Constitutional Law and Public Administration in India

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Right to Constitutional Remedies - I (Article 32)

The last part of fundamental rights under the Constitution of India, warrants discussion on two articles, namely, Article 31 and Article 32 of the Constitution. Article 31 of the Constitution is also a very critically important article. However, this article now stands removed from the Constitution, though not entirely but in its larger context. Article 31 as it was adopted in the Constitution, stated the right to property as being one of the fundamental rights. But by the 44th Amendment Act of 1978, this was taken off and it was put in Article 300 of the Constitution. That is why the right to property no longer is a fundamental right. The acquisition of state is provided under Article 31A. Most of the land reform legislations did look at acquisition of states. The State took over a lot of entities and corporations. In the 1970s and 80s, while we were influenced by the socialism theory of government or democracy, we did look at nationalization of banks and public sector undertakings being established. Government took over the duty of doing a lot of businesses, extraction of mangroves, running of trains and buses, and so on and so forth.

The duty of the state vis-a-vis what it wanted to do with private property in terms of acquisition warrants discussion. There were these jagirs that were there in the princely states and hence those jagirs could be taken by the government and only the state could own a state and that was provided for in the Constitution. Article 32 speaks of Constitutional remedies which are the core and important aspect of the fundamental rights chapter. The architect of the Constitution, Dr. Ambedkar had clearly stated that Article 32, is the very heart and soul of this document called the Constitution of India. It is really very important for citizens to have Constitutional remedies, without which rights that are guaranteed under part III of the Constitution will only remain rights, they will not remain fundamental. They may remain legal, but they will not remain fundamental. So, without Article 32 and Article 226, which are called the writ remedies of the court, these rights would not be fundamental or core.

So emphasizing that Article 32 is the most important article he said that fundamental rights would be of no use unless a proper mechanism was developed for citizens to avail these

rights and enjoy them in a meaningful manner. And, if they are not able to exercise any kind of remedies, then the rights will be of no use. Article 32 is the right to move to the Supreme Court by appropriate proceedings for the enforcement of one's rights. There is India, the hierarchy of the court system in the judiciary that starts from say the district level and within the district level, there are criminal and civil courts, if you are an aggrieved individual.

The principle of locus stand exists for one to go to the court and claim the appropriate remedy, either against state or against private individuals as well. From the district court, you are supposed to seek the appellate jurisdiction of the High Court from the High Court, you can appeal to the Supreme Court. In certain cases, appeal is a discretion of the court, the court may grant you or admit your appeal or may not admit your appeal. But in most cases, like for example, in case of an accused having been given the death penalty, then the appeal is kind of right so that the Constitutional court or the apex court can actually decide whether it was appropriately granted, or it was not. From the High Court, you can appeal to the Supreme Court, from the Supreme Court, you can take a review within the Supreme Court, from a two judgement to a three judgement and then the mercy petition as it were, in case death penalty is being awarded, goes to the President of India.

However, under Article 32, the point that one should realize is that you do not have to go under the rigour of district, High Court, Supreme Court and any other court or any other review of the Supreme Court but you have the right to go to the Supreme Court directly. It is possible to cut short this time and the rigour and process that is established by the judiciary and you go to the Supreme Court directly, in case you think there has been a breach of your fundamental rights by the state or by any other authority. This 'any other authority' has been discussed under Article 12 of the Constitution. Courts generally have two broad jurisdictions. One is called the appellate jurisdiction.

From district to High Court to Supreme Court, is usually an appeal process. So, the Supreme Court is then considered as an appellate court. But when you are approaching the apex court directly, then you are going under what is called the original jurisdiction. Article 32 is an original jurisdiction suit. Wherever a citizen feels that his fundamental rights are going to be infringed or violated, or he finds that the machinery to exercise his right is not very effective, then he can directly approach the Supreme Court under Article 32. Article 32 grants us a right to move to the court and seek the enforcement of your rights. The Supreme Court has power under Article 32 to issue directions or order or any kind of writ for the enforcement of any fundamental rights. And the writs that are generally issued under Article 32 include, the writ of *habeas corpus*, *mandamus*, prohibition, *certiorari* and *co-warranto*.

The writ of *habeas corpus* is usually used to get a person who is in detention. Habeas and corpus mean to produce the person before the court of law, so that his rights can be

determined, either in detention or in custody, or vis-a-vis state exercise and abuse of power. The writ of *habeas corpus* is generally being used vis-a-vis police action of the state. And law is created by the legislature, but it is the executive that implements the law, and, in its implementation, the executive may violate the principles of natural justice, or the principles of protection of fundamental rights, and hence, the courts will intervene by issuing a writ of *habeas corpus*. This writ in current times has been utilized even for producing a person who is missing or who has gone missing and requesting the state to take actions to find the missing person.

