



“ARTICLE 32: SCOPE AND APPLICABILITY”

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ABSTRACT

The fundamental rights were incorporated in the Constitution, which fully ensured the basic human liberties. To fructify these rights into actual liberties, a detailed legal provision was incorporated in the Constitution itself to safeguard these rights. Under Article 32, the enforceability of these rights was included as a fundamental right and an almost parallel provision was provided under Article 226 as a constitutional right. Remedies for enforcement of fundamental rights are guaranteed in this article. From the earliest stages in the constituent Assembly, the founding fathers seemed to be agreed on the need for constitutional remedies for the enforcement of fundamental rights. To understand these two provisions in their true spirit and context, it would be desirable to first see them in their literal context. This paper analyzes the scope, enforcement and important applications of this article.

SCOPE OF ARTICLE 32:

This article describes the last of the Fundamental Rights, it is remedial and not substantive in nature. But it is in no way less important than the other rights. In the words of Dr. Ambedkar “Just as the remedy of habeas corpus is called the bulwark of liberties in England, this Article has been called the heart and soul of the Constitution”.

Gajendragadkar, J., "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, 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 infringements of such rights” .

Remedies for enforcement of rights conferred by this Article are –

- 1) The right to approach the Apex Court, by appropriate proceedings for the purpose of enforcement of the rights is guaranteed under this Article.
- 2) The SC have power to issue directions, orders or writs, including in the nature of *habeas corpus*, *prohibition*, *quo warranto*, *mandamus* and *certiorari*, appropriate for the enforcement of rights conferred .

- 3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), parliament may by law empower any other Court to exercise its jurisdiction or any of the powers used by the Supreme Court under clause (2).
- 4) The right guaranteed by article 32 shall not be suspended except as otherwise given for by this Constitution.

Article 32 (1):

The right to move the Supreme Court guaranteed under clause (1) is subject to the condition of 'appropriate proceedings'. Article 32 (1) says: "The right to move the Supreme Court by "appropriate proceedings" for the enforcement of the rights conferred by this part is guaranteed." There is no freedom to move the Supreme Court by all sorts of proceedings but only by 'appropriate proceedings'. Only those proceedings are appropriate which invoke, by original petition, the jurisdiction of the Supreme Court to issue, according to the nature of the case, writs or orders or directions of the types described in clause (2).

In *Daryao v. State of U.P.*¹, the Supreme Court has said; "The expression 'appropriate proceedings' has reference to proceedings which may be appropriate having regard to the nature of order, direction or writ which the petitioner seeks to obtain from this Court. The appropriateness of the proceedings would depend upon the particular writ or order which he claims and it is in that sense that the right has been conferred on the citizen to move this Court by 'appropriate proceedings'".

The Court has further clarified that "there is no limitation in regard to the kind of proceedings envisaged in clause (1) of Article 32 except that the proceedings must be 'appropriate' and this requirement of appropriateness must be judged in the light of the purpose for which the proceedings is to be taken, namely, enforcement of a Fundamental Right"².

The word "appropriate" does not refer to any form but to the purpose of the proceeding and therefore so long as the purpose of the proceeding is enforcement of a Fundamental Right, it is appropriate and when it relates to the enforcement of the Fundamental Rights of poor, disabled or ignorant by a public spirited person "even a letter addressed by him to the Court can legitimately be regarded as an 'appropriate proceeding' ".³

Article 32 of the Constitution gives the Supreme Court very wide discretion in the matter of framing writs to suit the exigencies of particular cases and the application of the petitioner cannot be thrown out simply on the ground that the proper writ or direction has not been prayed for.⁴

Article 32 (2)

Clause (2) empowers the Supreme Court to issue directions or orders or writs, including the writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, whichever may be appropriate for the enforcement of any of the rights conferred by Part III of the Constitution. The five writs specifically mentioned in clause (2) are known as the prerogative writs in the English law.

¹AIR 1961 SC 1457, 1461.

² *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161 : AIR 1984 SC 802, 813-14.

³ *M.C. Mehta v. Union of India* (1987)1 SCC 395

⁴ *Chiranjit Lal Chowdhury v. Union of India* AIR 1951 SC 41

The language of clause (2) is wide and does not confine the power of the Court to issuing of prerogative writs only, nor does it compel the Court to observe all procedural technicalities which had gathered round the prerogative writs in English law. It extends to issuing of any directions or orders that may appropriate for the enforcement of any of the Fundamental Rights. The powers of the Court are not only injunctive in scope i.e. preventing the violation of a fundamental rights but also remedial in scope and provides remedy against the breach of a Fundamental Rights already provided.

