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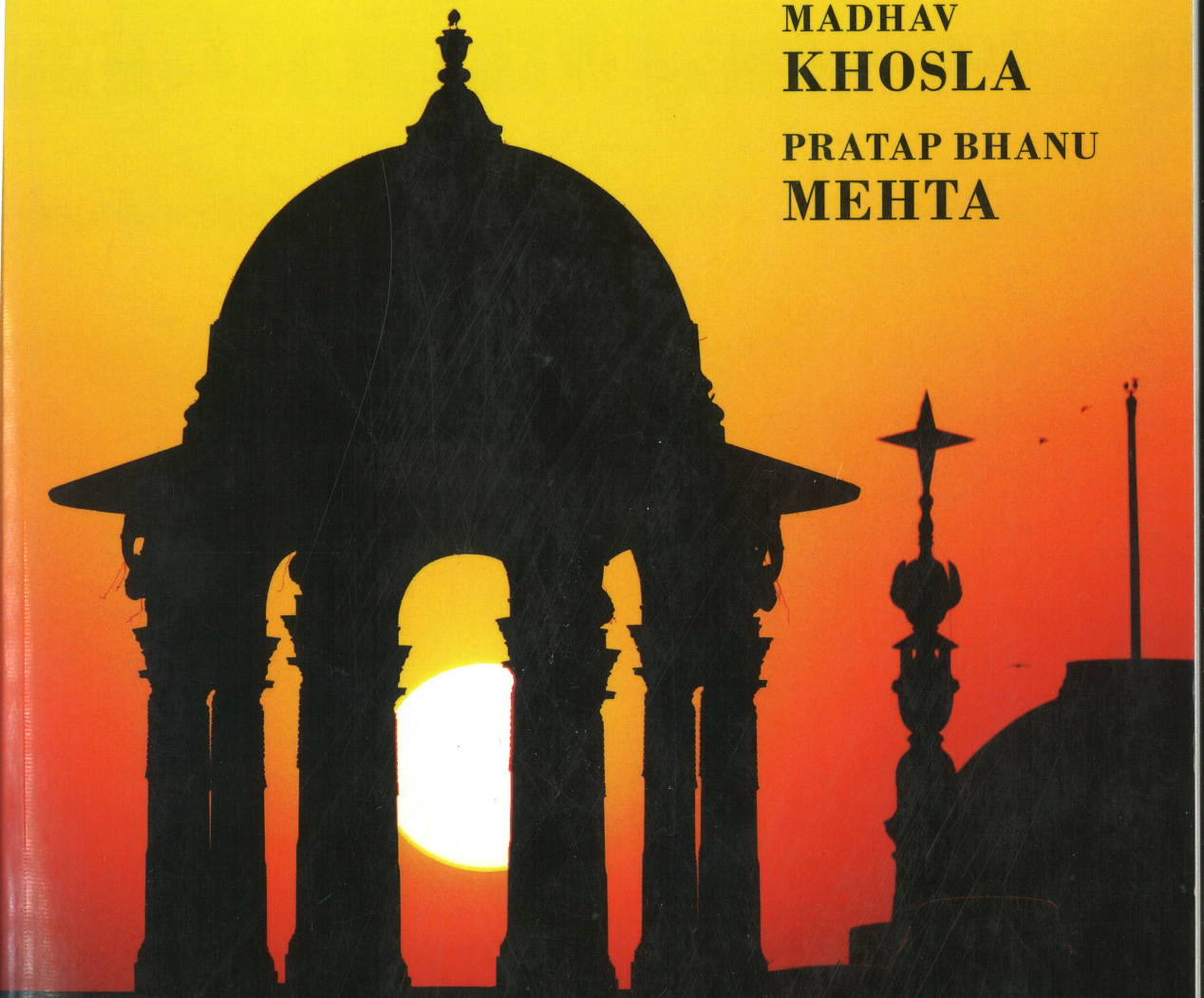

The Oxford Handbook *of* THE INDIAN CONSTITUTION

THE OXFORD HANDBOOK OF

THE INDIAN CONSTITUTION

Edited by

SUJIT CHOUDHRY, MADHAV KHOSLA,

and

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CHAPTER 34

WRITS AND REMEDIES

GOPAL SUBRAMANIUM

I. INTRODUCTION

Ubi jus ibi remedium—where there is a right, there is a remedy—is a defining principle of the common law. In *Ashby v White*, Holt CJ of the King's Bench famously observed that 'If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy.'[1] Unlike the American Constitution, where the power of judicial review emerged after the Supreme Court's decision in *Marbury v Madison*,[2] the Indian Constitution explicitly provides courts with the power to issue writs and grant remedies. It would be meaningless, the Indian founders believed, to confer rights without providing effective remedies for their enforcement. Articles 32 and 226 were and continue to be regarded as integral to the Constitution. Indeed, for BR Ambedkar, Article 32 was 'the very soul of the Constitution and the very heart of it...'[3] Gajendragadkar J expressed a similar sentiment when he observed:

> The fundamental right to move this Court can...be appropriately described as the cornerstone of the democratic edifice raised by the Constitution...The key role assigned to the right guaranteed by Article 32 and the width of its content are writ large on the face of its provisions, and so, it is in our opinion unnecessary and even inappropriate to employ hyperboles or use superlatives to emphasise its significance or importance.[4]

This chapter focuses on Articles 32 and 226. Both these provisions have been held to be part of the basic structure of the Constitution—they cannot be taken away, even by way of a constitutional amendment.[5] It is through these provisions that rights are protected under the Indian Constitution, and it is ultimately through them that the Supreme Court has come to acquire the role it has within Indian democracy.

