights of the parties, but it need not be expressed to have perpetual effect, it may be awarded for a fixed period or for a flexed period with leave to apply for an extension or for an indefinite period terminable when conditions imposed on the defendant have been complied with; or its operation may be suspended fro a period during which the defendant is given the opportunity to comply with the conditions imposed on him, the plaintiff being given leave to reply at the end of that time.

Mandatory injunction. When to present the breach of an obligation, it is necessary to compel the performance of certain acts which the court in capable of enforcing, the court may in the discretion grant an injunction to prevent the breach complained of an also to compel performance of the requisite acts. **(S. 39 of the Specific Relief Act.)** The mandatory injunction may be taken as a command to do a particular act to restore things to their former condition or to undo, that which has been done. It prohibits the defendant from continuing with a wrongful act and also imposes duty on him to do a positive act. For example construction of the building of the dependant obstructs the light for which the plaintiff is legally entitled. The plaintiff may obtain injunction not only for restraining the defendant from the construction of the building but also to pull down so much of the part of the building, which obstructs the light of the plaintiff.

Declaration (Declaratory Action)

Declaration may be taken as a judicial order issued by the court declaring rights of the parties without giving any further relief. Thus a declaratory decree declares the rights of the parties. In such a decree there is no sanction, which an ordinary judgment prescribes same sanctions against the defendant. By declaring the rights of the parties it removes the existing doubts about the rights and secures enjoyment of the property. It is an equitable remedy. Its purpose is to avoid future litigation by removing the existing doubts with regard to the rights of the parties. It is a discretionary remedy and cannot be claimed as a matter of right.

Action for Damages

If any injury is caused to an individual by wrongful or negligent acts of the Government servant the aggrieved person can file suit for the recovery of damages from the Government concerned. This aspect of law has been discussed in detail under the topic liability of Government or state in torts.

WRITS
WRIT 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.

(a) testing the validity of detention under preventive detention laws;
(b) securing the custody of a person alleged to be lunatic;
(c) securing the custody of minor;
(d) detention for a breach of privileges by house;
(e) testing the validity of detention by the executive during emergency, etc.

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,**(AIR 1950 SC.27)** 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 virus 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.

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 (**AIR 1980 SC.1579**) Il 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 hebeas 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

rejected 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.

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,* 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.

WRIT OF MANDAMUS

Nature and Scope__ 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 whom 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.

Grounds of the Writ of Mandamus

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

(i) That the petitioner has a legal right.
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.

(ii) That there has been an infringement of the legal right of the petitioner;

(iii) That the infringement has been owing to non-performance of the corresponding duty by the public authority;

(iv) That the petitioner has demanded the performance of the legal duty by the public authority and the authority has refused to act:

(v) 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 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 duty 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 fulfillment of those purposes, which are contemplated by the law. If the public authority ignores these basic facts in the exercise of mandatory or discretionary.

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(**AIR 1980 Raj.207)** 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 Maharastra Sagar Mills case.

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, **(AIR 1961 SC 182**) 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.

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 Court on any of the following grounds may refuse it:

1. The Supreme Court has held in Daya v. Joint Chief Collector **(AIR 1962 SC1796),** 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.

Who may apply for 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. Vardhi Chand **(AIR 1980 SC 1622**) 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. The Ratlam Municipality neglected to discharge the statutory duties.

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

- **(i)** 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.

Against whom a Writ of Mandamus cannot be issued?

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.

WRIT OF CERTIORARI

Definition and Nature : 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.

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.

Against whom it can be issued : As regards the question against whom the writ can be issued, it is well settled that the writ is available against nay 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**(ILR1940 Mad.205.)** 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.

Necessary conditions for the issue of the Writ : When any body persons

(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.

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.

(1) Want of jurisdiction : The Supreme Court has stated in Ebrahim Abu Bakar v. Custodian- General of Evacuee Property(**111952 SCJ 488),** that want of jurisdiction may arise from.

- **(1)** The nature of subject matter.
- **(2)** From the abuse of some essential preliminary, or

(3) 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.

It may be added that jurisdiction also depends on

(4) 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. **(T. C. Basappa v. T. Nagappa AIR1954 SC 440**). 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.

WRIT OF QUO WARRANTO

Definition and Nature. 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 character 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 larches, 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 lashes 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 lie n 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 waarrnto 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 lie. In Jamalpur Arya Samaj Sabha v. Dr. D. Rama, **(AIR 1954 Pat 297)** the High Court of Patna refuse to issue the writ of quo warranto against the members of the Working Committee of Bihar Raj Arya Samaj Pratinidhi 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 an 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. **(AIR 1973 Pat 85)** The University of Bihar, Muzzafarpur 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.

Public Interest Litigation
P I L

Good governance is the *sine qua non* of any State, particularly a democratic polity that would have three organs of government, namely, executive, legislative and judiciary. These three organs constitute as it were three pillars of the good and effective governance with the judiciary functioning as the watchdog for maintenance of the Constitutional balance as the powers and responsibilities of the various machineries of state, vis-à-vis one another, and the people.

