Constitutional Law and Public Administration in India

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Week- 06

Lecture-02

Right to Constitutional Remedies - II (Article 32 & Article 226)

Writs are an important tool for enforcing fundamental rights guaranteed under the constitution. There are five writ orders that are issued by the court. These are orders based on the writ petition that is generally filed in either the High Court or the Supreme Court. So, a writ petition is different from a writ order. Writ order is issued based on what has been the individual's plea, whether he has been able to substantiate the same and whether the court has found it necessary to review the petition of the plaintiff and whether the court seems so necessary to intervene in the matter and issue such a writ. Based on all of these, to safeguard the interest of citizens, to control the power of the state, to regulate public administration and to look at the doctrine of separation of power theory, the judiciary is bestowed with the absolute and fundamental power of judicial review and issuing these kinds of writs to different sectors of public administration under the constitution of India.

In public administration, there is what is called constitutionality of a legislation that is checks and balances rule on the legislative competence or the legislative necessity. The Supreme Court did say that the National Judicial Appointment Commission's bill was unconstitutional, which is called the NJAC bill, because courts have retained their independence and autonomy by holding that the Act of the parliament is unconstitutional. The Act attempted to balance the power of the executive with the power of the judiciary in making appointments of judges to the superior courts, through the National Judicial Appointment Commission’s bill. In that sense, the writ jurisdiction is a very broad jurisdiction that may check the power of the parliament.

By the abrogation of Article 370 and Article 35A of the constitution, in which special status to Jammu and Kashmir created by the constitution, was removed. And the same was taken with the Supreme Court. So, the Supreme Court will decide whether the actions of the government are valid or not, whether constitutional or unconstitutional. Similarly, the power of the police is the power of the executive administration. Mandamus is the power within the judiciary itself because judicial review of the judiciary is also an important aspect of public administration. Instead of using the word public administration, the appropriate word would be the administration of justice.

So, these institutions are involved in administration of justice, and hence prohibition and certiorari are the writs that relate to them. In some landmark cases on writs, for example, the writ of certiorari was issued in the *Kharakh Singh v. State of Uttar Pradesh* case, it is a 1963 judgment of the court. It is a very important case, which also speaks about the right to privacy. In certain cases, the courts have intervened in certain matters where they have done a violation of certain errors of fact that they might have committed, or they might have exceeded the jurisdiction, or they might not have followed the principles of natural justice. Judicial and constitutional authorities are supposed to act fairly, and in a non-arbitrary manner and with reasonableness. And they have to provide an opportunity of being heard to the parties and be transparent in their administration. The writ of certiorari has been utilized by the Supreme Court to ensure the same, where either administrative or quasi-judicial authorities have not followed those kinds of principle in terms of administration of justice. In *State of Bihar v Kameshwar Singh*, the Supreme Court held that the writ of prohibition can be utilized to prevent lower courts from time to time from surpassing their jurisdiction. In the *ADM Jabalpur v. Shivkant Shukla* known popularly as the *Habeus Corpus* case, when citizens move the court for the enforcement of their fundamental rights, they can do so, but what happens when some of these constitutional remedies are suspended during emergency? Emergency was imposed in this country in 1975 and 1976. When such a national emergency is imposed by the government, which is a power that rests with the government or with the Union Cabinet under Article 352 of the Constitution of India, the state of emergency can be declared by the President and then some of the rights may have to be suspended in national interest, because emergency is a time when national interest is deemed to have been adversely impacted. Hence, we must make a choice between what can be exercised as fundamental and what cannot be exercised as fundamental. Emergency power impacts part III of the constitution, but how. As a foundation of an individual's existence in each society, an individual wants to develop his intellectual abilities, he must fulfil his spiritual advances, and he must adhere to his responsibility as a citizen within the ambit of law and order and morality and public policy.

The original Constitution gave a certain fundamental right namely, the right to equality, the right to freedom, the right against exploitation and so on. Right to equality is between Article 14 and 18. Right to freedom is between Article 19 and 22. Right against exploitation is Article 23 and 24. And the right to freedom of religion is between Article 25 to 28. Cultural and educational rights are Article 29 and 30. Right to property was there under Article 31. And finally, is the right to constitutional remedies under Article 32. Right to property is now no longer a fundamental right but a legal right under Article 300a of the constitution. Originally, there were seven fundamental rights, now there are six, namely right to equality, right to freedoms, in Articles 19 to 22, right against exploitation, right to freedom of religion, cultural and educational rights, and finally constitutional rights.

