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ANALYZING CONSTITUTIONAL REMEDIES UNDER ARTICLES 32 AND 226 OF THE INDIAN CONSTITUTION

~Anuprabha Bansod

Father of the Indian Constitution, Dr. Ambedkar, prominently referred to The Right to Constitutional Remedies as the “heart and soul” of the Constitution, this appellation underscores its vast application in safeguarding citizens’¹ rights. In events where the rights are encroached upon, individuals can directly approach the Supreme Court for redress. Article 226, along with Article 32, pledges every citizen the Right to Constitutional Remedies, ensuring equality before the law and equal protection of the laws. This right is typically exercised by filing a writ petition in the High Courts and Supreme Court of India.

1. HISTORICAL BACKGROUND

India’s journey to independence was long and strenuous with significant events occurring between 1858 and 1947 – a span of nearly a century. During this period, a demand for fundamental rights evinced parallel to the call for a responsible government. As the era under British rule progressed, these demands intensified, resulting in the adoption of the Constitution. The Constitution not only embedded fundamental rights but also provided mechanisms for their protection and enforcement. The Constituent Assembly debated Draft Article 25 on 9 December 1948. This draft article grants citizens the right to approach the Supreme Court for constitutional remedies when their fundamental rights are violated. The assembly, with one voice, recognized the significance of this

¹ Government of Odisha, *Orissa Review Magazine*, Jan. 2007.

Article, with some members referring to it as the “crowning section and “very heart and soul of the constitution.” Despite this concordance, some amendments were proposed, which led to the adoption of Article 32. The history of writs in India originates from the foundation of the Supreme Court of Judicature at Calcutta, where the first writs were issued. Subsequently, the Supreme Courts of Bombay and Madras also started issuing writs. With the adoption of the Indian High Courts Act of 1861, High Courts across India were empowered to issue writs. The evolution continued, and since 1937, the Federal Court of India also had the authority to issue writs. The evolution continued and since 1937, the Federal Court of India also had the authority to issue writs. Furthermore, writs could be issued by the Privy Council², further fortifying their importance in the Indian legal system.

2. CONSTITUTIONAL REMEDIES

A Fundamental Right may be enforced through normal legal procedures such as a declaratory suit or a defense in legal proceedings. Nonetheless, Article 32 is specially referred to as the “constitutional remedy” for enforcement of fundamental rights. This clause is included in the fundamental rights assuring that it cannot be denied to any person. Dr. B.R. Ambedkar referred Article 32 as the most important Article avowing that without it the Constitution would be reduced to nullity.³ Under Article 32, the Supreme Court may issue a writ against any person or government amid the jurisdiction of India. If a fundamental right has been encroached upon, the Supreme Court cannot refuse relief on the grounds that the wronged person has other remedies available before other courts or under ordinary law. Reprieve cannot be denied even if contested facts need to be collected. Moreover, the Supreme court may confer the appropriate writ, and even alter it as necessary, regardless of whether the petitioner specially requested it. Typically, only the aggrieved person can approach the court, but in matters of social or public interest, the Supreme Court has held that anyone may move the Court. Any piece of legislation or law that intervenes with the Supreme Court’s power under Article 32 shall be declared null and void. Thus, neither the legislative nor the executive authority can evade the power and responsibility entrusted to the Supreme Court by the Constitution. In the landmark case of *Gopalan v. State of Madras 1950 AIR*

² V.D. Mahajan, *Modern Indian History* (18th ed. 1990).

³ *Supra at 1*

27 the supreme court declared Section 14 of the Prevention of Detention Act of 1950 void. The court held that this clause acted as a dividing line around the acts of the executive authority, effectively thwarting judicial review of preventive detention orders.

ARTICLE 226

Article 226, situated within Part V of the Constitution, endows authority in the High Courts to issue various writs. According to Article 226(1), every High Court is accredited to issue orders or writs, such as habeas corpus, mandamus, prohibition, quo warranto, and certiorari, to any person or government for the enforcement of fundamental rights or other purposes. Article 226(2) expands this power to include issuing writs or orders to individuals, governments, or authorities within its jurisdiction or outside its territorial limits if the cause of action arises, wholly or partly, within its jurisdiction.

Article 226(3) establishes a mechanism for the respite of interim orders, such as injunctions or stays passed by a High Court against a party. This application for respite must be dealt with by the court within two weeks. Article 226(4) clarifies the authority conferred to the High Courts by Article 226 does not cut down the Supreme Court's authority under Article 32(2). Article 226 can be applied against any person or authority, including the government. It is important to note that Article 226 constitutes a constitutional right rather than a fundamental right⁴ and thus cannot be suspended even during an exigency. Additionally, while Article 226 is mandatory for the enforcement of fundamental rights, its application for "any other purpose" is voluntary. It serves as a mechanism not only for enforcing fundamental rights but also for safeguarding other legal rights.

In the realm of constitutional remedies, the writ system offers a potent tool for upholding justice and ensuring the proper functioning of the legal system. At the hub of this system are five fundamental types of writs; among the most valued is the Habeas Corpus, which translates to "produce the body." Its chief function is to protect against arbitrary detention or imprisonment. Subsequently, *mandamus*, meaning "we command" in Latin, empowers the judiciary to obligate public officials or bodies to perform their duties. The Prohibition writ serves as a check on the jurisdiction of the lower courts or tribunals. Meanwhile *Certiorari*, with its roots in the Latin phrase "to be informed of", Certiorari functions as an apparatus of judicial review. Lastly, *Quo*

⁴ *Om Prakash Aggarwala, Fundamental Rights and Constitutional Remedies: Constitutional Remedies (1954).*

Warranto meaning “by what authority” targets the legality of individuals holding public office, or positions. Together, these five types of writs form the mainstay of legal aid, offering a vigorous outline for addressing disputes, upholding individual rights and certifying the proper delivery of justice.⁵

In the case of *Bandhua Mukti Morcha v. Union of India 1984 AIR 802*, the Supreme Court ruled that Article 226 encompasses a wider scope compared to Article 32. Article 226 can be invoked not only to safeguard fundamental rights but also to protect legal rights. Similarly, in the case of *Common Cause v. Union of India AIR 2018 Supreme Court 1665*, the Supreme Court reiterated that the writ under Article 226 could be utilized for enforcing public responsibilities by public authorities. This emphasizes the expansive nature of Article 226, which extends beyond the protection of individual rights to the enforcement of public duties and responsibilities.

⁵ *Supra at 1*