In respect of award of compensation, the Court has clarified that Article 32 is a public law remedy and the limitation of sovereign immunity in Article 300 in respect of private law remedies, is inapplicable to it.⁵ Such Compensation may, however, be awarded only to the victim of violation of the Fundamental Rights.

Again, Clause (2) does not lay down the procedure which the Court has to follow in the enforcement of Fundamental Rights and granting the appropriate relief. It does not mean that the Court can ignore all canons of judicial procedure and propriety, but certainly it can devise appropriate procedures within the broad judicial parameters to suit the enforcement of a Fundamental Right.

Further, the Court has held that its power under Article 32 is plenary power which it can use even for correcting its own mistakes.⁶ The power can also be used for entrusting functions on other bodies such as National Human Rights Commission.

Territorial Jurisdiction – The powers of the Court under Article 32 are not circumscribed by any territorial limitation. It extends not merely over every authority within the territory of India but also those functioning outside, provided such authorities are under the control of the Government of India. But the power under Article 32 must be read in conjunction with Article 142 of the Constitution.

Article 32(3)

The Parliament is authorized under clause (3) to empower by law any other Court to exercise, within the local limits of its jurisdiction, any of the powers exercisable by the Supreme Court under Clause (2). It will be noted that the Constitution itself empowers every High Court throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority within those territories, directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition *quo warranto*, *certiorari*, or any of them for the enforcement of any of the rights conferred by Part III. The power conferred on the High Courts and to be conferred on any other Court under this clause is not in derogation of the power conferred on the Supreme Court by clause (2) of Article 32.

CLAUSE (4)

It is enacted in clause (4) that the right to move the Supreme Court for the enforcement of the Fundamental Rights shall not be suspended except as otherwise provided in the Constitution. It is only under Article 359 that the Constitution empowers the President to suspend the

⁵ Nilbati Behra v. State of Orissa, (1993) 2 SCC 746; Consumer Education & Research Centre v. Union of India, (1995) 3 SCC 42.

⁶ Common Cause, A Registered Society v. Union of India, (1999) 6 SCC 667 : AIR 1999 SC 2979.

enforcement of the Fundamental Rights, when a proclamation of emergency under Article 352 is in operation.

RELATIONSHIP BETWEEN ARTICLES 32 AND 226

Art. 32 differs from Art. 226 in that whereas Art. 32 can be evoked only for the enforcement of Fundamental Rights, Art. 226 can be evoked not only for the enforcement of Fundamental Rights but for “any other purpose” as well. This means that the Supreme Court’s power under Art.32 is restricted as compared with the power of a High Court under Art.226. The words “for any other purpose” mentioned in Art. (Not in Art.32), enable a High Court to take consideration of any matter even if no Fundamental Right is involved.

However, there are some exceptional cases where the Supreme Court has entertained writ petitions under Art. 32 and question of Fundamental Right was not involved.

These matters are –

- (i) Misuse of ordinance – making power by the State of Bihar.⁷
- (ii) Appointment of the judges of High Courts and the Supreme Court.⁸
- (iii) Issues related with the procedure to remove a Supreme Court Judge.⁹

In **Romesh Thappar v. State of Madras**¹⁰, the Supreme Court ruled that such a petitioner can come straight to the Supreme Court without going to the High Court first. The Court stated that unlike Art. 226, Art. 32 confers a Fundamental Right on the individual and imposes an obligation on the Supreme Court which it must discharge when a person complains of infringement of a Fundamental Right. Art.32 provides a guaranteed remedy for the enforcement of the Fundamental Rights and constitutes the Supreme Court as the “guarantor and the protector of Fundamental Rights.” This proposition has been reiterated by the Supreme Court in a number of cases.¹¹

In **P.N. Kumar v. Municipal Corporation of Delhi**.¹² SC held that the citizens should not come to the court directly for the enforcement of their Fundamental Rights, but they should first seek remedy in the High Courts and then if the parties are dissatisfied with the judgment of the High Court, they can approach the Supreme Court by way of appeal. Disposing the petition, the judges laid down following guidelines for the exercise of the right under Article 32.