[1] (1703) 2 Ld Raym 938, 953. [2] 5 US 137 (1803).
[3] *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 953, 9 December 1948.
[4] *Prem Chand Garg v The Excise Commissioner* AIR 1963 SC 996 [2].
[5] *Raja Ram Pal v Speaker, Lok Sabha* (2007) 3 SCC 184 [413].

II. JURISDICTION

An important feature of Article 32 is that it does not merely guarantee the protection of fundamental rights, but it is itself located in Part III of the Constitution. In other words, it is not found alongside other Articles of the Constitution that define the general jurisdiction of the Supreme Court. Further, it is also clear from the expression 'in the nature of' employed in clause (2) of Article 32 that the power conferred by the said clause is in the widest terms and is not confined to issuing the high-prerogative writs specified in the said clause, but includes within its ambit the power to issue any directions or orders or writs which may be appropriate for enforcement of fundamental rights.[6] Therefore, even when the conditions for issue of any of these writs are not fulfilled, the Supreme Court would not be constrained to 'fold its hands in despair and plead its inability to help the citizen who has come before it for judicial redress...'[7]

The Supreme Court's powers were clarified by its decision in *Nilabati Behera*.[8] Here, the Court affirmed its previous decisions in *Khatri (II) v State of Bihar*[9] and *Khatri (IV) v State of Bihar*,[10] wherein the Court had held that it was not helpless to grant relief in a case of violation of the right to life and personal liberty, and it should be prepared 'to forge new tools and devise new remedies for the purpose of vindicating the most... precious fundamental right...'[11] It was also indicated that the procedure suitable in the facts of the case must be adopted for conducting the inquiry needed to ascertain the necessary facts, for granting relief for enforcement of the guaranteed fundamental rights. In his concurring judgment in *Nilabati Behera*, Anand J made the following observations with regard to Articles 32 and 226:

> This Court and the High Courts, being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings. The State of course has the right to be indemnified by and take such action as may be available to it against the wrongdoer in accordance with law—through appropriate proceedings.[12]

Article 226 is wider in scope than Article 32. The High Courts are authorised under Article 226 to issue directions, orders, or writs to any person or authority, including any government to enforce fundamental rights and 'for any other purpose'. The difference in the language of Articles 32 and 226 gives a clear indication that their nature and purpose are different. The right guaranteed by Article 32 can be exercised only and only for the enforcement of fundamental rights conferred by Part III of the Constitution, and the same

[6] *TC Basappa v T Nagappa* AIR 1954 SC 440.
[7] *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161 [13].
[8] *Nilabati Behera v State of Orissa* (1993) 2 SCC 746.
[9] (1981) 1 SCC 627.
[10] (1981) 2 SCC 493.
[11] *Khatri (II)* (n 9) [4].
[12] *Nilabati Behera* (n 8).

must also be evident from the pleadings. On the other hand, the right conferred by Article 226 can be exercised not only for the enforcement of fundamental rights, but 'for any other purpose' as well, that is, for enforcement of any legal right conferred by a statute, etc.[13] The differing jurisdiction of the Supreme Court and High Courts was recently noted in the following terms by the Supreme Court:

> Under the constitutional scheme as framed for the judiciary, the Supreme Court and the High Courts both are courts of record. The High Court is not a court 'subordinate' to the Supreme Court. In a way the canvas of judicial powers vesting in the High Court is wider inasmuch as it has jurisdiction to issue all prerogative writs conferred by Article 226 of the Constitution for the enforcement of any of the rights conferred by Part III of the Constitution and *for any other purpose* while the original jurisdiction of the Supreme Court to issue prerogative writs remains confined to the enforcement of fundamental rights and to deal with some such matters such as Presidential elections or inter-State disputes which the Constitution does not envisage being heard and determined by High Courts.[14]

Wide as the High Court's power might be under Article 226, it can only be deployed in cases where there is a pre-existing right. As the Supreme Court recently observed:

> The primary purpose of the writ is to protect and establish rights, and to impose a corresponding imperative duty existing in law. It is designed to promote justice (ex debito justitiae) and its grant or refusal is at the discretion of the court. The writ cannot be granted unless it is established that there is an existing legal right of the applicant, or an existing duty of the respondent. Thus, the writ does not lie to create or establish a legal right but to enforce one that stood already established.[15]

