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Writs and Indian supreme court-An analysis

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Abstract
Independence of the judiciary is the idea that the judiciary needs to be kept away from the other branches of government. There is no doubt that the Indian Supreme Court has always shown its independence and impartiality since its inception. That is, courts should not be subject to improper influence from the other branches of government, or from private or partisan interests. In some countries, the ability of the judiciary to check the legislature is enhanced by the power of judicial review. This power can be used, for example, when the judiciary perceives that legislators are jeopardizing constitutional rights such as the accused. In our country also the constitution has established a separate and independent judiciary. It has remained impartial and independent all these years. Our Supreme Court has very zealously been protecting the fundamental rights of the citizens. Thus it has been acting as a protector and guardian of the Indian Constitution as well as the rights of the citizens. But in the modern age the independence of the judiciary doesn't mean that it should not keep in mind the social and economic deals and aspirations of the people, while delivering its judgements. Rather the judiciary should actively participate in the sacred task of building a welfare society in the country and the regeneration of the nation. Similarly the executive or the Parliament should not do anything to undermine the independence of judiciary.

Keywords: judiciary, writs, habeas corpus, certiorari, mandamus and quo warranto

Introduction

The Constitution of India says the executive, legislature and judiciary are the three arms of our constitution. The Executive is accountable to the Legislature, which in turn is democratically accountable to the Legislature, which in turn is democratically accountable to the people. Of the three pillars of democracy, Judiciary is the most powerful, primarily because it has the power of judicial review over every action of the executive and the Legislature. It is not only the arbiter of disputes between the citizens, between citizens and the State, between States and the Union, it is also in purported exercise of powers to enforce fundamental rights, directs the governments to close down industries, commercial establishments, demolish unauthorized constructions, remove hawkers and rickshaw pullers from the streets, prohibits strikes and bandhs etc. In short, it has come to be most powerful institution of the State. Accountability and transparency are the very essence of democracy. Not one public institutions, or for that matter even private institution dealing with the public is exempt from accountability. Their judgements are also subject to scrutiny by the appellate courts.

> In *Sheela Barse v. Union of India,* [1] Justice Venkatachaliah said: *"….the references to judicial-accountability, having regard to the specific context in which they are made really mean no more than that the proceedings are to be conducted in conformity with the standards of promptitude and dispatch of which the applicant chooses to constitute herself the judge to sit in judgment over the alleged short comings in that behalf. The concept of public accountability of the judicial system is, indeed, a matter of vital public-concern for debate and evaluation at a different plane. All social and political institutions are under massive challenges and pressures of reassessment of their relevance and utility. Judicial institutions are no exception. The justification for all public institutions are related to and limited by their social relevance, professional competence and ability to promote the common-well. There is no denying that a debate is necessary and perhaps, is overdue."*

In *A.M. Mathur v. Pramod Kumar*, [2] K. Jagannatha Shetty J speaking for the court has said: "Judicial restraint and discipline are as necessary to the orderly administration of justice as they are to the effectiveness of the army.
The duty of restraint, this humility of function should be constant theme of our judges. This quality in decision making is as much necessary for judges to command respect as to protect the independence of the judiciary. Judicial restraint in this regard might better be called judicial respect, that is, respect by the judiciary. Respect to those who come before the court as well to other co-ordinate branches of the State, the executive and the legislature. There must be mutual respect."

Habeas Corpus and Quo Warranto
There were different kinds of writs known in the family of prerogative remedies like Habeas corpus, Certiorari, Mandamus and Quo warranto. They all belonged to the same ancestry. The writ of *habeas* corpus means that you have the body to submit or answer. It is a prerogative writ for securing the liberty or subject from the wrongful deprivation of liberty of the subject or unlawful detention of the subject against his The main object of the writ of Habeas Corpus is to give quick and immediate remedy to the person who is unlawfully detained by another. If the court is satisfied that such a detention is illegal or improper, it can direct the person to be set at liberty. And they are under legal obligation towards such subjects and the writ of habeas corpus will lie for the enforcement of duties. The Writ of Quo Warranto is issued calling upon a person or authority to show what is the authority of such person is to hold the office. By this writ, a holder of a public office is called upon to show the court, under what authority he holds the office and to prevent a person from holding office without authority or to prevent him from continuing to hold which he is not legally entitled to.

Origins in England
Habeas Corpus originally stems from the Assize of Clarendon, a re-issuance of rights during the reign of Henry II of England. In the 17th century the foundations for *habeas corpus* were "wrongly thought" to have originated in Magna Carta [3]. This charter declared that:

> *No Freeman shall be taken or imprisoned, or be disseized of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the land.*