Any person in the eyes of law can seek the intervention of the court, Supreme Court under Article 32 for the protection and the preservation of his fundamental right, and he can ask the court to protect his interest by issuing these kinds of writ. So, is Article 32 a fundamental right itself? The answer is yes. It is one fundamental right being used for enforcement of all other fundamental rights through the help of the court. Interestingly, if you see the power of the Supreme Court and the power of the High Court are two distinct powers because one is under 32, the other is under 226. The wordings are almost the same because the writs that the courts of the High Court and Supreme Court issue are one and the same. But when one can go to the High Court and when he can go to the Supreme Court is left to the individual choices because Article 226 can also be utilized in case there is a violation of fundamental rights. However, Article 226 is a little bit broader and wider because under 226 apart from fundamental rights, one can go into the High Court for the enforcement of a legal right also.

The writ of mandamus is like a judicial review of executive action. If this writ is being issued, then an executive officer in the government will be expected to do his statutory duties, which means that either he has omitted to do it or he has done an act that infringes the rights of citizens, or he is unable to perform his duty to protect the rights of citizens. In those circumstances, with the power of judicial review, the Supreme Court will intervene and issue the writ of mandamus directing that government executive officer to do precisely and exactly what is supposed to do by the court order. The writ of mandamus is a very powerful writ, and it is used to protect citizens' interest vis-a-vis the state. So, the state and its functionaries ought to facilitate the rights of citizens and the writ of mandamus is a very powerful writ that is used quite often.

Writ of prohibition and certiorari se are two writs which look at judicial review of the judiciary itself. These two writs are generally issued when there is a prohibition of a higher court trying to supervise a lower court. Prohibition literally means to forbid; the writ of prohibition means to forbid. That means the higher court will ask a lower court which is exceeding its jurisdiction, not do so as it is not a case within the jurisdiction of the lower court. The higher court directs the lower court to transfer the case to some other court or to the high court. So, by a writ of prohibition a higher court may prohibit a lower court from admitting a matter or deciding a case which the higher court thinks that the lower court is

out of jurisdiction. The writ of certiorari is a Latin expression and literally means to be informed. This writ is generally issued against a judicial or a quasi-judicial body to either transfer the case or crash the case as the issue is. So generally, a certiorari means that the higher court concludes that judicial, or a quasi-judicial body is not deciding the case appropriately and hence they would want to exercise judicial review on this, that is when the writ of certiorari is usually issued.

The final writ is called the writ of quo-warranto. Quo-warranto means under what authority or under what warrant. This writ is usually issued to challenge the occupation of any public office. So, if any person is appointed to any public office, he or she must be able to justify the qualifications and the requirements to hold that kind of public office. So, to check irregular illegal appointments to public offices, this writ is generally being issued.

All these five writs that are there under 32 and 226 literally make judicial review a very powerful tool in public administration. So, public administration cannot have its discretion in a manner that violates the fundamental rights of citizens. The judiciary will check public administration. It will balance between the writ of public administration to the writ of citizens and it will ensure that public administration is done in an equitable manner, in a manner that does not violate the rights of citizens. The Supreme Court under Article has been the defender and guarantor of fundamental rights of the citizen as rightly stated by many Constitutional law authors.

Article 32 though is original, it is very wide in its power and how and the Supreme Court can intervene, not only in some rare cases that the Supreme Court but can exercise 32 as and when it feels that it is expeditious for the court to intervene. It may want the remedies to be inexpensive, speedier and in some cases a summary remedy. The Supreme Court can try to intervene in these matters. The Supreme Court just intervened under Article 32 for fundamental rights, and they have been extended for any statutory or legal right because the right to life under Article 21 has been so broadened, so expanded to mean so many different facets. Article 32 has been invoked not only for what is being stated in the Constitution, but what the Constitution means for a citizen to have a dignified life in the country. So, for all those unenumerated, unlisted, rights that have come from the President, Article 32 has been invoked. While writs can be invoked and sought by the court, Article 32 does not stop the Supreme Court just in terms of giving writs. It can also give directions or pass orders.

The right under Article 32 is not something that you need to postpone. The courts have said that even if there is an alternate remedy, if your fundamental right is violated, approaching the Supreme Court under 32 is still applicable. So, having an alternate remedy is no bar to seeking the relief under Article 32. The Supreme Court is your protector, your defender and an aggrieved individual has an option to either go to the High Court or to the Supreme

Court or any other remedy that he has. The jurisdiction of the Supreme Court under 32 can always be invoked.

There is something called the doctrine of laches. It clearly means that there has been a delay in seeking remedy. The courts usually invoke this doctrine even under Article 32 and Article 26. You cannot unnecessarily delay approaching for remedies. If you are someone who could not access justice, someone who is not literate, then the court may under doctrine of laches give you an exception. But generally, an unexplained delay may take away your right to seek remedy under Article 32. For example, like in the Sardar Sarovar project, the *Narmada Bachao Andolan v. Union of India*, in 2000 decided by the Supreme Court, the petitioners had very appropriate intention to look at the rights of tribals or forest dwellers who were not compensated when the Sardar Sarovar and the Narmada Bachao Andolan project was being planned and who were displaced and the government did not intervene in the case. One of the pleas in the *Narmada Bachao Andolan* case was that the dam building must stop, and the dam heightening project must not be allowed to continue. The court said that the petitioners approached the court very late in opposing the construction of a dam at a very late stage when a lot of so much of public money or taxpayers' money has been already utilized and therefore there is a public interest.

