



## Constitutional remedies under article 32 and 226: An overview

Ravi

Advocate, Punjab and Haryana High Court, Chandigarh, India

### Abstract

Fundamental Rights are essential for the moral and material development of the people. It is fundamental rights which help develop the people's best self and personality. These rights are guaranteed by the Constitution of India. Moreover, these rights are justifiable too. The Constitution provides for the courts to protect and safeguard them in case of any infringement. The concept of Fundamental Rights, being indispensable for the full and complete development of the human personality, has been discussed at length under this Article. Dr. Ambedkar referred to Article 32 as the "spirit of the constitution and exceptionally heart of it." The Supreme Court has included it into the fundamental structural regulation. Furthermore, with the exception of usually provided by the Constitution, the right to petition the Supreme Court cannot be interrupted. This implies that, under Article 359, this prerogative is suspended during a national crisis. Article 32 designates the Supreme Court as the protector and guarantor of fundamental rights. Furthermore, the Apex Court retains original jurisdiction over the power to issue writs. This means that an individual may contact SC directly for a cure rather than through an appeal. Article 32 can only be invoked to get redress for basic rights established in Articles 12- 35. It does not exist for any other legal right for which many laws are available. Right to Constitutional Remedy is the most important right of the Indian Constitution. This is the 6th and the last Fundamental Right of the Indian Constitution. Article 32 deals with the right to constitutional remedy. This right is giving the power to every person to move to the Supreme Court on the infringement of any of his Fundamental Rights under Article 32. They also have an option to move to high court under Article 226 of the Indian Constitution. This Article is made a part of the basic structure of the Indian Constitution.

**Keywords:** fundamental rights, magna carta, constitutional remedy, res-judicata locus standi, ultra vires etc

### Introduction

Fundamental rights are regarded fundamental because they are the most essential for the attainment of the full intellectual, moral and spiritual well-being of a person. Any negation of such rights will result in under-development of the potentialities of the citizens. The declaration of human rights in the Constitution serves as a reminder to the government in power that certain liberties assured to the people by the Constitution are to be respected and given due consideration. Speaking about the importance of fundamental rights in the historic judgment of *Maneka Gandhi vs. Union of India*, Bhagwati, J., observed: "These fundamental rights represent the basic values cherished by the people of this country (India) since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. The best conferment of the Constitution is the Fundamental Rights. Somehow or another, they frame the rampart of our Constitution. Each one of these Rights is trivial if there exists no instrument to authorize them. Article 32 gives such a component. That is the reason it is the gem, the delegated wonder, the heart, and the spirit of the Constitution. Article 32 is known as the "spirit of the constitution and exceptionally heart of it" by Dr. Ambedkar. Preeminent Court has included it in fundamental structure regulation. Further, it is clarified that privilege to move to Supreme Court can't be suspended with the exception of generally given by the Constitution. This suggests this privilege suspended amid a national crisis under article 359. Article 32 makes the Supreme Court the safeguard and underwriter of the major rights. Further, the capacity to issue writs goes

under the original jurisdiction of the Apex Court. This implies an individual may approach SC straightforwardly for a cure as opposed to by appeal. Article 32 can be used only to get a remedy for fundamental rights enshrined in Article 12-35. It is not there for some other legal right for which diverse laws are accessible. An individual whose privilege (Fundamental Right) is encroached by an arbitrary administrative action may approach the Court for a suitable remedy. Article 32(2) of the Constitution of India gives: "The Supreme Court will have the capacity to issue bearings or requests or writs, incorporating writs in the idea of habeas corpus, mandamus, prohibition, quo warranto, and certiorari, whichever might be suitable, for the requirement of any of rights given by this Part." Article 32 is a basic Right directly under Part – III of the Constitution. Under this Article, the Supreme Court is enabled to loosen up the customary standard of Locus Standi and permit general society to intrigue case in the name of public interest litigation (PIL). Article 32 isn't to be conjured for encroachment of an individual right of the agreement (contract), nor is to be summoned for unsettling questions which are fit for transfer under other laws. Article 226(1) of the Constitution of India, on the other hand says, "Notwithstanding anything in Article 32, every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose. As is obvious from the uncovered

dialect, this Article ensures a person to move the High Court for implementation of the fundamental rights and also for implementation of some other lawful right. Article 226 gives wide powers on the High Courts. It fills in as a major repository of legal capacity to control organization. Its capacity under Article 226 can't be diminished by enactment. In this manner, forces of High Courts gave under Article 226 are more extensive when contrasted with forces presented on the Supreme Court under Article 32 of the Constitution of India.