However, the directions of the Supreme Court in this case are contrary to the spirit of Art. 32, which guarantees to every citizen of India-the right to move the highest Court of the nation for the enforcement of his Fundamental Rights. The argument that since a large number of cases are pending in the Court therefore the citizens should not come directly to the court is not justified.

Since, it is the view expressed by a two Judge-Bench, it cannot be regarded as an authoritative pronouncement on an important constitutional issue, viz. inter relationship between Arts. 32 and

⁷ D.C. Wadhwa V. State of Bihar AIR 1987 SC 597.

⁸ Supreme Court Advocates on Record Ass. V. Union of India

⁹ Sarojini Ramaswamy V. Union of India AIR 1992 SC 2219

¹⁰ Romesh Thappar v. State of Madras AIR 1950 SC 124

¹¹ State of Madras v. V.G. Row, AIR 1952 SC, 196; K.K. Koachunni v. State of Madras, AIR 1959 SC 725; Kharak Singh v. State of Uttar Pradesh AIR 1963 SC 1295.

¹² (1987) 4 SCC 609.

226. Such a vital pronouncement could be made only by the constitution Bench consisting at least of five judges, especially, when the long established position is sought to be overturned.

RESTRICTIONS UNDER ARTICLE 32

1. Article 32 and Res-judicata: The Supreme Court has imposed a significant restriction on the invocation of its jurisdiction under Article 32 by applying the doctrine of res judicata, based on considerations of public policy. It is in the larger interest of the society that finality should attach to binding decisions of courts of competent jurisdiction and that individuals should not be made to face the same kind of litigation twice. Accordingly, a person cannot move successive petitions under Art 32 for the same cause of action.

But res-judicata would not apply if orders sought to be challenged through successive writ petitions as for example, when a petition challenging the validity of the tax assessment for one year is dismissed by the Supreme Court, a similar order passed for the subsequent year can be challenged through a new writ petition on some grounds not raised earlier in the first writ petition.¹³

The Supreme Court has ruled in *Lallubhai v. Union of India*¹⁴ that the doctrine of constructive res judicata is applied only to civil actions and civil proceedings. This principle of public policy is entirely inapplicable to illegal detention and does not bar a subsequent petition for a writ of habeas corpus under Art. 32 on fresh grounds not taken in the earlier petition for the same relief.

When a writ petition under Art. 226 has been dismissed by the High Court, another writ petition under Art, 32 cannot be moved in the Supreme Court, to seek redress in the same matter. The principle of res judicata envisages that if a judgement has been pronounced by a court of competent jurisdiction, it is binding between the parties unless it is reversed or modified in appeal, revision or other procedure prescribed by law.¹⁵The principle of res judicata has also been applied when a person first goes to the Supreme Court under Art 32, and on his application having been rejected there, comes to the High Court under Art, 226.¹⁶

2. Doctrine of Laches:Laches or inordinate delay on the part of the petitioner may disentitle him to move a writ petition Art, 32 to enforce his Fundamental Right. The Court refuses relief to the petitioner on the ground of laches unless there is reasonable explanation for the delay. The aggrieved party should therefore, file the petition at the earliest possible time.In *Rabindra Nath v. Union of India*,¹⁷ the Court rejected a writ petition filed to challenge the seniority rule made fifteen years earlier under Arts. 14 and 16.

3. Existence of Alternative Relief : The existence of an alternative relief is no bar, to the grant of remedy under Art. 32.¹⁸ In cases involving the breach of fundamental rights, even under Art 226, the existence of an alternate remedy is no ground for refusal of proper relief.¹⁹ The Supreme Court ordinarily insists that the alternative remedy should be availed of unless the

¹³ Amalgamated Coalfields V Janapada Sabha, Chinolvara Air 1961 SC 964.

¹⁴ Air 1981 SC 728

¹⁵ Daryao v. State of Uttar Pradesh, AIR 1961 SC 1457 : (1962) 1 SCR 574

Gulab Chand Parikh v. State of Gujarat, AIR 1965 SC 1153 : (1965) 2 SCR 547

¹⁶ Metal Corp. of India v. Union of India, AIR 1970 Cal 15

¹⁷ AIR 1970 SC 470 : (1970) 1 SCC 84.

¹⁸ K.K. Kochunni Moopil Nayar v. State of Madras, AIR 1959 SC 725.