The Supreme Court and the High Courts have concurrent jurisdiction for enforcement of the fundamental rights. An important question in this context is whether a petitioner must approach the High Court under Article 226 before he can approach the Supreme Court in Article 32. This has been the view taken by some decisions of the Supreme Court.[16] For instance, in *Kanubhai Brahmbhatt v State of Gujarat*,[17] the Court argued that if it '[took] upon itself to do everything which even the High Courts can do, this Court will not be able to do what this Court alone can do under Article 136 of the Constitution, and other provisions conferring exclusive jurisdiction on this Court'.[18] In addition, it also cited fears of a growing backlog of cases: 'If this Court entertains writ petitions at the instance of parties who approach this Court directly instead of approaching the concerned High Court... the

[13] *State of West Bengal v Committee for Protection of Democratic Rights* (2010) 3 SCC 571 [57]. See also *Dwarka Nath v Income Tax Officer* AIR 1966 SC 81.

[14] *Tirupati Balaji Developers (P) Ltd v State of Bihar* (2004) 5 SCC 1 [8].

[15] *Rajasthan State Industrial Development & Investment Corporation v Subhash Sindhi Cooperative Housing Society* (2013) 5 SCC 427 [24].

[16] *PN Kumar v Municipal Corporation of Delhi* (1987) 4 SCC 609; *Louise Fernandes v Union of India* (1988) 1 SCC 201; *Confederation of All Nagaland State Services Employees' Association v State of Nagaland* (2006) 1 SCC 496; *Central Bank Retirees' Association v Union of India* (2006) 1 SCC 497.

[17] (1989) Supp (2) SCC 310.

[18] *Kanubhai Brahmbhatt* (n 17) [3].

arrears pertaining to matters in respect of which this Court exercises exclusive jurisdiction... will assume more alarming proportions.'[19] Finally, it also pointed to the need to inspire institutional confidence in the judiciary as a whole: 'Faith must be inspired in the hierarchy of courts and the institution as a whole, not only in this Court alone.'[20] Such an interpretation, however, possibly detracts from the Supreme Court's role in protecting the rights guaranteed by Part III of the Constitution.[21]

A second important question that arises is whether Article 226 might be read as not merely confined to governmental institutions and statutory public bodies. The text of the entire provision read alongside Article 12, however, makes it clear that writs and directions under Article 226 can be issued only against authorities and persons having 'authority of the State'. Over time, however, the judicial approach has replaced the focus these provisions place on the body performing the functions with the kind of functions that are being performed. That is to say, the question has become, and increasingly so with the rise of public–private partnerships, whether the function being performed is of a public nature. As early as the decision in *Praga Tools Corporation v CA Imanual*, the Court noted that 'it is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body'.[22] In *Andi Mukta Sadguru*, the Court clarified that 'the form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body... judged in the light of positive obligation owed by the person or authority to the affected party.'[23] The law was summarised by the Supreme Court in *G Bassi Reddy v International Crops Research Institute*: 'A writ under Article 226 can lie against a "person" if it is a statutory body or performs a public function or discharges a public or statutory duty.'[24] The Court, however, has not provided much elaboration upon what a public function or public duty is, though the language used typically focuses upon whether the functions are similar to those performable by the State in its sovereign capacity.

An important recent decision in this respect is *Board of Control for Cricket in India v Cricket Association of Bihar*,[25] where the Court cited its decision in *Zee Telefilms Ltd v Union of India*[26] with approval to hold that the Board of Control for Cricket in India (BCCI) was amenable to writ jurisdiction under Article 226. Specifically, the Court examined the 'nature of duties and functions' which the BCCI performed and found that they were 'clearly public functions...' since the State 'not only [allowed] an autonomous/private body to discharge functions which it could in law take over or regulate but even lends its assistance to such a non-government body to undertake such functions which by their very nature are public functions...'[27]

[19] *Kanubhai Brahmbhatt* (n 17) [3].

[20] *Kanubhai Brahmbhatt* (n 17) [3].

[21] *Daryao v State of Uttar Pradesh* AIR 1961 SC 1457 [8]; *Prem Chand Garg* (n 4) [12]–[15]; *Raja Ram Pal* (n 5) [651].

[22] *Praga Tools Corporation v Shri CA Imanual* (1969) 1 SCC 585 [6].

[23] *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v VR Rudani* (1989) 2 SCC 691 [20].

[24] (2003) 4 SCC 225 [28]. See also *VST Industries Ltd v VST Industries Workers' Union* (2001) 1 SCC 298.

[25] (2015) 3 SCC 251. [26] (2005) 4 SCC 649.

[27] *Board of Control for Cricket in India* (n 25) [34].