William Blackstone cites the first recorded usage of *habeas corpus ad subjiciendum* in 1305, during the reign of King Edward I. However, other writs were issued with the same effect as early as the reign of Henry II in the 12th century. Blackstone explained the basis of the writ, saying "The King is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted". The procedure for issuing a writ of *habeas corpus* was first codified by the Habeas Corpus Act 1679, following judicial rulings which had restricted the effectiveness of the writ. A previous law (the Habeas Corpus Act 1640) had been passed forty years earlier to overturn a ruling that the command of the King was a sufficient answer to a petition of *habeas corpus*. The privilege of *habeas corpus* has been suspended or restricted several times during English history, most recently during the 18th and 19th centuries. However, as *habeas corpus* is only a procedural device to examine the lawfulness of a prisoner's detention, so long as the detention is in accordance with an Act of Parliament, the petition for *habeas corpus* is unsuccessful. Since the passage of the Human Rights Act 1998, the courts have been able to declare an Act of Parliament to be incompatible with the European Convention on Human Rights, but such a declaration of incompatibility has no legal effect unless and until it is acted upon by the government. The wording of the writ of *habeas corpus* implies that the prisoner is brought to the court for the legality of the imprisonment to be examined. With the development of modern public law, applications for habeas corpus have been to some extent discouraged, in favour of applications for judicial review. The Indian judiciary, in a catena of cases, has effectively resorted to the writ of *habeas corpus* to secure release of a person from illegal detention. For example, in October 2009, the Karnataka High Court heard a habeas corpus petition filed by the parents of a girl who married a Muslim boy from Kannur district and was allegedly confined in a *madrasa* in Malapuram town. Usually, in most other jurisdictions, the writ is directed at police authorities. The extension to non-state authorities has its grounds in two cases: the 1898 Queen's Bench case of *Ex Parte Daisy Hopkins*, wherein the Proctor of Cambridge University did detain and arrest Hopkins without his jurisdiction, and Hopkins was released and that of *Somerset v Stewart*, in which an African slave whose master had moved to London was freed by action of the writ. The Indian judiciary has dispensed with the traditional doctrine of *locus standi*, so that if a detained person is not in a position to file a petition, it can be moved on his behalf by any other person. The scope of *habeas* relief has expanded in recent times by actions of the Indian judiciary.
The habeas writ was used in the Rajan case, a student victim of torture in local police custody during the nationwide Emergency in India in 1976. On 12 March 2014, Subrata Roy's counsel approached the Chief Justice moving a habeas corpus petition. It was also filed by the Panthers Party to protest the imprisonment of Anna Hazare, a social activist.

Writ of Quo Warranto
Quo warranto had its origins in an attempt by King Edward I of England to investigate and recover royal lands, rights, and franchises in England, in particular those lost during the reign of his father, King Henry III of England. From 1278 to 1294, Edward dispatched justices throughout the Kingdom of England to inquire “by what warrant” English lords held their lands and exercised their jurisdictions (often including the right to hold a court and collect its profits). Initially, the justices demanded written proof in the form of charters, but resistance and the unrecorded nature of many grants forced Edward to accept those rights peacefully exercised since 1189. Later, *quo warranto* functioned as a court order (or “writ”) to show proof of authority; for example, demanding that someone acting as the sheriff prove that the king had actually appointed him to that office (literally, “By whose warrant are you the sheriff?"). The most famous historical instance of *quo warranto* was the action taken

against the Corporation of London by Charles II in 1683. The King's Bench adjudged the charter and franchises of the city of London to be forfeited to the Crown, though this judgment was reversed by the London, Quo Warranto Judgment Reversed Act 1689 shortly after the Glorious Revolution. In the case *Sasibhushan Roy v. Pramathnath Banerje* [4] the Calcutta high court held that in order for the writ of quo warranto to lie, the relevant offence must be of public nature, i.e. involves a delegation of some of the sovereign functions of the Government, executive, legislative or judicial, to be exercised by him for public benefit. Such public offence must be substantive in nature, not terminable at will. The official occupying the office must be independent and not merely one discharging the functions of a deputy or servant at the pleasure of another officer the person must be in actual position of the office. Mere declaration that a person is elected to an office or mere appointment to a particular office is not sufficient. He must accept such office. Art.226 - WRITS - Quo warranto, writ of Nature of writ Conditions to be satisfied for issue of writ. Broadly stated, the quo warranto proceeding affords a judicial enquiry in which any person holding an independent substitutive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty; if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of quo warranto ousts him front that office. In other words, the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right.
It is useful to refer to the case of *The University of Mysore and Another vs. C.D.Govinda Rao and Another,* [5] "As Halsbury has observed:

> *"An information in the nature of a quo warranto took the place of the obsolete writ of quo warranto which lay against a person who claimed or usurped an office, franchise, or liberty, to inquire by what authority he supported his claim, in order that the right to the office or franchise might be determined."*

Broadly stated, the quo warranto proceeding affords a judicial remedy by which any person, who holds an independent substantive public office or franchise or liberty, is called upon to show by what right he holds the said office, franchise or liberty, so that his title to it may be duly determined, and in case the finding is that the holder of the office has not title, he would be ousted from that office by judicial order. In other words, the procedure of quo warranto gives the Judiciary a weapon to control the Executive from making appointment to public office against law and to protect a citizen from being deprived of public office to which he has a right. These proceedings also tend to protect the public from usurpers of public office, who might be allowed to continue either with the connivance of the Executive or by reason of its apathy. It will, thus, be seen that before a person can effectively claim a writ of quo warranto, he has to satisfy the Court that the office in question is a public office and is held by a usurper without legal authority, and that inevitably would lead to the enquiry as to whether the appointment of the alleged usurper has been made in accordance with law or not." [6] Writ of quo warranto is granted only on respect of an offence which is of public nature. A petition will not lie against an offence of a private corporation. The post of a manager of corporation incorporated under the Companies Act cannot be held to be a public office [7]. Even the writ of quo warranto cannot go against the managing committee of a private educational institutional not created by statue or rules having statutory force. A Writ of Quo Warranto would not lie even against a person holding post in a government company which may be an 'authority' and, therefore, 'state' within the meaning of Article 12; as, such post is not a civil post, nor it is a post or offence held under the state. Where the entity is *ex facite* private, a writ of this nature cannot be issued-validity of an election to the membership of the working committee of an association like Arya Pratinidhi Sabha is not amenable to writ of Quo Warranto.