The public interest in the case was to provide drinking water to a large section of the community in Bihar. This petition should be barred by limitation or by the doctrine of laches. So, the courts have warned civil society organizations and individuals of this approach as soon as possible so that effective remedies can be granted under Article 32. Article 32 has grown over a period of time, both in terms of private individuals seeking the intervention of the court, like in the case of *Maneka Gandhi v. Union of India*, or in terms of the public interest litigation that has been championed by the Supreme Court from time to time. So there are two ways in which the writ under Article 32 can be granted. The Supreme Court has been a court that has not only given orders and directions and writs, but it has also looked at managing executive action. So, there is something called continuing mandamus. In a very famous case, this is called the Forest case of India namely, *TM Godavarman Thirumulpad v Union of India*. This was a petition filed in the year 1996. That was the first time it was decided. The Supreme Court was kind of surprised that the forests are not being managed or conserved effectively for the better right of a good environment or a healthy environment. And hence, the Supreme Court took upon itself the business of India's forests. Over the period of more than 15-20 years, the continuing mandamus even goes as of now in the Supreme Court, which was decided just last year. So, all these years, it was a continuing mandamus. It was the order of the court saying that if there must be any executive decision taken in forests in India, you must approach the court. So, the officers in the government had no power to decide about how and what matters to be taken inside forest areas. They could only do that after the permission of the court. And that is why this TM Godavarman case is a case of what we call as continuing

mandamus where the court would want to supervise, monitor, and implement its orders. And hence, the court appointed the Central Empowered Committee which would take a call and they would report to the Supreme Court as the case was made. Article 32 is a fundamental right to constitutional remedies.

The way in which judicial review happens in India and why there is so much respect for the judiciary, has the power of contempt. If any individual willfully, does not comply with the orders of the court, be it the High Court and the Supreme Court, then for that kind of an intentional, willful non-compliance the court can act against that individual, be it an executive officer or be it any other private citizen for contempt of court. There are two kinds of contempt, one is called civil contempt, where you may be asked to pay a fine and there is criminal contempt, where you may be asked to go to jail for not following the directions and the orders of the court. The courts usually may not use criminal contempt, but they may impose a very exemplary cost in case you do not comply with the orders of the court. So, in that context, the power of the judiciary in India is important. That is where the courts can issue their writs. Thus said the Supreme Court and judiciary in general, has been able to eradicate a lot of evils in our society.

If one scrutinizes the directions of the court in the last 30 years, especially post-emergency, the prerogative writs that have been issued, has been, the fountain of justice. The idea of the writs may come from common law, in England. They have laid the foundation of justice in this country. To a larger extent, the writs are, substantially checking public administration, they almost have a permanent character in how they have been issued and have been a jewel in the Constitution.

The legality of many actions of the executive and the legality of many laws are also something that the courts have checked over a period. Article 32 can be invoked by both Indian citizens as well as by corporate citizens. By this it is meant that sometimes industries may feel that their right is being violated, a company or society may feel that their right is violated. The press, for example, may feel that their rights are being violated under the Constitution, and they are also entitled to exercise the power to go and access the Supreme Court.

You can also go under Article 32 to the Supreme Court when you think that a law is being enacted without jurisdiction and also if an, an action is taken in a mala fide manner and seek the intervention in case, where the offices of the government itself in their employment services feel that there is an arbitrary action. So, it is not only for citizens but government employees, and public servants, who feel that within their organization and department, there is no fairness, there is no equity, there is no justice, can also seek the intervention of the court under Article 32.

Article 32 has been utilized for election matters by even political parties, or by citizens or by the Election Commission of India. A lot of institutions that are Constitutional bodies like the Election Commission being one have approached the court directly and have sought the court's intervention for any kind of wrong that should be brought to the attention of the court and in which it is felt there needs to be a judicial intervention on a national level, so that the Constitutional principles can be enhanced and better protected. Some of the legislations, which affect rights, can also be challenged under Article 32. For example, the Supreme Court has been approached in the Triple Talaq case, either in the original jurisdiction or in the appellate jurisdiction.

There is a long list of matters that the Supreme Court has intervened in and have given relief to workers in terms of compensation as well. They have given relief to sex workers. relief in service matters, matters emanating from contracts or customary rights, or rights following from a subordinate legislation or a right based on case law. All of these have been used for the intervention of the court. But it is also important to look at a word of caution here.

The Supreme Court has time and again imposed costs if the writ power of the court has been misused for frivolous petitions or for speculative matters. The court then dismisses such kinds of petitions because the time of the Supreme Court is very, very precious. And going to the court for all small matters or frivolous matters, like putting a ban on some film on some speculative character that it may hurt religious sentiments. The Supreme Court is supreme in that context. Time is also supremely important. So in those kinds of situations, the court then will dismiss it with a warning, impose a cost either on the petitioner or on the lawyer who should have checked whether this is a matter admissible under the writ power or not.