The final issue relating to Article 226 is that of cause of action and territoriality. Article 226 as it originally stood did not make reference to cause of action. It was amended by the Constitution (Fifteenth Amendment) Act 1963 and after Clause (1), a new Clause (1-A) was inserted:

> 226. (1-A) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

By the Constitution (Forty-second Amendment) Act 1976, Clause (1-A) was renumbered as Clause (2). As per this amendment, the High Court within whose jurisdiction the cause of action arises would also have the power to issue relevant directions, orders, or writs. Thus, cause of action was made an additional ground to confer jurisdiction on a High Court under Article 226. For a cause of action claim to succeed, the facts disclosed must bear a nexus to the relief that is sought.[28] The Supreme Court has held that the seat of the government or authority will not interfere with a High Court's powers so long as the cause of action arises within the territory in which its jurisdiction applies.[29] For instance, in *Om Prakash Srivastava v Union of India*, the Court phrased the test as follows: 'in order to maintain a writ petition, a writ petitioner has to establish that a legal right claimed by him has prima facie either been infringed or is threatened to be infringed by the respondent within the territorial limits of the Court's jurisdiction...'[30] However, in *Kusum Ignots*, the Supreme Court observed that:

> We must, however, remind ourselves that even if a small part of cause of action arises within the territorial jurisdiction of the High Court, the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merit. In appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens.[31]

This paragraph was reiterated in *Ambica Industries*, and the Court observed: 'indisputably even if a small fraction thereof accrues within the jurisdiction of the Court, the Court will have jurisdiction in the matter though the doctrine of *forum conveniens* may also have to be considered'.[32] This observation leaves some doubt and ambiguity relating to the powers of the High Court. The rule of forum conveniens is not to be found as part of the text of Article 226(2). Mere convenience to prosecute in another forum ought not to oust the jurisdiction of another forum that is otherwise competent.

[28] *Union of India v Adani Exports Ltd* (2002) 1 SCC 567; *National Textile Corpn Ltd v Haribox Swalram* (2004) 9 SCC 786.

[29] *Oil and Natural Gas Commission v Utpal Kumar Basu* (1994) 4 SCC 711 [5]; *Navinchandra N Majithia v State of Maharashtra* (2000) 7 SCC 640; *Mosaraf Hossain Khan v Bhagheeratha Engg Ltd* (2006) 3 SCC 658.

[30] (2006) 6 SCC 207 [8].

[31] *Kusum Ingots & Alloys Ltd v Union of India* (2004) 6 SCC 254 [30].

[32] *Ambica Industries v Commissioner of Central Excise* (2007) 6 SCC 769 [41].

III. Writs

The Supreme Court in *Rupa Ashok Hurra v Ashok Hurra*[33] clarified the nature of writ jurisdiction in India and its differences with English law. It noted that there were 'two types of writs' in English Law.[34] The first, 'judicial procedural writs... issued as a matter of course' (a writ of summons, for example), were not in use in India.[35] The second, 'substantive writs' (*quo warranto*, *habeas corpus*, mandamus, certiorari, and prohibition), 'were frequently resorted to in Indian High Courts and the Supreme Court'.[36] Delving further into the history of writs in English law, the Court noted that they were 'discretionary... but the principles for issuing such writs are well defined'.[37] The three 'prerogative writs' of certiorari, mandamus, and prohibition were succinctly summarised:

> Historically, prohibition was a writ whereby the royal courts of common law prohibited other courts from entertaining matters falling within the exclusive jurisdiction of the common law courts; certiorari was issued to bring the record of an inferior court into the King's Bench for review or to remove indictments for trial in that court; mandamus was directed to inferior courts and tribunals and to public officers and bodies, to order the performance of a public duty.[38]

Noting the expansion of writ jurisdiction under the Constitution to all the High Courts and the Supreme Court from just the three Chartered High Courts[39] in the colonial era, the Court clarified that while the High Courts in India were 'placed virtually in the same position as the Courts of King's Bench in England', it was a 'well-settled principle that the technicalities associated with the prerogative writs in English law have no role to play under our constitutional scheme'.[40]

The first writ we shall examine, the writ of mandamus, has historically been understood as a writ that can be employed to safeguard justice in a wide variety of cases. The Indian Supreme Court has taken a very broad view of this writ. In *Comptroller and Auditor-General of India v KS Jagannathan*,[41] the Court referred to Halsbury's *Laws of England* to affirm the writ's wide applicability.[42] It observed that 'in a proper case, in order to prevent injustice resulting to the parties concerned, the court may itself pass an order or give directions which the government or the public authority should have passed or given had it properly and lawfully exercised its discretion'.[43] In a later decision, the Court held that mandamus is a very wide remedy, which must be easily available 'to reach injustice wherever it is found'.[44] Technicalities should not come in the way of granting that relief under Article 226.[45] One innovative use of the writ of mandamus has been the idea of 'continuing