Writs Certiorari and Prohibition
Certiorari

> *At* Common Law, *an original writ or order issued by the Chancery or King's Bench, commanding officers of inferior courts to submit the record of a cause pending before them to give the party more certain and speedy justice.*
>
> *A writ that a superior appellate court issues in its discretion to an inferior court, ordering it to produce a certified record of a particular case it has tried, in order to determine whether any irregularities or errors occurred that justify review of the case. A device by which the* Supreme Court of the United States *exercises its discretion in selecting the cases it will review.*

Certiorari is an extraordinary prerogative writ granted in cases that otherwise would not be entitled to review. A petition for certiorari is made to a superior appellate court, which may exercise its discretion in accepting a case for review, while an appeal of a case from a lower court to an intermediate appellate court, or from an intermediate appellate court to a superior appellate court, is regulated by statute. Appellate review of a case that is granted by the issuance of certiorari is sometimes called an appeal, although such review is at the discretion of the appellate court.

Petition for Writ of Certiorari

A document which a losing party files with the Supreme Court asking the Supreme Court to review the decision of a lower court. It includes a list of the parties, a statement of the facts of the case, the legal questions presented for review, and arguments as to why the Court should grant the writ. Someone with a legal claim files a lawsuit in a trial court, such as a U.S. District Court, which receives evidence, and decides the facts and law. Someone who is dissatisfied with a legal decision of the trial court can appeal. In the federal system, this appeal usually would be to the U.S. Court of Appeals, which is required to consider and rule on all properly presented appeals. The highest federal court in the U.S. is the Supreme Court. Someone who is dissatisfied with the ruling of the Court of Appeals can request the U.S. Supreme Court to review the decision of the Court of Appeals. This request is named a Petition for Writ of Certiorari. The Supreme Court can refuse to take the case. In fact, the Court receives thousands of "Cert Petitions" per year, and denies all but about one hundred. If the Court accepts the case, it grants a Writ of Certiorari. "Review on writ of certiorari is not a matter of right, but a judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons." The effect of denial of certiorari by the U.S. Supreme Court is often debated. The decision of the Court of Appeals is unaffected. However, the decision does not necessarily reflect agreement with the decision of the lower court.

Writ certiorari obligations

The statute provides that whenever an application shall be made for a writ of habeas corpus, according to the provisions of that act, to any officer or court, if it appear to such court or officer, upon the facts set forth in the petition, that the cause, matter or offense for which the person is confined or detained is not bailable, according to the provisions of the law, instead of regarding a writ of *habeas corpus*, a *writ of certiorari* may be granted, directed to the officer or person in whose custody or under whose control such prisoner is alleged to be, in like manner as if such writ of certiorari had been applied for by the prisoner. The proceedings upon the return of such writ, are the same as upon the return of writs of habeas corpus, and the proofs of the parties in support of, and against the return made, are the same f and it appearing that the person detained is illegally imprisoned, confined or restrained of his liberty, a writ of discharge is granted, commanding those having him in custody to discharge him forthwith; it appearing that he is legally detained, and that he is not entitled to bail, all further proceedings thereon cease. But if it appear that the person detained is entitled to bail, the court or officer hearing the cause shall, by order, certified by the clerk of the court, to by the officer granting the same, direct the sum in which he shall be admitted to bail, and the court at which he shall be required to appear; and on such order being complied with, by giving the required bail, he shall be discharged. The statute further provides that upon the production of such order to any judge of the County Courts of any county, he shall be authorized to take the recognizance of the per’s n so detained, and of two sufficient sureties in the sum so directed, with a condition for the appearance of such person at the court designated in such order. But the judge must first be satisfied, by the oath of the persons offering themselves as sureties, that they are householders in the county, and are severally worth double the sum inbwhich they shall be required to be bound, over and above all demands against them. The Supreme Court has jurisdiction to award a certiorari, even where the law has provided some other tribunal to hear and determine the questions, if the jurisdiction is not taken away by express words. In Parry &Co V. P.C.Pal it was observed that writ of certiorari is generally granted when a Court has acted without or in access its jurisdiction. It is available in those cases where a tribunal though competent to enter upon an inquiry, acts in flagrant disregard of the rules of procedure or violates the Principles of Natural Justice, where no particular procedure is prescribed. Where the tribunal has disabled itself from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or where the conclusion on the very face of it is so wholly arbitrary and caprices that no reasonable person can ever have arrived at the conclusion interference under Art. 226 would be justified.

Writ of prohibition

The writ of prohibition is issued to prohibit a court and party to whom it is directed, from proceeding in a suit or matter depending before such court, upon the suggestion that the cognizance of such suit or matter does not belong to it.

The office of a prohibition is to prevent courts from going beyond their jurisdiction in the exercise of judicial and not ministerial power, and should not be issued where there are other perfectly adequate remedies.