¹⁹ U.P. State V Mohd. Nooh AIR 1959 SC Sb, Kharak Singh V State of U.P. AIR 1963. SC. 1295.

alternative remedy is useless to the petitioner. In *Kharak Singh v. State of U.P.*²⁰ and also in *K.K. Kochuni v. State of Madras*²¹, it was held that in cases involving the breach of fundamental rights, even under Article 226, the existence of an alternative remedy is no ground for the refusal of proper relief. The existence of an alternative relief is no bar to the grant of remedy u/a 32.

4. No Direct Place u/a 32: In the case of *Bhisham Das v. State of Punjab*²² it was held that writ petition as regards regularization of service would require detailed investigation into the facts. The court directed petitioner to approach the State Govt. with a claim of regularization first.

In the case of *Virender Singh Negi v. State of UP*²³ it was held that as the writ petition was filed for protection in hilly areas in Dehradun, the Court directed to file case before Allahbad High Court. SC directed the cases for violation of human rights to be filed before National Human Rights Commission – *Upendra Baxi v. State of U.P.*²⁴

AGAINST WHOM A WRIT CAN BE ISSUED

The rights which are given to the citizens by way of Fundamental Rights as included in Part III of the Constitution are a guarantee against State action as distinguished from violation of such rights from private parties. Private action is sufficiently protected by the ordinary law of land.

In *P.D. Shamdasani v. Central Bank of India*,²⁵ the petitioner, in an application under Article 32 of the Constitution, sought the protection of the Court on the ground that his property right under Articles 19 (1) (f) and 31 were infringed by the action of another private person – the Central Bank of India. The Supreme Court dismissed the petition.

Fundamental Rights are enforceable against the State. The term ‘state’ has been defined in Art. 12. The actions of any of the bodies comprised within the term ‘State’ as defined in Art. 12 can be challenged before the courts under Art. 13(2) on the ground of violating Fundamental Rights.

The most significant expression used in Art. 12 is “other authorities.” This expression is not defined in the Constitution. The Supreme Court has expanded, the term “other authorities” in Art. 12 and has made the coverage of the Fundamental Rights wider. i.e. more and more bodies are brought within the scope of the Fundamental Rights. For this purpose, the Supreme Court has developed the concept of an “instrumentality” of the state under Art. 12.

In *Rajasthan State Electricity Board v. Mohanlal*,²⁶ the Supreme Court ruled that a State electricity board, set up by a statute, having some commercial functions to discharge, would be an ‘authority’ under Art. 12. The Court emphasized that it is not material that some of the powers conferred on the concerned authority are of commercial nature. This is because under Art. 298, the government is empowered to carry on any trade or commerce.

The question was considered more thoroughly in *Ramanna D. Shetty v. International Airport Authority*²⁷, The International Airport Authority, a statutory body, was held to be an ‘authority’.

²⁰ AIR 1963 SC 1295

²¹ AIR 1960 SC 1080

²² AIR 1961 SC 1570

²³ AIR 1954 SC 447

²⁴ AIR 1987 SC 191

²⁵ AIR 1952 SC 59

²⁶ AIR 1967 SC 1857: (1967) 3 SCR 377.

²⁷ AIR 1979 SC 1628 : (1979) 3 SCC 489

The Supreme Court also developed the general proposition that an 'instrumentality' or 'agency' of the government would be regarded as an 'authority' or 'state' within Art.12 and laid down some tests to determine whether a body could be regarded as an instrumentality or not.

In *A.R. Antulay v. R.S. Nayak*,²⁸ held that the Court cannot pass an order or issue a direction which would be violative of Fundamental Rights of citizens, it can be said that the expression "State" as defined in Article 12 of the Constitution includes judiciary also.

There are a few Fundamental Rights, such as, under Arts 17, 21, 23 or 24 which are also available against private persons. In case of violation of any such right, the court can be make appropriate orders against violation of such rights by private persons.

Who can apply for a writ:

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

The general principle is that a person whose Fundamental Right has been infringed has *locus standi* to move the Supreme Court under Art. 32 for the enforcement of his right except the petition for a writ of habeas corpus.²⁹The rule of standing is also relaxed in case of a petition for *quo warranto*.