### Origin and Development of Writs

The Magna Carta, which traces its origin in as early as 1215, is the first written document assuring the then ancient liberties to the English people. Thereafter, from time to time, the King had to accede to many rights to his subjects. Since the 17th century, human thinking has been veering round the theory that man has certain essential, basic, natural and inalienable rights or freedoms and it is the function of the State, in order that human liberty may be preserved, human personality developed, and an effective social and democratic life promoted, to recognize these rights and freedoms and allow them a free play. In France, the Declaration of the Rights of Man and the Citizen (1789), which was a fundamental document pertaining to the history of human rights, declared the natural, inalienable and sacred rights of man. The modern trend of guaranteeing fundamental rights to the people may be traced to the Constitution of the United States of America drafted in 1787. Therefore, following the spirit of the Magna Carta of the British and the Declaration of the Rights of Man and the Citizen, America incorporated the Bill of Rights in its Constitution. The United States Constitution was the first modern Constitution to give concrete shape to the concept of human rights by putting them in to the Constitution and making them justiciable and enforceable through the instrumentality of the courts. The Government of India Act, 1935, on which the present Indian Constitution is substantially based, embodied several prohibitions against discrimination; but they fell short of a comprehensive Bill of Rights, the enactment of which was, indeed, expressly rejected when the Bill was before Parliament. What was rejected by the United Kingdom Parliament in 1935 commended itself to the framers of the Constitution of independent India. The framers of the Indian Constitution took inspiration from the Bill of Rights of U.S.A and incorporated a full chapter in the Constitution dealing with Fundamental Rights. But, the declaration of the Fundamental Rights in the Indian Constitution is the most elaborate and comprehensive yet framed by any State. The inclusion of a Chapter of Fundamental Rights in the Constitution of India is in accordance with the trend of modern democratic thought, the idea being to preserve that which is an indispensable condition of a free society.

### Object behind Incorporation of Fundamental Rights in the Constitution

In modern times, it is widely accepted that the right to liberty is the very essence of a free society and it must be safeguarded at all times. The idea of guaranteeing certain rights is to ensure that a person may have minimum guaranteed freedom. In India, a few good reasons made the enunciation of the Fundamental Rights in the Constitution rather inevitable. For one thing, the main political party, the

Congress having suffered long incarceration during the British regime, had long been demanding these rights. Secondly, the Indian society was fragmented into many religious, cultural and linguistic groups, and it was necessary to declare fundamental rights to give to the people a sense of security and confidence. Therefore, it was considered necessary that people should have some rights which may be enforced against an arbitrary government. There was a danger that the majority in the legislature may enact laws which may be oppressive to individuals or minority groups and such a danger could be minimized by having a Bill of Rights in the Constitution. In other words, the decision of the framers of the Constitution to incorporate Fundamental Rights was influenced by factors such as—consciousness of the massive character of minority problems in India, memories of the protracted struggle against government under British rule, acknowledgment of Gandhian ideals, of the climate of international opinion and of American experience. The Supreme Court has observed, the purpose of enumerating fundamental rights in the Constitution “is to safeguard the basic human rights from the vicissitudes of political controversy and to place them beyond the reach of the political parties, who, by virtue of their majority may come to form the government at the centre or in the State”. Therefore, the underlying idea in entrenching certain basic and fundamental rights is to take them out of the reach of transient political majorities. It has, therefore, come to be regarded as essential that these rights be entrenched in such a way that they may not be violated, tampered or interfered with by an oppressive government. With this end in view, some written Constitutions guarantee a few rights to the people and forbid government organs from interfering with the same. The object behind the inclusion of the Chapter on Fundamental Rights in the Indian Constitution is to establish rule of law. Fundamental Rights are a necessary consequence of the declaration in the Preamble to the Constitution that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and a secure to all its citizens justice, social, economic, and political; liberty of thought, expression, belief, faith and worship; equality of status and opportunity.