Public Interest Litigation

An individual who does it out of concern for public interest initiates it. But after having initiated it, once the Court admits a matter, it no longer remains the concern only of the person who has initiated it.

For example, Sheela Barse, a journalist, had initiated a PIL on behalf of the children who were languishing in remand homes. The respondents were the State governments who prolonged the litigation by not filing their affidavits in time. Sheela Barse had to rush from her home in Bombay to Delhi to attend the Supreme Court every time a date was fixed for a hearing. Exasperated with the willful delay caused by the State Governments, which was not adequately checked by the Court, when threatened to withdraw the petition. Although her frustration was understandable, the court could not allow her to withdraw the petition. Even if she withdrew from the matter, the Court could continue to examine the contentions made by her in the petition and deliver the orders. Although a person may be accorded standing to bring a public interest matter in Court, such a person cannot withdraw proceedings on the ground that she was disassociating herself from that matter. Justice Venkatachaliah (as he then was) speaking for himself and Ranganath Misra J (as he then was) observed that:

If we acknowledge any such stands of a dominos lit is to a person who brings a public interest litigation, we will render the proceedings in public interest litigation vulnerable to and susceptible of a new dimension which might, in conceivable cases, be used by persons for personal ends resulting in prejudice to the public weal.

Constraints on Public Interest Litigation.

Although the courts have been liberal in conceding locus standi to public-spirited citizens to espouse petitions involving public interest, such public interest litigation has got to be constrained by considerations of feasibility as well as propriety. The constraints of feasibility restrain the courts from over admitting matters, which might go beyond its resources to deal with. The consideration of propriety persuades the courts from not undertaking issues, which are better, dealt with by the other co-ordinate organs of the government such as the legislature or the executive.

It’s Area of Operation

While this may be true, as far as popular perception is concerned, the truth, in a deeply vital sense, is that if certain infringement of law, injury to public interest, public loss due to official apathy, inaction or manipulation or dereliction of duty as ordained by the authoritative rules or statutes—which are co relatable to public interest, being offensive to or destructive of it, will all fall within the PIL jurisdiction and judgment given in such cases, in view of their impact and end-result or even visibility in forms of reduction or elimination of the “original sin” are often categorized as pronouncements

belonging to the area of the " judicial activism". Some of the areas where so-termed judicial activism, emanating from PIL, has been in evidence cover subjects like environment pollution, social ills__ like dowry death/bride burning, bonding labour, child labour, custodial death police torture (Bhagalpur blinding case) and other forms of atrocities on prisoners/jail inmates, non -payment on the part of Ministers/Prime Ministers for private use of public (Air force) air crafts, public compensations, dereliction or abnegation of essential statutory duties by public Institutions/corporations or official bodies. There have been cases where other individual fundamental rights as enshrined in Part III of the Constitution have formed part of PIL as they had under public repercussions. Such PIL cases may be taken directly to Supreme Court where constitutional infringement is involved__ private, i.e., individual rights included. They can also be taken up in High Courts.

It's Rationale

Usually, the courts take cognizance of a case when the person affected makes complaint. This is the question of *locus standi*, that is, whether a person not involved or affected in any case has any legal justification or ground to take up someone else's case in the constitution on others behalf. The courts were reluctant to accept or admit such cases. But in the early 80s (or may be a little earlier), the Supreme Court made a relaxation of this principle and started accepting genuine and appropriate cases even through complainant was someone different from the person affected. Of course, the admissions done only after a very strict scrutiny of the points involved, the motive or motivation of the complainant and the purpose, which the case, if decided, would serve. It is only after a full satisfaction of the court that such a case is accepted as a PIL.

There are many reasons, which dictate the rationale for PIL. In a country like ours, where:

(1) Poverty is abysmal.
(2) Illiteracy is acute.
(3) Society is case ridden.
(4) Backwardness is widespread,
(5) Fear of the high and might is deep
(6) Three M's (money, muscles and mind) have a sway
(7) Communications system is poor,
(8) Judicial process is cumbersome and costly, and
(9) Justice is denied through delay.

It is idle to except that poor, illiterate, disprivileged, weak and vulnerable sections of society, utterly ignorant of the law and the processes of law would come out openly against the abuses of their personal or group rights(al bit legally bestowed), fighting the very people who are often treated, in remote interiors of the country, as Mai-baap (because they are rich, high caste,

powerful and brutal). Fighting the government can never cross the mind of majority of our people__ as being possible, feasible, desirable or profitable.

The only way such a situation can be tackled is if some public-spirited men take up cudgels on their behalf and bring up before law courts cases of law infringement or non-implementation on statutory provisions affecting adversely people or public. The alternative is that the courts suo moto take up some such cases either on the basis of reports, communications or other verifiable evidences. As of now, the courts are well disposed towards this form or course of litigation. They do not or would not reject such a course outright but would take cognizance, even if ultimately they way as well dispose of them or discuss them on good and sufficient grounds.