The principle applicable to civil suits that all parties interested in the subject-matter of the suit should be made parties, is not applicable to the petitions under Art. 32. If a petitioner has a right to maintain the petition, his petition would not be thrown out and relief refused to him merely because he has not made another person, having equal right with him to maintain the petition, a party thereto.³⁰Over a period of time, the Supreme Court has been taking a liberal view of *locus standi* through the concept of PIL.It is not necessary that the victim of the violation of the Fundamental Rights should personally approach the Court for redress as the Court can itself take cognizance of the matter and proceed *suo motu*, or on a petition filed by any public spirited individual.

RELIEF UNDER ARTICLE 32:

The phraseology of Art. 32(2) is very broad. Thereunder the Supreme Court is authorized to issue orders, directions, or writs, "including" writs, "in the nature of"-*mandamus, certiorari, prohibition, quo warranto* and *habeas corpus*.Under Art. 32, the Supreme Court may issue not only the specified writs but also make any order, or give any directions as it may consider appropriate in the circumstance of the case, to give proper relief to the petitioner. The Court can grant declaration or injunction as well if that be the proper relief.The Court can mold relief to meet the exigencies of the specific circumstances.³¹

²⁸ AIR 1988 SC 1531

²⁹ Sunil Batra v. Delhi Administration (II), AIR 1980 SC 1579

³⁰ Mahendralal Jaini v. State of Uttar Pradesh, AIR 1963 SC 1019

³¹ Golaknath v. State of Punjab, AIR 1967 SC 1643.

In *M.C. Mehta v. Union of India*, SC held, the petition cannot be thrown out merely because he has not prayed for a proper writ or direction. While issuing writs, the Court is not bound to follow all the technicalities which surround these writs in Britain.³²

DAMAGES/COMPENSATION

In course of time, the Supreme Court has given a new dimension to Art. 32 by awarding damages/compensation for violation of fundamental rights and where no other suitable remedy is available to give relief and redress in the specific situation for the injury caused to the petitioner. This, indeed, is a major contribution made by the Supreme Court towards the protection of Fundamental Rights against undue interference by administrative authorities.

In *Rudul Sah v. State of Bihar*³³, in a writ petition for habeas corpus, the Court awarded damages to the petitioner against the State for breach of his right of personal liberty guaranteed by Art. 21, as he was kept in jail for 14 years even after his acquittal by a criminal court. The Court has granted damages in the cases of- personal injuries at the hands of government servants by their tortuous acts;³⁴ police atrocities;³⁵ custodial deaths;³⁶ medical negligence;³⁷ environmental pollution.³⁸ etc. In cases of environmental pollution, the Supreme Court has advocated the principle of polluter pays.

GENERAL DIRECTIONS

The Court has used Art. 32 for a much wider purpose i.e. to lay down general guidelines having the effect of law to fill the vacuum till the making of necessary law. The Court derives such a power by reading Art. 32 with Art. 142 and Art. 141. Art. 144 mandates all authorities to act in aid of the Court orders.

The Court has stated in the case of *Visakha*³⁹, that it is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature. And where even the executive does not act, the judiciary must step in, in exercise of its constitutional obligations.

THE WRITS

1. *Habeas Corpus*

The writ of habeas corpus is used to secure release of a person who has been detained unlawfully or without legal justification or against due procedure subject to the provisions of Art. 22. The greater value of the writ is that it enables an immediate determination of a person's right to freedom. The power of detention vested in an authority, if exceeded, abused or exercised mala fide makes the detention unlawful.⁴⁰

³² AIR 1987 SC 1086, 1091.

³³ AIR 1983 SC 1086

³⁴ Rudal Shah v. State of Bihar, AIR 1983 SC 1086

³⁵ D.K. Basu v. State of West Bengal, AIR 1997 SC 610

³⁶ Nilabati Behera v. State of Orissa, AIR 1993 SC 1960

³⁷ Paschim Banga Khet Mazdoor Samity v. State of West Bengal, AIR 1996 SC 2426

³⁸ M.C. Mehta v. Union of India (2001) 9 SCC 520

³⁹ AIR 1997 SC 3011

⁴⁰ Ram Manohar Lohia v. State of Bihar, AIR 1966 SC 740.