### Constitutional Writs under Article 32 and 226

1. **Habeas Corpus:** This word means ‘to have a body’. This writ is issued by the court to bring the body of the imprisoned person to itself and then look into the legality of his imprisonment. If the court finds out that the person is unnecessarily detained then he can be set free by the court. This writ can be issued against any private person or government authority that are having the concerned person in his authority. This writ is issued for the enforcement of the Fundamental Rights and when the order of detention is *Ultra Vires*.
2. **Mandamus:** Mandamus means ‘Command’. This writ commands the person to do his legal or quasi-legal duty. This is issued usually because the person in duty has failed in performing his duty. It is issued for the enforcement of Fundamental Rights.
3. **Prohibition:** The writ of Prohibition is issued by the Supreme Court to a lower court forbidding them to stop proceeding in a case which is completely outside its

jurisdiction. This writ commands inactivity to the lower courts.

4. **Certiorari:** This writ is issued to a lower court by the Supreme Court. Under this writ, the Supreme Court quashes the decision or order of a lower court. The decision is quashed because the lower court was working outside its jurisdiction. Certiorari is issued at a later stage when the decision is already given by the court. On the other hand, writ of Prohibition is issued when the proceeding is still going on in the lower court.

5. **Quo Warranto:** This is the 5th and the last writ issued by the Supreme Court under Article 32. In this writ, the Supreme Court enquires about the legality of a claim of a person to a public position. If the court finds that it is not a right claim then Supreme Court will remove that person using this writ.

It is important to remember that the office must be a public office created by a Statute or by the Constitution of India. The position of that person must be at a substantive level and not at the level of a peon or a servant. There must be a contravention of law when that person is holding that position.

#### Article 32 and Public Interest Litigation (PIL)

In early days the courts used to follow the rule of *locus standi* which says that the right to move the court is available only to the person whose legal right is infringed. It is because of this rule the poor people were not able to get access to Justice in the Society.

The Supreme Court of India decided a different approach and created the concept of Public Interest Litigation (PIL). Under this litigation, the court allowed people to file cases which are largely for the benefit of poor and backward people. This is made for people who cannot approach the court directly due to their economic and social condition in society.

In the case of *A.B.S.K. Sangh (Railway) v. Union of India*, AIR 1981, the Supreme Court said that Public interest Litigation is the present Constitutional Jurisprudence. In the case of *S.P. Gupta v. Union of India*, AIR 1982, the Supreme Court ruled that any member of the public can invoke the writ jurisdiction of the High Courts and Supreme Court seeking redressal from the violation of legal and constitutional rights of persons who cannot directly approach the court due to their poverty.

#### Due to the misuse of PIL the Supreme Court laid down the following guidelines

1. The PIL should concern a large number of people.
2. The affected person must be from a disadvantaged section of society.
3. Where judicial law-making is necessary to avoid the exploitation.
4. Where judicial intervention is important to protect the sanctity of democratic institutions.
5. Where the government's decision is harmful to natural resources like air and water.

#### Article 32 and Res Judicata

Res-Judicata means a thing which is already decided. This principle says that the things which are decided by a court must be taken as a conclusive truth until they are reversed by some higher court. So a subsequent proceeding cannot be

started on a case which is already decided. This is a principle of Civil law. It is added in Section 11 of the Code of Civil Procedure, 1908. The rule of Res-Judicata is also applied on writ petitions filed under Article 32. This means that if a question under a writ petition is decided by the Supreme Court, so that same question cannot be re-opened. In the case of *Gulam Sarvar v. Union of India*, AIR 1967, it was decided that the rule of *res judicata* won't be applied in the writ of habeas corpus and in the petitions where the petitioner has been refused a writ under the High Court then he can approach the Supreme Court under Article 32.

#### Article 32 and Rule of Laches

*Rule of Laches* says that the court will help those who are vigilant about their rights and who do not sleep on their rights. So the courts will not entertain pleas which are coming to them after some considerable delay of time. So we can say that if a person wants him to be heard by the court then he must approach the court under Article 32 within some reasonable time. There is no specific limit of 90 days is given under the Limitation Act.

In the case of *Trilokchand Motichand v. H.B. Munshi*, AIR 1970, the main question which was to be decided was if there is any type of period of limitation which is to be followed while filing cases under Article 32 of the Indian Constitution. The question is of the discretion of the court, which is to be followed on the case by case basis. There is no lower limit or upper limit of the period of limitation while deciding the cases under Article 32. It will depend upon the discretion of the Judges.