[33] (2002) 4 SCC 388. [34] *Rupa Ashok Hurra* (n 33) [6].
[35] *Rupa Ashok Hurra* (n 33) [6]. [36] *Rupa Ashok Hurra* (n 33) [6].
[37] *Rupa Ashok Hurra* (n 33) [6].
[38] *Rupa Ashok Hurra* (n 33) [6] citing *Halsbury's Laws* (4th edn, 1998) vol 1, para 109.
[39] The High Courts of Bombay, Calcutta, and Madras. [40] *Rupa Ashok Hurra* (n 33) [6].
[41] (1986) 2 SCC 679. [42] *Comptroller and Auditor-General of India* (n 41) [19].
[43] *Comptroller and Auditor-General of India* (n 41) [20].
[44] *Sasi Thomas v State* (2006) 12 SCC 421 [26]; See also *Secretary, ONGC Ltd v VU Warrier* (2005) 5 SCC 245.
[45] *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust* (n 23) [22].

mandamus', through which the Court, often in public interest litigation cases, decides to monitor a case or investigation and passes orders and directions from time to time.[46] It was first used in *Vineet Narain v Union of India*,[47] where the Court considered a writ petition that alleged a failure on the part of investigative agencies in a case involving prominent politicians and bureaucrats. The Court described its response to the petition as a 'continuing mandamus': '[keeping] the matter pending while the investigations were being carried on, ensuring that this was done by monitoring them from time to time and issuing orders in this behalf'.[48] In *Manohar Lal Sharma v Principal Secretary*, the Court considered whether Section 6-A of the Delhi Special Police Establishment Act, which required the approval of the Union government before an investigation under the Prevention of Corruption Act, could 'bind the exercise of plenary power by this Court of issuing orders in the nature of a continuing mandamus under Article 32 of the Constitution...'[49] Rejecting this construction, the Court held that Section 6-A had to be 'meaningfully and realistically read, only as an injunction to the executive and not as an injunction to a constitutional court monitoring an investigation under Article 32...'[50]

Since a writ of mandamus lies only when the person entrusted with a duty has failed to perform his duty, it is a requirement in law that, prior to approaching the Court, the petitioner must make an unambiguous demand that the authority must perform its duty. The chief function of the writ of mandamus is to compel the performance of public duties prescribed by statute and to keep statutory authorities and officers exercising public functions within their jurisdictions. The writ can even be issued against a private person so long as the duty sought to be enforced is a statutory duty. In order to obtain a writ or order in the nature of mandamus, the applicant has to satisfy that he has a legal right to the performance of a legal duty by the party against whom the writ is sought. Finally, a writ of mandamus cannot be issued to the legislature to enact a particular legislation. The same is true as regards the executive when it exercises the power to make rules which are in the nature of subordinate legislation.

Habeas corpus, by contrast, is a writ against illegal detention: 'The principal aim of the writ is to ensure swift judicial review of alleged unlawful detention on liberty or freedom of the prisoner or detenu.'[51] The underlying objective of the writ was expressed in the following terms by the Supreme Court in *Sapmawia v Deputy Commissioner*:

> The writ of *habeas corpus* is a prerogative writ by which the causes and validity of detention of a person are investigated by summary procedure and if the authority having his custody does not satisfy the court that the deprivation of his personal liberty is according to the procedure established by law, the person is entitled to his liberty. The order of release in the case of a person suspected of or charged with the commission of an offence does not per se amount to his acquittal or discharge and the authorities are not, by virtue of the release only on habeas corpus, deprived of the power to arrest and keep him in custody in accordance with law for this writ is not designed to interrupt the ordinary administration of criminal law.[52]

[46] *Vineet Narain v Union of India* (1998) 1 SCC 226. See also *Research Foundation for Science, Technology and Natural Resource Policy v Union of India* (2012) 7 SCC 769.

[47] *Vineet Narain* (n 46). [48] *Vineet Narain* (n 46) [7]. [49] (2014) 2 SCC 532 [95].

[50] *Manohar Lal Sharma* (n 49) [98].

[51] *State of Maharashtra v Bhaurao Punjabrao Gawande* (2008) 3 SCC 613 [25].

[52] (1970) 2 SCC 399 [11].

The third writ to be examined, certiorari, is a call by a superior court to an inferior court for records of its proceedings. A notable test for when certiorari may be issued was posited by Atkin LJ in *R v Electricity Commissioners*, in which he observed that 'wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs'.[53] In *R v London County Council*, Scrutton LJ separated the four independent conditions in this text, and the existence of each condition was held as necessary to determine the nature of the act in question.[54]

One important consideration in the exercise of certiorari jurisdiction is the existence of a finality clause that seeks to bar the jurisdiction of an appellate court. In *Kihoto Hollohan v Zachillhu*,[55] the Court, referring to Wade's *Administrative Law*,[56] clarified the scope of certiorari in such cases. The test was 'whether the impugned action falls within the jurisdiction of the authority taking the action or it falls outside such jurisdiction'.[57] A finality clause, or 'ouster clause' as the Court preferred, would limit judicial review to 'actions falling outside the jurisdiction of the authority taking such action' but would '[preclude] challenge to such action on the ground of an error committed in the exercise of jurisdiction vested in the authority because such an action cannot be said to be an action without jurisdiction'.[58] In other words, an ouster clause would 'oust certiorari to some extent', 'if the inferior tribunal has not acted without jurisdiction and has merely made an error of law which does not affect its jurisdiction and if its decision is not a nullity for some reason such as breach of rule of natural justice'.[59]