The Supreme Court has pointed out in *Icchu Devi v. Union of India*⁴¹, that in case of an application for a writ of habeas corpus, the court does not, as a matter of practice, follow strict rules of pleading. Even a postcard by a detenu from jail is sufficient to activate, the court into examining the legality of detention. Also, because of Art. 21, the court places the burden of showing that detention is in accordance with the procedure established by law on the detaining authority. The court may grant an interim bail while dealing with a habeas corpus petition. *Habeas corpus* may also be issued when a person complains of illegal custody or detention by a private person. When conflicting claims are made for the custody of an infant, the court can enquire into these claims and award the custody to the proper person.

2. Quo Warranto

The writ lies only in respect of a public office of a substantive character. The writ calls upon the holder of a public office to show to the court under what authority he is holding that office. The court may oust a person from an office to which is not entitled. It is issued against the usurper of an office and the appointing authority is not a party. The court can thus control election or appointment to an office against law, and protect a citizen from being deprived of a public office to which he may be entitled.⁴²

To file a petition for *quo warranto*, it is not necessary that the petitioner should have suffered a personal injury himself, or should seek to redress a personal grievance.

3. Mandamus

Mandamus is a command issued by a Court commanding a public authority to perform a public duty belonging to its office. For example, when a tribunal omits to decide a matter which it is bound to decide, it can be commanded to determine the questions which it has left undecided.

Mandamus can be granted only when a legal duty is imposed on the authority in question and the petitioner has a legal right to compel the performance of this duty. The existence of a legal right in the petitioner and corresponding legal duty on the respondent are conditions precedent for issuing a writ of *mandamus*. The performance of the duty should be imperative and not discretionary.

According to the Supreme Court, *mandamus* is issued “to compel performance of public duties which may be administrative, ministerial or statutory in nature”. *Mandamus* writ cannot be issued to the State Government directing it to appoint a commission to inquire into changes in climatic cycle, floods in the State etc. because the Government’s power to appoint a commission is discretionary and optional.⁴³ *Mandamus* can be issued when the government denies to itself a jurisdiction which it undoubtedly has under the law.⁴⁴

4. Certiorari and Prohibition

The writs of *Certiorari* and *Prohibition* are issued practically on similar grounds. The only difference between the two is that *certiorari* is issued to quash a decision after the decision is taken by a lower tribunal while *prohibition* is issuable before the proceedings are completed. The object of prohibition is prevention rather than cure. The jurisdiction to issue *certiorari* is a

⁴¹ AIR 1980 SC 1984

⁴² Univ. of Mysore v. Govinda Rao, AIR 1965 SC 491

⁴³ Vijay Mehta v. State of Rajasthan, AIR 1980 Raj 207.

⁴⁴ E.A. Coop. Society v. State of Maharashtra, AIR 1966 SC 1149

supervisory jurisdiction and the High Court exercising it is not entitled to act as an appellate Court.

The Supreme Court has emphasized that a writ in the nature of *certiorari* is a wholly inappropriate relief to ask for when the constitutional validity of a legislative measure is being challenged. In such a case, the proper relief to ask for would be a declaration that a particular law is unconstitutional and void. If a consequential relief is thought necessary, than a writ of *mandamus* may be issued restraining the state from enforcing or giving effect to the provisions of the law in question.⁴⁵

The grounds for the issue of certiorari have been succinctly stated by the Supreme Court is ***Syed Yakooob v. K.S. Radhakrishanan***.⁴⁶The writ of *certiorari* or *prohibition* is issued on the following grounds :

- (1) when the body concerned proceeds to act without, or in excess of, or
- (2) fails to exercise its jurisdiction; or
- (3) there is an error of law apparent on the face of the record in the impugned decision of the body; or
- (4) the findings of fact reached by the inferior tribunal are based on no evidence; or
- (5) it proceeds to act in violation of the principles of natural justice; or
- (6) it proceeds to act under a law which is itself invalid, ultra vires or unconstitutional, or
- (7) it proceeds to act in contravention of the Fundamental Rights.

Effect of Declaration of Emergency on Article 32

Emergency has a debilitating effect on the rights of the people in a democratic country. In India, a proclamation of emergency under Art 352 affects the Fundamental Rights of the people very drastically.