#### What is the difference between Article 32 and Article 226?

Following are the differences between Article 32 and Article 226

- Article 32 is given for the Supreme Court and Article 226 is given to all the High Courts of different States.
- Article 32 can only be enforced for Fundamental Rights. Article 226 by High Courts can be used for any other purpose. So this makes the power of Article 226 much wider than the power of the Supreme Court. High courts can give issue writs on any other purpose.
- The power exercised by the High Courts cannot be in derogation of the power of the Supreme Court. This means that the order of the Supreme Court will supersede any previous order given by the High Courts.
- A person can directly approach the Supreme Court under Article 32 for the violation of his Fundamental Rights. There is no need to go to the high court first.

#### Remedy for the Enforcement of Fundamental Rights

Article 32 A mere enumeration of rights, even in the most elaborate and meticulously worded form, is not enough. A declaration of fundamental rights is meaningless unless there is an effective machinery for the enforcement of the rights. It is the remedy which makes the right real. If there is no remedy there is no right at all. It was, therefore, in the fitness of things that our Constitution-makers having incorporated a long list of fundamental rights have also provided for an effective remedy for the enforcement of these rights. Article 32 confers one of the "highly cherished rights". It confers the right to move the Supreme Court for the enforcement of the Fundamental Rights. Article 32 provides for the last of the fundamental rights. Unlike other

rights, it is remedial and not substantive in nature. So, if and when a person feels that he is unduly deprived of any of the fundamental rights, he can, under Article 32 of our Constitution, move the Supreme Court for a legal remedy. Article 32 is itself a fundamental right. Article 226 also empowers all the High Courts to issue the writs for the enforcement of fundamental rights. In the words of Dr. Ambedkar "If I was asked to name any particular Article in this Constitution as the most important Article without which this Constitution would be a nullity- I could not refer to any other Article except this one. It is the very soul of the Constitution and the very heart of it." Clause (1) Under the above Clause, the Supreme Court's power to enforce fundamental rights is the widest. There is no limitation in regard to the kind of proceedings envisaged in Art. 32(1) except that the proceeding must be "appropriate" and this requirement must be judged in the light of the purpose for which the proceeding is to be taken, namely, enforcement of the fundamental rights. Therefore, the word 'appropriate' does not refer to any form but to the purpose of the proceeding. Hence, so long as the purpose of the proceeding is enforcement of a fundamental right, it is appropriate and when it relates to the enforcement of the fundamental rights of poor, disabled or ignorant by a public spirited person "even a letter addressed by him (to the Court) can legitimately be regarded as an 'appropriate' proceeding. Moreover, it is not obligatory for the Court to follow adversary system; they can be inquisitorial proceedings also. The Constitution-makers deliberately did not lay down any particular form of proceeding for enforcement of fundamental right nor did they stipulate that such proceeding should conform to any rigid pattern or a strait-jacket formula because they knew that in a country like India where there is so much of poverty, ignorance, illiteracy, deprivation and exploitation, any insistence on a right formula of proceeding for enforcement of fundamental right would become self defeating. What should be the appropriate remedy to be given to the petitioner for the enforcement of the fundamental right sought to be vindicated is a matter for the Court to decide under Article 32. Article 32 gives very wide discretion in the matter of framing writs to suit the exigencies of particular cases and the application of the petitioner cannot be thrown out simply on the ground that the proper writ or direction has not been prayed for. The Supreme Court has emphasized in Romesh Thappar that "this Court is thus constituted the protector and guarantor of the Fundamental Rights, and it cannot consistently with the responsibility so laid upon it, refuse to entertain application seeking protection against infringement of such rights.

### **Fundamental Rights**

1. Right to Equality
2. Right to Freedom
3. Right against exploitation
4. Right to Freedom of Religion

Right to Constitutional Remedies under Article 32 of the Indian Constitution is a basic right that provides that persons have the privilege to petition the Supreme Court (SC) for the implementation of other constitutionally protected Fundamental rights.

- Article 32 of the Indian constitution, covers the Right to Constitutional Remedies.

- Article 32 for Supreme court and Article 226 for High court empower the enforcement of fundamental rights.
- For the enforcement of fundamental rights, a person can seek constitutional remedy from either Supreme Court or High Court with the help of the constitutional provisions mentioned in Articles 32, 35, and 226.
- Part III of the Indian constitution deals with the right to constitutional remedies.