Another important issue is the limit on certiorari jurisdiction: can it be issued to coordinate or superior courts? This was answered concisely by the Court in *Rupa Ashok Hurra*:

> A High Court cannot issue a writ to another High Court. One Bench of a High Court cannot issue a writ to another Bench of the same High Court. The writ jurisdiction of a High Court cannot be invoked to seek issuance of a writ of certiorari to the Supreme Court. Although, the judgments/orders of High Courts are liable to be corrected by the Supreme Court in its appellate jurisdiction, the High Courts are not constituted as inferior courts. Even the Supreme Court would not issue a writ under Article 32 to a High Court. Similarly, neither a smaller Bench nor a larger Bench of the Supreme Court can issue a writ under Article 32 of the Constitution to any other Bench of the Supreme Court.[60]

The next writ under consideration is prohibition, whose origins lie in common law courts prohibiting other courts from entertaining matters that fall within their jurisdiction. The Indian Supreme Court has held that this writ will be issued 'to prevent a tribunal or authority from proceeding further when the authority proceeds to act without or in excess of jurisdiction; proceeds to act in violation of the rules of natural justice; or proceeds to act under a law which is itself *ultra vires* or unconstitutional'.[61] A writ of prohibition will not lie unless there is an error of jurisdiction as opposed to an error of law. In practice, however, courts

[53] [1924] 1 KB 171, 205. [54] [1931] 2 KB 215. [55] (1992) Supp (2) SCC 651.
[56] HWR Wade, *Administrative Law* (6th edn, Oxford University Press 1988) 720–21.
[57] *Kihoto Hollohan* (n 55) [101]. [58] *Kihoto Hollohan* (n 55) [101].
[59] *Kihoto Hollohan* (n 55) [101]. [60] *Rupa Ashok Hurra* (n 33) [7].
[61] *Standard Chartered Bank v Directorate of Enforcement* (2006) 4 SCC 278 [25].

are less willing to grant writ of prohibition unless the exercise of jurisdiction is grossly exceeded, and prefer to relinquish the jurisdiction in favour of appellate proceedings rather than exercising writ jurisdiction.[62]

It is important to note that prohibition restrains a tribunal or court from continuing ahead in excess of jurisdiction, whereas certiorari requires the record or the order of the court to be sent up to the High Court to have its legality inquired into, and if necessary to have the order quashed. The scope of prohibition was clarified by the Supreme Court in *Isha Beevi v Tax Recovery* Officer: 'in order to substantiate a right to obtain a writ of prohibition from a High Court or from the Supreme Court, an applicant has to demonstrate total absence of jurisdiction to proceed on the part of the officer or authority complained against'.[63] In *S Govinda Menon v Union of India*,[64] it has been held that 'If there is a want of jurisdiction, then the matter is *coram non judice* and a writ of prohibition will lie to the Court or inferior Tribunal forbidding it to continue proceedings therein in excess of its jurisdiction.'[65] In addition:

> The jurisdiction for grant of a writ of prohibition is primarily supervisory and the object of that writ is to restrain courts or inferior tribunals from exercising a jurisdiction which they do not possess at all or else to prevent them from exceeding the limits of their jurisdiction. In other words, the object is to confine courts or tribunals of inferior or limited jurisdiction within their bounds. It is well settled that the writ of prohibition lies not only for excess of jurisdiction or for absence of jurisdiction but the writ also lies in a case of departure from the rules of natural justice.[66]

The final writ is *quo warranto* and involves the usurpation of a public office. The Supreme Court has held that this writ can only be issued when the person holding the public office lacks the eligibility criteria or when the appointment is contrary to the statutory rules.[67] The law distinguishes between eligibility and suitability, and the writ of *quo warranto* is available when a person who is ineligible is appointed to a public office.[68] There is a major distinction between *quo warranto* and the other substantive writs. This distinction lies in the requirement of standing to sue.[69] The concept of locus standi is not applicable to the petitioner approaching the court for issuance of a writ of *quo warranto*. The basic purpose

[62] *Thirumala Tirupati Devasthanams v Thallappaka Ananthacharyulu* (2003) 8 SCC 134 [14]: 'A writ of prohibition must be issued only in rarest of rare cases. Judicial discipline of the highest order has to be exercised whilst issuing such writs. It must be remembered that the writ jurisdiction is original jurisdiction distinct from appellate jurisdiction. An appeal cannot be allowed to be disguised in the form of a writ.'