One must appreciate that the rule of law clearly says that none of your rights, whether it is fundamental or legal, are going to be absolute or complete or that you can do whatever you want with it. Every right has some scope of what you can do with it. And every right has some limitation of what you cannot do. So, the limitation on rights either can be imposed by the constitution itself, or one can infer it by the law on public administration and how public policy is determined from time to time, because that can be very dynamic. What was public policy in terms of limitations to fundamental rights in 1970 can be different from what it is today. Because there is also what is called this fourth generation of rights. Initially when we got independence from the British colonized kind of rule, we were looking at the first generation of rights called civil and political rights which includes having your democratic government, having your own government, establishing your own policies, etc. These were the initial struggles that our forefathers who adopted and gave us this constitution had to undergo. Then slowly, as the society progresses, the state and country progresses, civil and political rights get a little bit settled and then you have to move on, to look at fair elections, in civil and political rights so that the democratic process is ensured. Then you move forward and have your cultural and economic rights which is the second stage of rights that citizens generally enjoy.

Cultural and social rights or economic rights would mean the right to development, what you can do as a right to business, right of movement, having your own property or house, income, and so on. Cultural rights could mean, you have your faith, religion, language which are protections in the second generation of rights. In the third generation of rights, you come to a stage where you talk about the quality of life, and not just the life, wherein health and environment become very critical. The Courts post 1990 looked at regulating private businesses, stopping their greed and all of these became the third generation of rights.

Today it is a stage of fourth generation rights. Every generational right had its own scope for the right, and their own limitation to the same and the public policy that is laid down by any process of governance. Public policy cannot be uniform in a country like India, which is very diverse in terms of its geography, language, and culture. And it may differ from time to time as well from one generation to another. In fourth generation, rights, you can talk about rights of homosexuals, transgenders, gender equality in places of worship, and endless number of rights. These are the fourth generation of citizens of this country, who demand a different set of rights for their determination, because they know that the country is safe, national security is safe, and that the political process is already done.

Culturally and economically, India is well off post 1991, because of liberalization, privatization, and globalization. So, we need some other rights by which we developed fourth generation rights. In all these rights, some could be fundamental, some could be just legal. These rights are granted in the hope and with the aim and purpose that it will

only do public good. It will serve you better, make you more intellectually developed and the country would progress and become a superpower. There is scientific innovation and a trillion-dollar economy, the fifth largest economy, wherever you want to achieve new progress, multi dimensionally in terms of GDP growth. However, there has always been a limitation that some of the fundamental rights ought to be subservient to the social good, to the social cause, to public order and to public morality.

Morality, in terms of constitutional morality can be spoken about which is the new test of morality today. And then finally, the safety and security of the state which you cannot compromise. So, when it comes to the safety and security of the state, suppose there is a conflict between protecting fundamental rights and safety and security of the state, one would easily conclude that the safety and security of the state would have to be given prominence not fundamental rights. So, fundamental rights not being absolute are to be governed with reasonable restrictions.

The word reasonable is a very important restriction, which will tell you limitations on the exercise of your fundamental rights. But the fact remains that whenever reasonable restrictions are imposed, those that are stated in the constitution are to be implemented. So, when we say public order, what exactly in a given situation is public order due to which your fundamental rights have been curbed, infringed, or abridged would be subjective to that case to the place that it has been invoked or imposed. And hence, those kinds of restrictions are always subject to judicial review.

They will always be subject to the fact of whether those restrictions are justiciable in nature and character. If they are found to be so by the court, it will pass the test of constitutionality. And the fundamental rights may be curtailed or restrained because of the necessity of maintaining public law and order. So, can fundamental rights then be suspended during emergency and which of these rights cannot be suspended was decided by the Supreme Court held in the case of *ADM Jabalpur v. Shivkant Shukla*, called *habeus corpus* case which was in 1976, just after emergency. The dissenting opinion then in this case became the majority opinion in the *Maneka Gandhi* case.