This writ can be issued only by the Supreme Court, and is to be issued upon affidavits, by motion, in the same manner as writs of mandamus. The Superior Court of the city of Buffiilo, has, within that city, concurrent jurisdiction with the Supreme Court to issue such writ. It is granted or denied in the discretion of the court. The writ when issued, is directed to the court and party, commanding that they desist and refrain from any farther proceedings in the suit or matter specified therein, until the next term of the said court, and the further order of the said Supreme Court thereon, and that they then show cause, why they should not be absolutely restrained from any further proceedings in such suit or matter. When served, it stays both the court and the party from proceeding in the matter or suit. The writ is served upon the court and party to whom it is directed, in the same manner as a writ of mandamus; and the return thereto is also to be made by the court in the like manner; which return may be enforced by attachment.

Difference between "Prohibition" and "Certiorari" (India) [8]
This writ is issued to prevent a court or quasi-judicial tribunal from exceeding its jurisdiction, or acting contrary to natural justice. Its object is prevention rather than cure. It differs from certiorari not so much in nature as in the fact that it is issuable at a stage when the tribunal is proceeding with the matter and it has not yet disposed it off. After disposal, the proper writ is certiorari for it is the decision which is to be quashed. Writ of prohibition is issued only if there are proceedings pending in a court or tribunal. The grounds on which the writ of prohibition is issued are the same on which a writ of certiorari is issued.

Difference between Prohibition and Certiorari
Prohibition and certiorari are much in common. Both the writs are issued with the object of restraining the inferior courts from exceeding their jurisdiction. The Supreme Court has expressed the difference of the two writs in *Hari Vishnu Kamath vs. Ahmad Ishaque,* [9] in the following terms: "When an inferior Court takes up for hearing a matter over which it has no jurisdiction, the person against whom the proceedings are taken, can move the Supreme Court for a writ of prohibition and that an order will be issued forbidding the inferior court from continuing the proceeding. On the other hand, if the court hears the case or the matter and gives a decision, the party aggrieved would have to move the Supreme Court for a writ of certiorari. On that an order will be made quashing the decision on the ground of jurisdiction. "When the case is pending before the court but it has not been finally disposed of, the Supreme Court has to apply both prohibition and certiorari; prohibition to prevent the court to proceed further with the case and certiorari for what has been already decided." Prohibition like certiorari lies only against judicial or quasi-judicial bodies. It does not lie against a public authority which acts purely on an executive or administrative capacity, nor to a legislative body. Thus, the object of the writ of prohibition is prevention rather than cure, while certiorari is used as a cure.

Writ Mandamus
General observations
The writ of mandamus is a high prerogative writ, issued in the name of the people, by the Supreme Court, and directed to any person, corporation or inferior jurisdiction, within the state, requiring the doing of some particular thing therein specified, which pertains to the office or duty of such person, corporation or inferior jurisdiction, and which such court has previously determined, or at least supposed, to be consonant to right and justice.' This writ is issued or withheld in the discretion of the court, and the court, in is saying it, will be governed by what seems to be necessary and proper to be done in the premises, for the purposes of justice. It will not be issued in cases of doubtful right. The legal right of the party to that which he demands in the writ must be clearly established/ and to entitle a party to this writ, it must appear that there is no other specific legal remedy to which he can resort for the enforcement of his right. Where the party has an adequate remedy by action, this writ will not be awarded, and it is granted only for public purposes to compel the performance of public duties, and there must have been a neglect or a refusal to perform such duties, after a demand had been made for their performance. In general, the Supreme Court should not interfere by mandamus, with that portion of the practice of inferior courts, which does not depend upon established principles or is not regulated by fixed rules.

Against whom, and when the writ will lie
The writ, in proper cases, will lie against inferior courts, corporations and ministerial officers.

Against inferior courts
This writ lies to set an inferior court in motion, where it refuses to act; but it will not require that court to come to any particular decision, or to retrace its steps where it has acted. Nor will it be granted where the court has acted judicially in making its decision, for the purpose of reviewing or correcting such decision/ not even for the purpose of enabling the party applying to bring error. The writ of mandamus cannot be awarded for the correction of judicial errors? Nor has the court jurisdiction, by mandamus, to review the decisions of a subordinate court in a matter of which such subordinate court had judical cognizance. When the writ is directed to judicial officers, its mandate is that they proceed adjudicate exercise discretion upon a particular subject. It will direct the judge or court to proceed to render judgment, that will with direct what judgment shall he render. Thus the court, by mandamus, will require a subordinate court to settle a case after the denial of a motion to set aside the report of a referee, so as to enable the party to bring error; but it will not direct what facts shall he inserted in the case. So the Supreme Court will require an inferior court to proceed in the exercise of its judicial discretion, but it will not attempt to control that discretion.
This writ will not be granted to be directed to a court acting under a special commission, which had expired by its own limitation prior to the application for the writ. A mandamus will not lie to the Common Pleas, to correct the taxation of a bill of costs in items dependent, in a measure, upon discretion; thus, how many folios should be disregarded as unnecessary f nor will it lie to review the determination of a question of fact on the weight of evidence, as an order setting aside the report of referees.