[63] (1976) 1 SCC 70 [5]. [64] AIR 1967 SC 1274. [65] *S Govinda Menon* (n 64) [5].

[66] *S Govinda Menon* (n 64) [5].

[67] *Rajesh Awasthi v Nand Lal Jaiswal* (2013) 1 SCC 501 [31]. It was held that 'a citizen can claim a writ of *quo warranto* and he stands in the position of a relater. He need not have any special interest or personal interest. The real test is to see whether the person holding the office is authorized to hold the same as per law.'

[68] In *Mahesh Chandra Gupta v Union of India* (2009) 8 SCC 273 [71], it has been held that 'In cases involving lack of "eligibility" writ of quo warranto would certainly lie. One reason being that "eligibility" is not a matter of subjectivity. However, "suitability" or "fitness" of a person to be appointed a High Court Judge: his character, his integrity, his competence and the like are matters of opinion.'

[69] *State of Punjab v Salil Sabhlok* (2013) 5 SCC 1 [88] held that a public internet litigation for a writ of *quo warranto* in respect of an appointment to a constitutional position would not be barred.

of a writ of *quo wattanto* is to confer jurisdiction on the constitutional courts to see that a public office is not held by a usurper without any legal authority, and therefore, the same can be brought to the court's notice by any person. '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.'[70] Even the doctrine of laches has no application against a person seeking a writ of *quo warranto*.[71]

IV. Constitutional Remedies: Procedural Aspects

1. *Res Judicata*

A decision on an issue raised in a writ petition under Article 226 or Article 32 of the Constitution would also operate as *res judicata* between the same parties in subsequent judicial proceedings.[72] The only exception is that the rule of *res judicata* would not operate to the detriment or impairment of a fundamental right.[73] Founded in public policy,[74] a general principle of *res judicata* applies to writ petitions filed under Article 32 or Article 226.[75] It is necessary to emphasise that the application of the doctrine of *res judicata* to the petitions filed under Article 32 does not in any way impair or affect the content of the fundamental rights guaranteed to the citizens of India. It is relevant to note that the Supreme Court has permitted a party to pursue one of the two parallel remedies, provided that both are not being pursued at the same time.[76]

2. Questions of Fact

In *Gunwant Kaur v Municipal Committee, Bhatinda*, the Supreme Court held that, in a petition under Article 226:

> Merely because a question of fact is raised, the High Court will not be justified in requiring the party to seek relief by the somewhat lengthy, dilatory and expensive process by a

[70] *University of Mysore v CD Govinda Rao* AIR 1965 SC 491 [6]. See also *BR Kapur v State of Tamil Nadu* (2001) 7 SCC 231.

[71] *Central Electricity Supply Utility of Odisha v Dhobei Sahoo* (2014) 1 SCC 161 [22].

[72] *Ishwar Dutt v Land Acquisition Collector* (2005) 7 SCC 190

[73] *Ashok Kumar Srivastav v National Insurance Company Ltd* (1998) 4 SCC 361 [11].

[74] The basic idea in the rule of res judicata has sprouted from the maxim *nemo debet bis vexari pro una et eadem causa* (no man should be vexed twice over for the same cause).

[75] *Amalgamated Coalfields Ltd v Janapada Sabha Chhindwara* AIR 1964 SC 1013.

[76] *Orissa Power Transmission Corporation Limited v Asian School of Business and Management Trust* (2013) 8 SCC 738.

> civil suit against a public body. The questions of fact raised by the petition in this case are elementary.[77]

When a manifest error has resulted in the failure of justice or there has been a miscarriage of justice, interference under Article 226 would be called for.[78] In *Sant Lal Gupta v Modern Cooperative Group Housing Society Ltd*,[79] the Court elaborated on this when considering the exercise of certiorari jurisdiction by the Delhi High Court: 'The writ of certiorari under Article 226...can be issued only when there is a failure of justice and it cannot be issued merely because it may be legally permissible to do so.'[80] In the interest of justice, the power can also be exercised to summon a deponent for cross-examination where a conclusion cannot be arrived at on the basis of affidavits.[81] In *ABL International v Export Credit Guarantee Corporation of India Ltd*, the Supreme Court held that 'when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution',[82] and therefore, it was not necessary to relegate a party to the civil courts. The tenor of the Court's judgment emphasises that it was necessary to examine whether the claim of 'disputed question' is a bona fide dispute or was it being raised to avoid judicial scrutiny.

3. Political Questions

Taking note of *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs (No 2)*,[83] the Supreme Court has held that 'the contemporary English view is that in principle even such "political questions" and exercise of prerogative power will be subject to judicial review on principles of legality, rationality or procedural impropriety' is applicable in India as well.[84] In *State of Rajasthan v Union of India*,[85] Bhagwati J has summarised the legal position as under:

> [M]erely because a question has a political complexion, that by itself is no ground why the Court should shrink from performing its duty under the Constitution if it raises an issue of constitutional determination...So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so.[86]

[77] (1969) 3 SCC 769 [14].