### **Legal Provisions for the Enforcement Constitutional Remedies Articles 32 and 226**

- Constitution since it empowers the Supreme Court to issue writs to enforce Fundamental Rights. The Supreme Court's authority to issue writs falls within original jurisdiction. Article 32 also Article 32: According to Dr. Ambedkar, Article 32 is the heart and spirit of the Indian provides for judicial review. This means that the Supreme Court has the authority to declare a statute unconstitutional if it violates any provision of the Constitution.
- Article 226 empowers High Courts to issue writs for the execution of Fundamental Rights. This article also discusses equality in all aspects. Article 226 empowers the high court with regard to jurisdiction to issue writs against various entities and other authorities in the event of a violation of basic rights.

### **What is a Writ?**

- A writ petition is a legal document submitted in a court of law to seek remedies from an authority for a violation of basic rights.
- When the state or any of its agents violates an individual's basic rights, a writ petition is filed. It is a way of ensuring that the state respects and protects its people's rights.
- A precept in writing, couched in the form of a letter, issued from a court of justice and sealed with its seal, addressed to a sheriff or other officer of the law, or directly to the person whose action the court desires to command, either as the commencement of a suit or other proceeding, or as incidental to its progress, and requiring the performance of a specified act, or giving authority and commission to have it performed.

### **Constitutional Provisions of Writ Jurisdiction**

The High Court's writ jurisdiction is specified in Article 226 of the Indian Constitution, which allows the high court the right to issue prerogative writs, as well as the Supreme Court under Article 32.

- It is a discretionary power, which means the High Court has the authority to determine whether or not to issue a writ.
- Article 32 should not be invoked for encroachment on an individual right of the agreement (contract), nor should it be invoked for disturbing questions that are transferable under other laws.
- "Notwithstanding anything in Article 32, every High Court shall have powers, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders, or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto, and certiorari, or any of them.



### Restrictions on Fundamental Rights

- Provision for Basic Rights Violations: Article 13 of the Indian constitution stipulates that all legislation that are inconsistent with or violate any of the fundamental rights are invalid.
- The Supreme Court (Article 32) and the high courts have been given this authority (Article 226).
- The government may also impose limits in the interest of morals and public order. During a state of emergency, the six freedoms are also automatically suspended or restricted.

### Important Judgments Related to Article 32

- The Supreme Court declared in the Chandra Kumar case (1997) that the writ jurisdiction of both the high court and the Supreme Court is part of the basic framework of the Constitution.
- In A.K. Kripak v. Union of India, the Supreme Court ruled that the selection list of the Indian Forest Service should be quashed since one of the shortlisted applicants was an exofficio member of the selection committee.
- In C.G. Govindan v. State of Gujarat, the court refused to issue a writ of mandamus against the governor for failing to approve the determination of court personnel pay by the Chief Justice of High Court under Article 229.

### Recent Observations Related to Article 32

- The Supreme Court recently moved from the Delhi High Court the matter regarding land usage for the national capital's Central Vista project to itself. In any case, the petitioners had not requested such a move.
- Recently, the Supreme Court expressed its worry that the High Courts are not exercising their constitutional authority in numerous cases concerning personal liberty.
- The Supreme Court recently moved from the Delhi High Court the matter regarding land usage for the national capital's Central Vista project to itself. In any case, the petitioners had not requested such a move.
- During a recent hearing of a plea, the Chief Justice of India (CJI) stated that the court is attempting to discourage petitions filed under Article 32.

### Conclusion

The Constitution of India has always focussed upon the concept of Fundamental Rights. Thus, it has provided the remedies for enforcement of such rights. So the author intends to give a proper evaluation of the Article 32 and its further validation down the years. The author deals with the conceptual overview and also the related cases. There is substantive interpretation in this paper by the author. Insight into concepts such as 'Right to move the Supreme Court and Writs has been given primary importance. In-depth analysis and validity of the provisions in Indian scenario would closely dealt in this paper. During certain circumstances, the privileges that citizens ought to get under Article 32 are negated. The right to constitutional remedies is denied when the President of India proclaims emergency. According to Article 352, the fundamental rights to the citizens remain suspended. Similarly, the Article 358 gives Parliament the authority to curtail the rights guaranteed by the Constitution. There had been instances wherein the petitions under Article

32 were not entertained by the Supreme Court. Leading news dailies have pointed out the fact that grievances under this Article are listened to only when they come from celebrities or when incidents are reported in public. What's even more alarming is the substantial decline in Article 32 petitions, which can be attributed to the court's reluctance to entertain such petitions. The author strongly believes in encouragement when it comes to entertaining petitions arising from Article 32.

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