Against officers
Where subordinate public agents refuse to act, or entertain a question for their discretion in cases where the law enjoins them 'to do the act required by law, the court may enforce obedience to the law by mandamus, where no

other remedy exists. As, where the supervisors of a county refuse to allow a claim, on the ground that it is not a county charge, when by law it is such charge, a mandamus lies to compel them to admit it as such, and to exercise their discretion as to the amount to be allowed. But if their discretion extended to allowing or rejecting the claim, a mandamus would not lie to compel such allowance. As against corporations and ministerial officers, a mandamus may be granted not only requiring them to proceed in the discharge of their duty, but also directing the manner in which they shall act, and, specifically, what they shall do. Thus a writ has been allowed to compel supervisors of a county to allow the expenses of a county clerk incurred by him according to law. So, also, to compel them to restore the names of certain banks which have been stricken from? The assessment roll as made by the assessors.* Also, to issue warrants for the military commutation; and, being neglected at their annual meeting, they have been compelled to meet again and perform that duty. Mandamus is also the appropriate remedy by which the supervisors are compelled to levy and collect money which, by statute, is made a county charge for to levy and collect the amount of damages sustained by the owners of land taken for the improvement of a public highway." But it will not lie to compel them to allow the compensation of a district attorney for his services on certiorari in a criminal case, which has been certified by a justice of the peace. A writ of mandamus is a process issuing from a court of competent jurisdiction directed to some chartered, corporate or public body or officer, or other person commanding the doing of some public act or duty in the performance of which the party applying for the writ is interested, and by the non-performance of which he is injured or aggrieved. Through this process the courts exercise control over all public officers, corporations and persons or bodies invested with powers for public imposes to compel them to perform some plain, legal duty, to lien the party has no other convenient or effectual remedy. It is issued on the relation of any person who has a clear, legal right to have that done which is set forth in the petition, and for the failure to do which there is no other adequate, specific remedy. The object and purpose of the writ is to prevent "a defect of justice." In The Constitution of India, nowhere the expression Natural Justice is used. However, golden thread of natural justice sagaciously passed through the body of Indian constitution. Preamble of the constitution includes the words, 'Justice Social, Economic and political' liberty of thought, belief, worship... And equality of status and of opportunity, which not only ensures fairness in social and economical activities of the people but also acts as shield to individuals liberty against the arbitrary action which is the base for principles of Natural Justice. Apart from preamble Art 14 ensures equality before law and equal protection of law to the citizen of India. Art 14 which strike at the root of arbitrariness and Art 21 guarantees right to life and liberty which is the fundamental provision to protect liberty and ensure life with dignity. Art 22 guarantees natural justice and provision of fair hearing to the arrested person. Directive principles of state Policy specially Art 39-A takes care of social, economic, and politically backward sections of people and to accomplish this object i.e. this part ensure free legal aid to indigent or disabled persons, and Art 311 of the constitution ensures constitutional protection to civil servants. Furthermore Art 32, 226, and 136 provides constitutional remedies in cases violation of any of the fundamental rights including principles of natural justice. With this brief introduction author undertakes to analyze some of the important provision containing some elements of Principle of Natural Justice.

Supreme Court of India knowing the importance of 'fair trial' by liberal interpretation of Art. 21, made several provision for the protection of accused and provided adequate safeguards to defend his case. SC is of the opinion that conducting a fair trial for those who are accused of criminal offences is the cornerstone of democracy. Conducting a fair trial is beneficial both to the accused as well as to the society. A conviction resulting from an unfair trial is contrary to our concept of justice. The Supreme Court has taken a gigantic innovative step forward in humanizing the administration of criminal justice by suggesting that free legal aid be provided by the State to poor prisoners facing a prison sentence. When an accused has been sentenced by a Court, but he is entitled to appeal against the verdict, he can claim legal aid: if he is indigent and is not able to afford the counsel, the State must provide a counsel to him. The Court has emphasized that the lawyer's services continued an ingredient of fair procedure to a prisoner who is seeking his liberation through the Court's procedure, Bhagwati, J., has observed in Hussainara Khatoon case [10]. *"Now, a procedure which does not make available legal service to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as 'reasonable, fair and just".* In *Nandini Satpathy v. P.L. Dani* [11] the Supreme Court observed that Article 22 (1) directs that the right to consult an advocate of his choice shall not be denied to any person who is arrested. This does not mean that persons who are not under arrest or custody can be denied that right.

The spirit and sense of Article 22 (1) is that it is fundamental to the rule of law that the services of a lawyer shall be available for consultation to any accused person under circumstances of near-custodial interrogation. Moreover, the observance of the right against self-incrimination is best promoted by conceding to the accused the right to consult a legal practitioner of his choice. Lawyer's presence is a constitutional claim in some circumstances in our country also, and in the context of Article 20(3) is an assurance of awareness and observance of the right to silence.

Nandini Satpathy's Case makes a clear departure from the literal interpretation stance of the Supreme Court in earlier cases. The case added an additional fortification to the right to counsel. The Supreme Court went a step forward in holding thatArticle 22(1) does not mean that persons who are not strictly under arrest or custody can be denied the right to counsel. The Court enlarged this right to include right to counsel to any accused person under circumstances of near-custodial interrogation.