[78] *DN Banerjee v PR Mukherjee* AIR 1953 SC 58 [5]; *Bijili Cotton Mills (P) Ltd v Presiding Officer, Industrial Tribunal II* (1972) 1 SCC 840 [21]; *Sawarn Singh v State of Punjab* (1976) 2 SCC 868 [13]; *Kartar Singh v State of Punjab* (1994) 3 SCC 569 [459]; *Air India Statutory Corporation v United Labour Union* (1997) 9 SCC 377 [59]; *Roshan Deen v Preeti Lal* (2002) 1 SCC 100 [12]; *Union of India v SB Vohra* (2004) 2 SCC 150 [13]; *Govt of AP v Mohd. Nasrullah Khan* (2006) 2 SCC 373 [11]; *State of Uttar Pradesh v Rakesh Kumar Keshari* (2011) 5 SCC 341 [29].

[79] (2010) 13 SCC 336.

[80] *Sant Lal Gupta* (n 79) [28].

[81] *Barium Chemicals Ltd v Company Law Board* AIR 1967 SC 295 [26]; *Babubhai Muljibhai Patel v Nandlal Khodidas Barot* (1974) 2 SCC 706 [11].

[82] (2004) 3 SCC 553 [53].

[83] [2008] UKHL 61.

[84] *BP Singhal v Union of India* (2010) 6 SCC 331.

[85] (1977) 3 SCC 592.

[86] *State of Rajasthan* (n 85) [149].

However, the jurisdiction of a court may not be available in purely political questions[87] such as those involving the continuation of a state of emergency.[88]

V. Conclusion

An important development relating to constitutional remedies in India that has not been explored by this chapter is public interest litigation. This development has both procedural aspects—that is, the dilution of the principle of locus standi and increased access to justice—and substantive features, such as the recognition of a range of enumerated rights within the right to life in Article 21. The developments have been covered elsewhere in this Handbook, but it is important to note that the liberal interpretation given to the standing requirements in Articles 32 and 226 have been the central medium through which this development has occurred.

One question which often arises in the context of the Court's power is what remedies might be issued with respect to the legislature. The expansion of the meanings of statutory or constitutional provisions by judicial interpretation is a legitimate judicial function; the making of a new law, which the courts in this country have sometimes done, may not be a perfectly legitimate judicial function unless it aims to fill a legal vacuum.[89] The courts have acknowledged that they are not equipped with the skills, expertise, or resources to discharge the functions that belong to the other coordinate organs of the government (the legislature and the executive). Their institutional equipment is wholly inadequate for undertaking legislation or administrative functions. The courts have held that they cannot issue writs against the legislature.[90] In *Union of India v Association for Democratic Reforms*, the Supreme Court observed that:

> At the outset, we would say that it is not possible for this Court to give any directions for amending the Act or the statutory Rules. It is for Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules.[91]

[87] *SR Bommai v Union of India* (1994) 3 SCC 1 [258]:

> Justiciability is not a legal concept with a fixed content, nor is it susceptible of scientific verification. Its use is the result of many pressures or variegated reasons. Justiciability may be looked at from the point of view of common sense limitation. Judicial review may be avoided on questions of purely political nature, though pure legal questions camouflaged by the political questions are always justiciable. The courts must have judicially manageable standards to decide a particular controversy. Justiciability on a subjective satisfaction conferred in the widest terms to the political coordinate executive branch created by the constitutional scheme itself is one of the considerations to be kept in view in exercising judicial review. There is an initial presumption that the acts have been regularly performed by the President.

[88] *Bhut Nath Mete v State of West Bengal* (1974) 1 SCC 645.

[89] See *Common Cause v Union of India* (2008) 5 SCC 511.

[90] *Union of India v Deoki Nandan Aggarwal* (1992) Supp (1) SCC 323; *Union of India v Prakash P Hinduja* (2003) 6 SCC 195.

[91] *Union of India v Association for Democratic Reforms* (2002) 5 SCC 294 [19].

In *Supreme Court Employees' Welfare Association v Union of India*,[92] it was held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law that it has been empowered to do under the delegated legislative authority.

Over time, two features of the Indian legal system have played a key role in the weakening of constitutional remedies in India. First, the growth of tribunals in India has seriously impacted the traditional writ jurisdiction of the High Courts. While the Supreme Court rightly observed, in *Union of India v R Gandhi*, that if tribunals are vested with the powers of High Courts they must also be given the same degree of independence and capacity as such courts, this is yet to be realised in practice.[93] The second important feature that has plagued the realisation of remedies is the very capacity of the judicial system. With a judicial system burdened by backlogs, delays, and inefficiency, the timely recognition of rights violations, the awarding of remedies, and above all their enforcement, all remain a major challenge in India.

[92] *Supreme Court Employees' Welfare Association v Union of India* (1989) 4 SCC 187.
[93] *Union of India v R Gandhi* (2010) 11 SCC 1 [106].