The ***ADM Jabalpur v. S. Shukla***⁴⁷ ruling was startling and struck at the very foundations of Rule of Law and the Administrative Law of India. It has been laid down judiciary that the executive must keep the law, even during an emergency, in relation to Art 358.As a result of the ***Shukla***case ruling, the emergency provisions in the Indian Constitution came to be re-casted through the 44th Amendment of the Constitution, enacted in 1978.The 44thConstitutional Amendment restricted the scope of Art 358 in several ways.Art. 19 is not suspended in case of the proclamation of emergency issued on the ground of armed rebellion. Under Art, 358 (1), there is an automatic suspension of Art. 19 as emergency is proclaimed on the ground of war or external aggression, and Art 19 ceases to restrain the legislature or the executive power of the state or the Centre. If the legislature makes a law. or the executive commits acts, which are inconsistent with the rights guaranteed by Art 19, their validity is not open to challenge either during the continuance of the emergency or even thereafter.

Art 358 (1) does not apply to:

⁴⁵ Prabodh Verma v. Uttar Pradesh AIR 1985 SC 167

⁴⁶ AIR 1964 SC 477

⁴⁷ AIR 1976 SC 1207

- i) Any law which does not contain a recital that such law is in relation to the proclamation of emergency in operation when it is made; or
- ii) Any executive action taken otherwise than under a law containing such a recital.

Art. 358 (2) confirms that only a law enacted in regard to the emergency, but no other law, would be immune from being challenged under Art 358 during an emergency. In (ii) above "action under a law" suggests that any action which is *ultra-vires* the law is not protected.

According to a proviso to Art 358 (1), makes it possible to extend any law or executive action taken in the part in which emergency prevails to any others part of the country if activities there in threaten the security of India or any post thereof.

Art 359 refers to the suspension of the operation of all fundamental rights other than Art 19 during an emergency. Under Art. 359, Fundamental Rights as such are not suspended, but only their enforcement. But to curtail the vast power vested in the executive, the 44th Amendment restricts the scope of Art. 359 somewhat. Art 359 has been amended so as to provide that the presidential power to suspend the right to move the Court for the enforcement of a Fundamental Right can't be exercised in respect of the Fundamental Rights guaranteed by Arts 20 and 21. Thus it is not possible to suspend the right to life and personal liberty guaranteed by Art 21 and the right to protection in respect of conviction for offences guaranteed by Art 20.

Under Art 359 (1), when a proclamation of emergency is in operation the President may by Order, declare that the right to move any court for the enforcement of such of the Fundamental Rights as may be mentioned in the order (except Art 20 and 21), and all proceedings pending in any Court for the enforcement of the rights so mentioned, 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.

CONCLUSION:

Fundamental Rights in order to be meaningful must be enforceable. The Constitution not only guarantees certain Fundamental Rights but under article 32 it also guarantees the right to move the highest Court in the land directly by appropriate proceedings for the enforcement of the Fundamental Rights. The Supreme Court may issue writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*. Parliament may empower any other courts also to exercise these powers. The right guaranteed by article 32 cannot be suspended except as provided by the Constitution. For example, during a proclamation of Emergency (a) the right to move Court for enforcement of any of the Fundamental Rights except articles 20 and 21 can be suspended under article 359 and (b) executive and legislative power of the State shall not stand restricted under article 358 by the rights to freedom enshrined in article 19. Where the suspension of Fundamental Right is protected by the Constitution, article 32 will not apply. It has been held by the Supreme Court that this right cannot be taken away even by amending the Constitution as it is a basic feature of the Constitution. Even at the time of framing the Constitution, Dr. Ambedkar had described this provision as the very soul and heart of the Constitution.

Only the Fundamental Rights guaranteed by the Constitution can be enforced under article 32. Article 32 is not exactly concerned with an erroneous order or even with the unconstitutionality

of a legislation unless it directly affects or invades any of the Fundamental Rights. Since right to constitutional remedy under article 32 is itself a Fundamental Right, the Supreme Court may not refuse relief for violation of a substantive Fundamental Right.

Article 226 grants powers to the High Courts also to issue various writs. In case of violation of Fundamental Rights, the Supreme Court and the High Courts both have concurrent jurisdiction and an affected person can approach either. However, the Supreme Court has since held that where relief through High Court under article 226 is available, the High Court should be approached first.

Under the new concept of public interest litigation propounded by the Supreme Court in the *Transfer of Judges case*, it is no more necessary to be the affected party to approach the Court for violation of Fundamental Rights. Any member of the public can do so even through a letter on behalf of a person or group of persons who for any reason may not be in a position to approach the Court.