PIL, thus, represents the arguments of both liberals and conservations upholding the soul and sprit of justice through following on initiatory procedure not traditionally preferred or favoured. The former Chief Justice of India, P.N. Bhagwati, sitting with Justice O.A. Desai in 1982 described the diatribe against PIL as:

The criticism is based on a highly elitist approach and proceeds from a blind obsession with the rites and rituals sanctified by an out-moded Anglo-Saxom jurisprudence.

This aroused the judicial conscience of others. Justice fazal Ali, sitting with Justice S. S. Venkataramiah in the same year referred to the whole gamut of PLIL and the courts' jurisdiction to a five Judges Bencdh - sensing the importance and relevance of the new reality. Infect, one of the questions formulated was:

Can a stranger to a cause- be he a journalist, social worker, advocate or an association of such persons initiate action before the court in matters alleged to be involving public interest or should a petition have some interest in common with others whose rights are infringed by some governmental action or inaction in order to establish the locus stand to make such a complaint?

Now, it is no longer in doubt. Even a post card received from a far away place from an unknown man can e treated ass a petition (so goes the report) if it contains valid points worthy of being taken cognizance by the Court. Time have changed, approaches have changed and so have the Courts' systems – though they are still bogged down in perhaps avoidable rituals which make for delay, add to cost and dilute justice at times. The gradual erosion in principles and values in public life since Nehru and Shastri era in India have brought into sharp focus the constitutional mandate and Supreme Court of India, arousing public interest in the on-going debate over the intentions behind Constitutional provision. It was being widely felt and publicly perceived that the declining values, lack of access to social justice and judicial system, States' arbitrariness, corrupt practices, attack on rights, grossly deviant social and economic activities, and murder of moral mores cannot make India an honest, progressive and a prosperous society.

PIL as a Tool for Access of Poor man to Justice

No less a person than the former Chief Justice of India, A.M Ahmadi, had once described the Supreme Court as the world's powerful court because of its wide -ranging, vast jurisdiction. Apart from its original, appellate, civil criminal and advisory jurisdictions, it has the power to entertain petitions even from ordinary people who otherwise cannot approach it due to financial and a host of other constraints. In the Fertilizer Corporation Manager Union v. Union of India case, the eminent jurist V.R. Krishna Iyer, the initiator of this innovative process of PIL, described law as " a social auditor and this audit function can be put into action only when someone with real public interest ignites the jurisdiction of the Court".

In the same vein, the former Chief Justice P.N Bhagwati, picking up the thread from where Iyer left it, propounded in S.P. Gupta's case, "the court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights, the only way in which this can be done is by entertaining writ petitions and even letters from public spirited citizens seeking judicial redress on behalf of those who have suffered a legal wrong or an injury". At last, the problem of providing justice to millions of helpless and hapless men got recognition PIL fast became one of the most effective and powerful instruments of justice for protecting the weak, the deprived the prosecuted be they women in protective custody, children in juvenile institutions under trial prisoners in jails, unorganized workman, landless labourers, slum and pavement dwellers or people belonging to schedule castes/scheduled tribes.
It is the PIL which exposed the brutality of Bhagalpur blinding, merciless exploitation of bonded labour, river (Jamuna) pollution through industrial effluents, environmental degradation, health hazard issues, education capitation rackets and so on.

Not remaining confined to righting the wrongs alone, judicial activism has made its presence felt by entering areas traditionally believed to be in the domains of legislature and executive. For instance, the apex judiciary can ask for the records based on which the president and the Governors may have reached their 'subjective satisfaction' with regard to, say, failure of constitutional machinery in a state. This, in effect, means that such decisions can be challenged on various grounds like malafides, extraneous considerations, and unreasonableness. Governance, a clear executive function, is now a good subject of judicial activism.

Similarly, justice Kuldeep Singh's directive to the union government for in acting a uniform civil code, one of the unenforceable directive principles of State Policy (Part IV of the constitution) is another example of excessive judicial zeal.

Again, certain other constitutional provisions, such as the pleasure of the president contained in articles 310, 311 and 312 of the constitution, as well as section 18 of Army Act, which deal with civil services and armed forces respectively, have been brought under judicial control through the 'creative interpretation' of articles 14 and 19 of the constitution. The recent "santusti"case is also a case in point. If only establishes the fact that if the constitution provides for any absolute power, it is judiciary's own authority of judicial review, to say the least. Though such review attempts cannot be branded as "grossly undemocratic", critics maintain that the courts, ordained as a judicial body, cannot at the same time be looked to as a "general heaven for reform movements". It cannot, even so, be gainsaid that the need and desirability of judicial activism have clearly been established on the ground; for, more than once,

It has brought out skeletons from administration's cupboard which remained unexposed for years and would have otherwise remained so for years on end;

It has shown that those in authority abuse and misuse power without compunction for noxious purposes and hide them from public gaze;

All that glitters in the legislative and executive world is not gold. Arbitrariness, greed, corruption, Reports, patronage, the notorious 'in-law and out-law' syndrome, 'private-gain-at public expense' considerations, malafide motive and many other vilest vices do reign supreme in places and persons who were earlier considered to be 'paragons of virtue'.