The Supreme Court issued the following requirements

1. *An arrested person being held in custody is entitled, if he so requests, to have one friend, relative or other person who is known to him or likely to take an interest in his welfare told as far as practicable that he has been arrested and where is being detained.*
2. *The Police Officer shall inform the arrested person when he is brought to the police station of this right.*
3. *An entry shall be required to be made in the Diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22 (1) and enforced strictly.*

The above requirements shall be followed in all cases of arrest till legal provisions are made in this behalf.

Art 22 (4) to (7) deals with preventive detention, Art. 22(5) provides same safeguards to person detained under Preventive Detention Laws, like Under COFEPOSA-1974, National Security-1980, etc In Nandlal Bajaj v. State of Punjab, [12] the Court allowed legal representation to the detainee through a lawyer even when Section 11 of the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980, and Sec 8(e) of COFEPOSA- 1974 denied legal representation in express term, because state had been represented through a lawyer. The SC observed even when the law does not allow legal representation to the detenu, he is entitled to make such a request and the advisory board is bound to consider this request on merit, and Board is not preclude to allow such assistance when it allows the state to be represented through a lawyer.

Art 32, 226 and 22

Art 32 and 226 of the constitution provides for constitutional remedies for violation of fundamental Rights and other legal rights respectively remedies, Under Art 32 and 226 can be exercised by issuing appropriate Writ, Direction and Orders. Writs in the nature of Habeas Corpus mandamus, prohibition quo-warranto and certiorari. Writ of Habeas Corpus is invoked to prevent unlawful detention and Mandamus is invoked to compel public official to perform his legal duties. Whereas Writ of Prohibition and Certiorari are used to prevent Judicial and quasi-judicial bodies from acting without jurisdiction, in excess of jurisdiction, or where error of law apparent on face of record, violation of Fundamental Right and on the ground of violation of Principles of Natural Justice. However, in recent time it is new development that Writ of Certiorari can also be invoked against Administrative authority exercising adjudicatory function. In U.P.Warehousing Coproration V. Vijay Narain [13], in this case Court held that Writ of certiorari or prohibition usually goes to a body which is bound to act fairly or according to natural justice and it fails to do so. In the same manner where the decision is affected by bias, personal, or pecuniary, or subject matter as the case may be considered as violation of principle of natural justice. In such circumstances also writ of certiorari and prohibition can be issued both Under Art 32 and 226. In Manacle V. Dr. Premchand, [14] speaking for SC, Gagendragadkar, J., remarked: "it is obvious that pecuniary interest, however small it may be in the subject matter of matter of the proceedings, would wholly disqualify a member from acting as judge.

Art. 311 and principles of Natural Justice

Art 311 deals with Dismissal, removal, or reduction in rank of persons employed in civil capacities under the Union or a State, though Art. 310 of the constitution adapts 'doctrine of Pleasure' Art 311 constitution provides sufficient safeguards against misuse of such power, (1) of Art 311 declares that no person who is a member of civil service of the Union or an all-India service of State or holds a civil post under Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed and Clause (2) of Art.311 declares no such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. The word 'reasonable opportunity of being heard' includes all the dimension of principles of natural justice, accordingly no dismissal, removal, or reduction of rank of civil servant can be made without giving reasonable opportunity of being heard. Art. 311 requires the authority, which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file representation before the disciplinary authority records its findings on charges framed against the officer. This is because before imposing the punishment, the employer is expected to conduct a proper enquiry in accordance with the provisions of the Standing Orders, if applicable, and principles of natural justice. The enquiry should not be an empty formality.

Conclusion and Suggestions

Fundamental rights mentioned in the third chapter include in its content, certain basic rights which every individual enjoys being a part of free nation; it tries to ensure that minimum standards that are required for survival with dignity and respect are not taken away. Directive Principles of State Policy were formulated to lay down directives for the state. Dr. B. R. Ambedkar very eloquently stated;

> *"Because we did not want merely a parliamentary form of Government to be instituted through the various mechanisms provided in the Constitution, without any direction as to what our economic ideal, as to what our social order ought to be, we deliberately included the Directive Principles in our Constitution. The word 'strive' which occurs in the Draft Constitution, in judgment, is very important. We have used it because our*

intention is even when there are circumstances which prevent the Government, or which stand in the way of the Government giving effect to these Directive Principles, they shall, even under hard and unpropitious circumstances, always strive in the fulfillment of these Directives. That is why we have used the word 'strive'. Otherwise, it would be open for any Government to say that the circumstances are so bad, that the finances are so inadequate that we cannot even make an effort in the direction in which the Constitution asks us to go."

The judicially enforceable '*Fundamental Rights'* provisions of the Indian Constitution are set forth in part III in order to distinguish them from the non-justifiable '*Directive Principles'* set forth in part IV, which establish the inspirational goals of economic justice and social transformation. It means that the Constitution does not provide any judicial remedy when directive principles are not followed; but in the words of Dr. Ambedikar *"State may not have to answer for their breach in a Court of Law. But will certainly have to answer for them before the electorate at election time."*

