

Right to constitutional remedies

[Article 32]

- **Article 32 under Part III of the Indian Constitution** allows all the citizens to move to the Supreme Court in case of violation of Fundamental Rights.
- During the Constituent Assembly debates in December 1948, a discussion on this fundamental right (in the draft, it is referred to as Article 25), Dr B R Ambedkar had said, “If I was asked to name any particular Article in this Constitution as the most important — an Article without which this Constitution would be a nullity — I could not refer to any other Article except this one. It is the very soul of the Constitution and the very heart of it...” He said the rights invested with the Supreme Court through this Article could not be taken away unless the Constitution itself is amended and hence it was “one of the greatest safeguards that can be provided for the safety and security of the individual”.

- **Article 32 (1)** provides the right to move the supreme court by for enforcement of rights conferred by part III of the constitution.
- **Article 32(2)** to empower the Supreme Court to issue directions, orders or red including the red of *Habeas Corpus, mandamus, prohibition, quo warranto and certiorari* for enforcement of rights conferred by part 3 of constitution.
- **Article 32(3)** provide that Parliament may by law empower any other Court to exercise the rights exercisable by supreme court under article 32(2)
- **Article 32 (4)** provides that the rights guaranteed by this article shall not be suspended except otherwise provided in the constitution.

- Habeas Corpus
- The Writ of Habeas Corpus is issued by the Courts in those cases where a person is illegally detained. Habeas Corpus means 'to have the body' and it is one of the most effective remedies available to a person detained.
- By this Writ, the Court commands the person or authority who has detained or restrained another person to present such person before the Court. The Court requires the detaining person to provide the grounds on which the person has been detained and if he fails to provide a valid ground, the person who has been detained will be released by the Court immediately.

ADM Jabalpur v. Shivkant Shukla, (Habeas Corpus Case), AIR 1976

- The judgment, in this case, was laid down by a 5-judge bench consisting of Justices Ray, Beg, Chandrachud, Bhagwati, and Khanna.
- The majority ruling was pronounced by four judges while Justice Khanna delivered a powerful dissent.
- The Court held – *Given the Presidential order dated 27 June 1975 no person has any locus standi to move any writ petition under Article 226 before a High Court for habeas corpus or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order is not under or in compliance with the Act or is illegal or is vitiated by mala-fides factual or legal or is based on extraneous consideration.*

- The Court also upheld the constitutional validity of Section 16A (9) of MISA.
- Justice H.R. Khanna in his dissent stated that invoking Article 359(1) does not take away the right of an individual to approach the Court for the implementation of statutory rights.
- He added that Article 21 is not the sole repository of life and personal liberty.
- He further stated that during the proclamation of emergency, Article 21 only loses the procedural power but the substantive power of this article is very fundamental and the State does not have the power to deprive any person of life and liberty without the authority of law.

Mandamus

- It means 'we command'.
- It is an order **issued by superior court commanding a lower court or public authority to perform his official duties correctly.**
- The writ of Mandamus **can be issued against any public body, a corporation, an inferior court, a tribunal or government itself.**
- It is an important writ to check arbitrariness of an administrative action. It is also called 'Writ of Justice'
- It **cannot be issued against** a private individual/ body and to enforce contractual obligation/departmental instruction that do not possess statutory force.
- This writ cannot be issued against the **President of India or the State Governors; Chief Justice of a High Court acting in a judicial capacity.**
- This writ **can also be issued by the High Courts for violation of ordinary rights.**
- This writ is a discretionary remedy and the Courts may refuse to grant it where some alternate remedy is available.

Prohibition:

- It means: 'to forbid' or 'Stay order'.
- It is **issued by a higher court to a lower court to enforce inactivity in the jurisdiction** (in case of excess or absence of jurisdiction).
- It is a writ issued by superior Court to Lower court or Tribunal forwarding it to perform an act which **is outside its jurisdiction**
- It can **only be issued against judicial and quasi-judicial authorities.**
- It is **preventive writ in nature.**
- It is **not available against administrative authorities, legislative bodies, and private individuals or bodies**

Certiorari:

- It means 'to be certified' or 'to be informed'.
- It is **issued by the Supreme Court and High Courts to a lower court, tribunal or Quasi-judicial body usually to quash the judgment of the latter.**
- It can be **issued under the following grounds** (a) to correct errors of the jurisdiction (excess or lack of jurisdiction) (b) in case of error of law.
- It can also be **issued against administrative authorities in case the rights of individuals get affected.**
- This writ is **unavailable against the equal or higher court** and is only available **against the lower courts.**

Quo-Warranto:

- It means 'by what authority or warrant' or 'by what warrants'.
- It is issued by the court against the person who usurps a public office.
- It enquires the legality of usurpation of public office by a person.
- It is a writ issued with a view to restrain a person from acting in a public office to which he is not entitled to. The writ of quo warranto is used to prevent illegal assumption of any-office for or usurpation of any public office by anyone.
- The grounds on which this writ is issued (a) public office created by a statute or by the Constitution of India (b) person to be appointed by a statute.
- The writ cannot be issued against a ministerial office or private office.