The court did say that Article 21, that is right to life can also be suspended. But in *Maneka Gandhi*, it was held that it cannot be. Right to life at any given cost of whether it is an emergency or not, should not be suspended. And even during an emergency Article 21 will continue to prevail and the state is duty bound to protect that life and not infringe or abridge the same. This has been a very significant ruling in terms of whether the most important fundamental right, Article 21 can be suspended during national emergency. Whether Article 19, the six freedoms that we have under Article 19, freedom of speech and expression movement, business and so on can be suspended during an emergency. The answer is yes because if you refer to Article 358 of the Constitution of India, it specifically provides that the suspension of Article 19 during emergency can take place. So, the

constitution itself says it can be done, but 21 should not be because of the Supreme Court decision in the *Maneka Gandhi* case. So, when can Article 19 be suspended, and during which kind of emergency? When the proclamation of emergency is done, to ensure the security of India or any territory thereof, if it is threatened by any kind of a war or external aggression, then Article 19 can be restricted by the state by making any law to that effect or through executive action necessary in those matters. However, once the proclamation of emergency ceases, then automatically the rights under Article 19 will be restored. So, reading Article 359, one would come to this conclusion that except Article 20 and 21, most of the fundamental rights can be suspended and are stated in Article 359. So, there is a very clear demarcation. Articles 20 and 21 are not to be compromised during proclamation of any kind of an emergency, but rest of the fundamental rights can be affected.

Once the proclamation of emergency which is only, for a certain duration of time of not more than six months, unless reasonably required, ceases, then automatically your fundamental rights get reactivated, and you can exercise your fundamental rights and enjoy the same as well. The 44th Amendment Act of 1978 brought some changes by which suspension of fundamental rights can happen. When a presidential order to that effect is generally issued, it must be presented before both the houses of the parliament. And those are the procedures that are laid down in terms of how this is to be exercised. *ADM Jabalpur* case said Article 21 can be suspended, but then Article 359 very clearly now states that except Articles 20 and 21, no such rights can be suspended. Article 226 speaks about the writ jurisdiction of the High Courts.

The power of the High Court under Article 226 is very similar to the power of the Supreme Court under Article 32 but is far broader and wider. Because High Courts are in every state, and they are benches of the High Court also in different cities. The High Courts are the constitutional courts and not ordinary courts. Hence, they also have an original jurisdiction in accepting writs. A citizen can directly go to the High Court without going to the lower court in case there is a violation of two kinds of rights, one fundamental like under Article 32 and additionally, for the violation of a legal right, established by a statute, or a law of either the State Assembly or the parliament.

So, it is a normal right but not so very fundamental that is mentioned in the constitution. But it still has the power that it shall not be abridged, or infringed and the state has a duty to protect that kind of a legal right. And in case a citizen feels aggrieved or violated, then he can approach the High Court in its original jurisdiction as an aggrieved individual or a party. Article 226 also has been utilized for public interest litigation, of course, because the right to life and hence the dilution of the local standard principle means that anyone who is in public interest can approach and seek the protection of his fundamental or legal right not only for himself, but for someone else in public cause or social interest as provided under Article 226.

A significant case, *L. Chandrakumar v. Union of India*, was about Article 227. Article 227 is a very significant part of the High Court in what is called the supervisory jurisdiction of all courts within its territory. The High Court of Karnataka or the High Court of Tamil Nadu, called the High Court of Madras which is a High Court in a particular territory, and every other court below it, be it proper judicial court or even a quasi-judicial kind of a court shall come within the supervisory jurisdiction of the High Court. And hence, the High Courts can exercise their powers under Article 227 as well. In *L. Chandrakumar* case it was held that the Parliament or the State Legislature cannot intervene or exclude the jurisdiction of the constitutional courts. The constitutional courts are supreme at any given point of time, and taking away the power of the constitutional courts or limiting the power of the constitutional courts will be completely against the basic feature of the constitution. And this is an integral part of the constitution having Article 32 and 226. So, no tampering, or amendment, or any kind of interference can be done in these two articles.

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