CHAPTER - V

Judicial Review of Administrative Action and Writ Jurisdiction

In modern democratic countries like India, the administrative authorities are vested with vast discretionary powers. The exercise of those powers often becomes subjective in the absence of specific guidelines etc. Hence the need for a control of the discretionary powers is essential to ensure that 'rule of law' exist in all governmental actions. Lord Dyson said that “there is no principle more basic to our system of law than the maintenance of rule of law itself and the constitutional protection afforded by judicial review.” The judicial review of administrative actions in the form of writ jurisdiction is to ensure that the decisions taken by the authorities are legal, rational, proper, fair and reasonable.

Article 32 and 226 of the constitution of India has designed for the enforcement of fundamental rights and for a judicial review of administrative actions, in the form of writs. It is a constitutional remedy available to a person to bring his complaint or grievance against any administrative action to the notice of the court. The importance of remedies generally is reflected in the maxim *ubi jus ibi remedium* - where there is a right, there is a remedy. It is axiomatic that a legal right is of little, if any, use unless accompanied by an effective remedy. Remedies should be effective in terms of both procedure and effect, i.e the procedure for obtaining the remedy should be clear, simple and speedy and the remedy once granted should be suitable to protect the legal right from infringement and to compensate the victim for such infringement.\(^1\)

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5.1 Growth of Writ Jurisdiction in India: Origin and Development

The origin of writs took place in the English Judicial system, with the development of English law from folk courts-moots to the formal courts of common law. The law of writs originated from orders passed by the King’s Bench in England. Writ was precisely a royal order, which was issued under the Royal seal. It used to be issued on a petition presented to the king in council for exercise of the extraordinary judicial powers in a particular matter. In the Earlier stage, the King’s court consisted of barons and high ecclesiastical with legislative, judicial and administrative functions. However, with various phases of history it took different names and forms but the spirit of this extraordinary remained almost the same.3

5.1.1 Historical Development in India

Judicial review of administrative action is a product of English Common Law. The writ procedure has been used in England since the thirteenth century for purposes somewhat similar to the ends it is used for today. If a subject complained of injustice, the sovereign, the fountain of justice, wishing to be informed of it, ordered that the record be transmitted to the King’ Bench. In the Seventeenth century, it became a means of review of the newly acquired activities of the justice of peace. Over a period of time, this power was extended to the review of all administrative bodies.4

The origin of writs in India goes back to the Regulating Act, 1773 under which a Supreme Court was established at Calcutta by a charter in 1774. A similar charter also established the Supreme Courts of Madras and Bombay with analogous provisions in 1801 and 1823 respectively. Letters patent were given to all the three courts. These courts were replaced by the High Courts in 1862 under High Courts Act, 1861. The High Court’s so established enjoyed all the powers, which were there with the Supreme courts replaced by these courts. Thus the three presidency High Courts inherited the power to

issue writs as successor to the Supreme Court. Other High Courts subsequently established did not have these powers because they were newly created and they could not inherit these powers as the presidency High Courts did. The special authority, which was conferred by the charter on the three presidency High Courts, was not mentioned in the letters patent of the subsequent courts. However, the writ jurisdiction of these courts was limited to their original civil jurisdiction, which they enjoyed under section 45 of the Specific Relief Act, 1877.5

5.1.2 Writs Provisions under Different Statutes

The following statutes deal with writs provisions in India. These are as following:

5.1.2.1 The Code of Criminal Procedure, 1898:- The Code of Criminal Procedure (Cr PC) 1898 empowered the High Courts in the Presidency town to issue a writ of habeas corpus to set at liberty a person held in illegal detention.6 This jurisdiction was also limited to the original jurisdiction of the High Court. The effect of this legislation was that it was no longer possible to apply for the Common Law writ of habeas corpus.7 In 1923, the Cr PC amended to confer the power to issue writs on all High Courts.8

5.1.2.2 The Specific Relief Act, 1877:- Section 45 of the Specific Relief Act, 1877 empowered the three Presidency High Courts to make orders requiring any specific act to be done or forborne, within the local limits of their ordinary civil jurisdiction, by any person holding a public office or by any corporation or inferior Court. This Act deprived the High Court’s of the power to issue the common Law writ of mandamus.9

5.1.2.3 The Code of Civil Procedure, 1908:- Section 115 of the Code of Civil Procedure 1908 provided that a High Court might call for the record of an inferior Court and if there had been absence of jurisdiction or failure to exercise jurisdiction or material

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5 Ibid.
6 Section 491, the Code of Criminal Procedure, 1898.
7 Girinder Nath v. Birendra Nath, AIR 1927 Cal 496; Mathen v. District Magistrate, AIR 1939 PC 213.
8 Section 30, The Criminal Law Amendment Act 1923 (XII of 1923).
9 Section 50, The Specific Relief Act 1877.
irregularity in the exercise of jurisdiction, it could make such orders as it thought fit. This was a provision similar to certiorari, although it did not take away the power of the High Courts to issue a writ of certiorari. The writ jurisdiction could not be taken away, except by express words. Thus, the provision for revisional jurisdiction of the High Court has been retained in the CPC as amended in 1976 and the Cr PC 1973.10