PUBLIC INTEREST LITIGATION

- The traditional rule is that the right guaranteed under Article 32 is to move the Supreme Court is available only to those who have a locus standi i.e., whose fundamental rights has been infringed.
- The traditional rule of locust standi has now been relaxed by the Supreme Court in its recent rulings. The court now permits public interest litigations at the instance of public spirited citizens for the enforcement of constitution and other legal rights of any person or group of persons who because of their poverty for socially or economically disadvantaged positions are unable to approach the court for relief.

- **ABSJK sangh (Railway) vs Union of India 1981** It was held that though an unregistered association could maintain a writ petition under Article 32 for the redressal of a common grievance.
- **Justice Krishna Iyer declared - access to justice through class actions, PIL's and representative proceedings is the present constitutional jurisprudence.**

- **SP Gupta vs. Union of India 1982, Judges Transfer case**
- Justice Bhagwati has stated that in case of violation of any constitutional or legal rights of any person or group of persons who are unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction for writ in the high court under Article 226 or in case of breach of any fundamental right to this court under Article 32. Widening the scope of Article 32 of the Supreme Court has issued appropriate writs, Orders and directions on the basis of PIL in following cases.
- 1. Bihar blinding case
- 2. Injustice done to children in jail
- 3. Protection of pavement and slum dwellers of Bombay.
- 4. Payment of minimum wages
- 5. Abolition of bonded labourers
- 6. Protection of environment and ecology

- **Criticism of PIL**

- 1. It is said that courts will be flooded with litigation if it entertains cases through letter.
- 2. It is said that there would be delay in deciding many other important cases.
- 3. Interference by Court through PIL in sphere of Executive and legislative is not justified.
- 4. The court has no capacity to enforce its orders.
- Although Justice Bhagwati had, while expanding the locus standi , expressed A note of caution too. He observed that we must be careful to see that a member of the public is acting in a bonafide manner but not for any personal vested interest or for any political reasons. It shows that the judges were aware of the fact that this liberal rule of locus standi could be misused.

JUDICIAL ACTIVISM

- The word judicial activism is not defined under the constitution of India or any other act. It is defined under certain cases by the Supreme Court and some scholars. **Dr Upendra Bakshi-** Judicial activism is a social action litigation

- **Justice P N Bhagwati-** Judicial activism is for the judges to give meaning to what legislature has said and it is this process of interpretation which constitutes the most creative and thrilling function of a judge.
- The basic purpose of judicial activism is to bring the justice to the poor people at their doorstep.
- Rule of law and separation of power are the two basic features of Indian Constitution and to establish the rule of law judiciary has been empowered with Judicial review under Article 13, 32 and 226.
- Judicial activism is the condition when Judiciary acting on the doctrine of judicial creativity interferes with legislative and executive to fulfill the legal gap and to protect the violation of constitution especially part III.

Sources of judicial activism

- 1. Power of Judicial review under Article 13
- 2. Right to constitutional remedies under Article 32
- 3. Under Article 141 which says that laws declared by Supreme Court to be binding on all courts
- 4. Power of superintendence over all courts by the high court under Article 227
- 5. Basic feature doctrine as enshrined under Indian Constitution
- For the effective discharge of the duty of protection of fundamental rights of citizens, Supreme Court has relaxed the traditional concepts like Rule of locus standi, and now, through PIL any person can approach the Supreme Court for the enforcement of fundamental rights of the citizens who cannot approach to the court due to their poverty or their social disabilities.

Cases which reflect judicial activism

- **Sunil Batra vs Delhi administration-** Writ of Habeas Corpus can be issued not only for releasing a person from illegal detention but also from protecting prisoners from inhuman and barbarous treatment
- **Hussainara Khatoon vs State of Bihar-** Justice delayed is justice denied
- **Murli Deora case-** Banning of smoking in public places
- **MC Mehta versus state of Tamil Nadu 1991-** Children cannot be employed in match factories as it is a hazardous employment
- **MC Mehta versus Union of India 1987-** Closure of tanneries at Jajmau near Kanpur polluting the Ganga.

- **Rudal Shah vs State of Bihar**
- **Bandhua Mukti morcha vs Union of India**
- **Shriram food fertilizer case**
- **Nilabati Behera versus state of Orissa**
- **PUCL vs Union of India**
- **PUDR versus Union of India**
- **Vishaka vs State of Rajasthan**

CAUSES FOR THE EMERGENCE OF JUDICIAL ACTIVISM

1. Failure of The legislative and executive to act
 2. The entire system has got plagued by ineffectiveness and inactiveness
 3. Violation of basic human rights
 4. The court may on its own motion try to expand its jurisdiction and confer on themselves more functions and power.
- Judicial activism is a dynamic concept and it touched almost all aspects of life in Modern Times.