In the Constituent Assembly Debates, Dr. B.R. Ambedkar once said; "*if I am asked which is the most important provision of the Indian Constitution, without which the Constitution would not survive I would point to none other than article 32 which is the soul of the Indian Constitution."* In addition to this, Constitution includes Article 226 which gives the claimant the opportunity to file a writ in the high court, when there is a violation of a fundamental right or a right guaranteed by a statute. Similarly Article 136 is also a very significant provision in the Constitution. Hence, in our constitutional scheme, the High Court and Supreme Court have been depicted as the guardian of fundamental rights and have been bestowed with the power to make void any law passed by state and union legislature, which is violative of any fundamental right, as enshrined under Article 13 of the constitution and thereby deliver justice. A report by Newsweek in 2014 blamed "the weak rule of law in India" for the lack of support for untouchables that are prone to be trafficked into slavery. Increasingly, opinion editorials in India's national newspapers target the concept of Rule of Law, addressing the question of whether India is a country where the Rule of Law can be expected to prevail. In the early years, the Court took the view that although the Directives cast a "paramount" duty of observance in the making of law and policy, their explicit non-justiciability meant that the rights provisions overrode the Directives. This generated high –intensity conflict between Parliament and the Court, resulting in a spate of constitutional amendments. In the process, much constitutional heat and dust has also been generated, in the main over a "conservative" judiciary that seemed to frustrate a "progressive" Parliament committed to agrarian reforms and redistribution leading to Court "packing" Indian style [15]. Justices asserted judicial review power over the constitutionality of legislative performances. Laws that transgressed fundamental rights or the federal principle and detail activated the "essence" of judicial review power. Whenever possible the Supreme Court sought to avoid invalidation of laws; it adopted the (standard repertoire of "reading down the statutory scope and intendments so as to avoid conflict and by recourse to the peculiar judicial doctrine of 'harmonious construction"). But when necessary, enacted laws were declared constitutionally null and void. And even when resuscitated by legislative reaffirmation, they were re-subjected to the judicial gauntlet of strict scrutiny. The instances of judicial invalidation of statutes far exceed in number and range the experience of judicial review in the Global North. Going beyond this, Indian Justices have assumed awesome power to submit constitutional amendments to strict judicial scrutiny and review. They performed this audacious innovation through the judicially crafted doctrine of the Basic Structure of the Constitution, which stood, in judicial, and juridical discourse, as definitive of the "*personality"* defined, from time to time, as the "*essential features*" of the Constitution. They proclaimed the "*Rule of Law*", "*Equality*", "*Fundamental Rights*", "*Secularism*", "*Federalism*", "*Democracy*" and "*Judicial Review*" as essential features of the Basic Structure, which amendatory power may not ever lawfully transgress. Initially articulated as a judicial doctrine crafting the limits of amendatory power, the regime of the Basic Structure limitation has spread to other forms of exercise of constitutional, and even legislative, powers. The ineffable adjudicatory modes also mark a new and a bold conception: "constituent power" (the power to remake and unmake the Constitution) stands conjointly shared with the Indian Supreme Court to a point of its declaring certain amendments as constitutionally *invalid*. In the Indian Context, the framework of judicial activism is wider because of the unique position given to the judiciary especially to the Supreme Court, under the Constitutional scheme. The Supreme Court is at once, the arbiter of federal principle, the guardian of fundamental rights of the citizens, final interpreter of the constitutional and other organic laws and last but not the least the final judge to determine the validity of even a constitutional amendment. Therefore in India, the judiciary mainly the Supreme Court and the 18 High Court's have a greater scope to be active while discharging various judicial functions. This principle has been pointed out elsewhere in this thesis. Some judges believe that judicial activism is a necessary adjunct of the judicial function to protect public interest as opposed to private interest. A Constitutional Court is not bound by what was originally intended by founding fathers, but can interpret the constitution in terms of what would have been intended under the circumstances that exist at the time of such an interpretation [16]. The basic task of the judiciary through interpretation is to find the intention of the lawmaker. But the word 'intent' is not precise. In short, in spite of statutory canons and prohibitions of filling the gaps, the court does make rules through the device of statutory interpretation. This is necessary to make the statute workable. Moreover, a statute often addresses problems whose dimensions change over time [17]. Judicial process must function within prevailing, social, economic and political atmosphere. Judicial process can only give directions to the spirit of law. Basic reforms whether social or political do not fall within the jurisdiction of

the court. The *Keshavanand Bharti v. State of Kerala* [18] decision was an attempt by the Supreme Court to wrest finality to it. The court would decide which Constitutional amendment was destructive of basic structure, and what does constitute the basic structure. The basic structure doctrine is an improvement over the *Golak Nath case* [19], in so far as it is not located in any specific provisions, such as Article 13(2). It was difficult for Parliament to override it through another Constitutional Amendment. *Golak Nath* and *Keshavanand* were premised on the hypothesis that the constituent power of Parliament under Article 368 of the Constitution could not be unrestricted as the original constituent power possessed by the Constituent Assembly. *Keshavanand* derived legal justification for the basic structure doctrine from Article 368 itself, which said that after an amendment the Constitution should stand amended. If the constitution is to stand amended, obviously it cannot be totally repealed or disfigured. It must retain basic structure. In India, the Supreme Court has invoked the doctrine of basic structure as a counter-majoritarian device to sustain the liberal and democratic character of the Constitution. Doctrine need not to be seen as a device for judicial supremacy as against Parliamentary supremacy, it has to be seen as the supremacy of the people against the ruling elite. The judiciary acts as a guardian of the people and tries to sustain the Constitution in its true spirit. The court is the ultimate interpreter of the Constitution and to the court is assigned the delicate task of determining of what the power conferred on each branch of government is, whether it is limited and if so what the limits are. Though the Supreme Court may interpret the Constitution, yet it is still the Constitution, which is law and not the decision of the Court. The ultimate touchstone of constitutionality is the constitution itself not what judges have said about it. Constitutional democracy implies that the ultimate interpreter of Indian Fundamental law is not an autonomous judiciary but the interactive understanding of the people, their representatives and judges together. The Supreme Court of India has extended outstanding services; their achievements have been truly remarkable. The most notable achievement has been the development of vigorous judicial control over Government action by insisting fair, unbiased and bonafide decision making. The supervisory courts by and large have retained the confidence of the Nation.

As already we know that the Constitution is not static but a dynamic document, which has to keep evolving with the changing times. One fact that must never be lost sight of is that the Constitution is a document of the people, by the people and for the people and should not be regarded as sacrosanct. If the people, who are the ultimate arbiters of the Constitution, desire a change in the document, the same should not be resisted because of the legal or social philosophy of a judge or his external values. The key word to achieving all this, in the opinion of this researcher is Judicial dynamism. The Supreme Court has itself acknowledged through its judgments that it is supreme not because it is infallible but because it is the final or Apex Court. This it shows that the Supreme Court can be wrong at times and form a mistaken opinion. This is more likely to happen while it performs an activist role. It is less likely to happen when it plays dynamic role.

If the Judiciary adopts a dynamic rather than an activist role, it will be able to discharge its functions properly in tune with the spirit of the Constitution. Even the Legislature, while making Constitutional Amendments must act very carefully and must exercise its power of amending the Constitution for solving socioeconomic or politico-legal problems, rather than to use it as an instrument to achieve political ends of the party in power. As Justice Krishna Iyer has observed,

"Excessive of Basic Structure Doctrine can lead to judicial paralysation of Parliamentary function. All this necessitates reconsideration of judgement of the Supreme Court in the Keshavanand and Minerva Mills, all the more so in view of the fact, that Right to Property is no more a Fundamental Right".

Uphold the Spirit of the Constitution

One worrying fact of this research is the doctrinal fiction in the form of the Basic Structure Theory propounded by the Supreme Court in the case of *Kesavanand Bharti v. State of Kerala,* and reiterated in its subsequent judgments. A careful analysis of the judgments of the Supreme Court shows that the Judges were not unified in their approach towards the component that forms the *Basic Structure* of the Constitution and it appears that confusion and uncertainty was looming in their minds. Different judges have held different provisions of the Constitution as the *Basic Structure*. Even so, leave aside unanimity, not even a majority of seven Judges out of a Constitutional Bench comprising 13 Judges have held any one provision of the Constitution as the Basic Structure. Judicial law-making can be classified into two types. First one would be legal judicial legislation and second would be illegal judicial legislation. Therefore, judicial legislation can only be allowed in exceptional circumstances. Now there are two factors that need to be considered by the courts before making any judicial legislation. Firstly, if there is any lacuna or vacuum in the law and this has led to abuse of the process and there is no remedy available for the enforcement of the rights of the individuals. Secondly, the Supreme Court can interfere in the operation of any law if there are any gaps in the legislation and the filling of such gaps would fall clearly within the scope and objective of the legislation itself and would further the purpose sought to be achieved by the legislation. However, judicial legislation would clearly be void or illegal when there is a particular statute or law operating in a sphere and the judiciary either adds or subtracts or even changes the scope of operation of a law or imposes a new liability which is different from the existing law. Thus, the judges cannot substitute their own wisdom and interpretation of the law in place of the wisdom of the legislature. If the

legislature has decided to enforce the operation of a law in a particular way then the judiciary cannot abrogate such operation depending on its whims and fancies. The hallmark of a great nation is its institutions. The stronger the ability of these institutions to uphold and preserve fundamental values, the greater the nation would be. When India‘s founding fathers wrote the Constitution, they created three arms - Parliament, Executive and the Judiciary - of the state that together were to be the keepers of the ideals of the nation as enshrined in the Constitution. Over the past several years, however, the Parliament has become dysfunctional, the Executive has abdicated its duties and the Judiciary is cracking the whip. Indian Supreme Court alone enjoys power of judicial activism. Such power imposes an onerous burden on the court to allow legitimate changes in the Constitution but prevent the erosion of those enduring values that constitute the essence of Constitutionalism. Every government has one major role to play in a democracy that is to protect the rights of all its citizens. In our country also, steps are been taken by both the parliament and judiciary to secure the ends of justice. The Indian judiciary which is well regarded domestically and internationally for its progressive role in interpreting various provisions of the Constitution also took its work remarkably with a view to promote social, economic and political justice to all the sections of the society. Expanding the interpretation of the fundamental rights enshrined in the Constitution, overcoming restrictions based on rules relating to *locus standi*, creating new avenues for seeking remedies for human rights violations through public interest litigation pleas and promoting genuine judicial interventions in the areas of child labour, bonded labour, clean and healthy environment, and women's rights are but a few examples of successful judicial interventions to uphold the rule of law and ensure justice. The courts are the only forum where both a poor man and a retired Supreme Court judge can approach and access it for justice. They are therefore, rightfully called the '*Guardians of Justice*'. Despite of all this effort, at the same time it can't be denied that the intention of the constitution to achieve social, economic and political justice is yet unfulfilled.

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