5.1.3 Writs Provisions under Indian Constitution

The Constitution of India guarantees the individual effective, inexpensive and speedy remedies against the administration. Under Articles 32 and 226, the Supreme Court and High Courts have power to issue prerogative writs in the nature of habeas corpus, mandamus, prohibition, certiorari and quo warranto for the protection of fundamental right enshrined in part III of the Indian Constitution.11 Unless such Constitutional remedies for its enforcement is not provided the rights guaranteed by part III of the constitution cannot be ever implemented by the citizens. The main object of Article 32 is to maintain a balance between the competing interest of “personal liberty” and “public safety” as reflected in the text of the Constitution and its subsequent interpretation.12 Under this Article, Supreme Court has an extraordinary power like that under Article 136 to prevent manifest justice being done in proper cases.13

Article 32 contained in part III is itself a fundamental right given to the person under the Constitution. Similarly Article 226 of the Constitution is conferred on the High Courts to exercise its prerogative writs which can be issued against any person or body of person including the government. The distinction between the two remedies is very negligible. The remedy under Article 32 is limited only to the enforcement of fundamental rights, whereas the High Court can exercise such powers for any other purpose also apart from the enforcement of fundamental rights. It has been held that ‘for any other purpose’ means for the enforcement of any statutory or Common Law right,

11 Article 32(2) of the Indian Constitution.
other than a right acquired through a contract or under any personal law.\textsuperscript{14} The Words ‘any other purpose’ in this article enabled the High Courts to undertake judicial review of administrative action and provide reliefs and remedies against illegibilities committed by various administrative authorities.\textsuperscript{15} In \textit{Poonam v. Sumit Tanwar},\textsuperscript{16} it is held that a writ lies only against a person if it is a statutory body or performs a public function or discharges a public or a statutory duty, or is “State” within the meaning of Article 12 of the Constitution. Therefore, the High Court encompasses a wider area of jurisdiction as far as the subject of writ jurisdiction is concerned. Thus the Constitution provides the discretionary remedies on the High Court and the Supreme Court.\textsuperscript{17}

Justice Subbarao in the case of \textit{Basheshwar Nath v. Commissioner, Income Tax},\textsuperscript{18} stated that,

A large majority of people are socially poor educationally backward and politically yet not conscious of their rights, cannot be pitted against the state or the institution or they cannot be put on equal status with the state or large organisations. The people are requires to be protected from themselves. It is therefore the duty of the court to protect their rights and interests. Fundamental rights are therefore transcendental in nature and created and enacted in national and public interest and therefore they cannot be waived.

In \textit{M. Nagaraj v. Union of India},\textsuperscript{19} it is held that parliament while enacting a law does not provide content to a right. Content of a right is defined by Courts and Final Word on content of a right is of Supreme Court.

Article 227 (1) confers the power of 'superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.'\textsuperscript{20} However, this

\begin{itemize}
  \item \textsuperscript{15} Ibid.
  \item \textsuperscript{17} Available on, \textit{Role of Writs in the Administrative law}, in Legal service India.Com visited on 21.04.2013 at 2.37 pm.
  \item \textsuperscript{18} AIR 1959 SC 149.
  \item \textsuperscript{19} (2006) 8 SCC 212: AIR 2007 SC 71.
\end{itemize}
power does not extend, like Article 136, over any court or tribunal constituted under any
law relating to the Armed Forces.21

Under Article 136, the Supreme Court may grant special leave to appeal from any
judgment, decree, determination, sentence or order in any cause or matter passed by any
court or tribunal.22 What is a Tribunal is not defined, but the Supreme Court has
interpreted it in a liberal way. A tribunal is a body or authority which is vested, with
judicial power to adjudicate on question of law or fact, affecting the rights of citizens in a
judicial manner.

5.2 Modes of judicial review of Administrative Action by constitutional Writs

5.2.1 Public Law Review

Under Articles 32 and 226 of the Constitution, the Supreme Court and High Court
in India are empowered to exercise judicial review to correct administrative decisions and
under this jurisdiction High Court can issue to any person or authority, any direction or
order or writs for enforcement of any of the rights conferred by Part III or for any other
purpose. It is well settled position of law that simply because a remedy exists in the form
of Art.226 of the Constitution for filing a writ in the High Court concerned, it does not
prevent or place any bar on an aggrieved person to directly approach the Supreme Court
under Article 32 of the Constitution. It is true that the Court has imposed a self restraint
in its own wisdom on the exercise of jurisdiction under Article 32 where the party
invoking the jurisdiction has an effective, adequate alternative remedy in the form of
Article 226 of the Constitution. However, this rule which requires the exhaustion of
alternative remedies is a rule of convenience and discretion rather than a rule of law. At
any rate it does not oust the jurisdiction of this Court to exercise its writ jurisdiction
under Article 32 of the Constitution.23 The remedy under Article 32 of the Constitution

20 Article 227(1) of Constitution of India.
21 Article 227(4) of Constitution of India.
22 Article 136 (1) of Constitution of India.
cannot be granted as a matter of due course to provide redressal in situations where statutory remedies are available.\textsuperscript{24}

Thus, the jurisdiction conferred on the High Court under Article 226 is very wide. This is a public law remedy and it is available against a body or person performing public law function. In India public law review is conducted through constitutional modes by way of issuing the writs- habeas corpus, quo warranto, certiorari, prohibition and mandamus under Article 32 and 226.\textsuperscript{25}

5.2.1.1 Habeas Corpus

Habeas Corpus is a prerogative writ which is a renowned contribution of the English Common law to the protection of human liberty.\textsuperscript{26} It was granted to a subject of His Majesty, who was detained illegally in a jail. It is an order of release. The words ‘\textit{habeas corpus ad subjiciendum}’ literally mean that you have the body to answer. It means the writ of habeas corpus is a process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention whether in person or in private custody.\textsuperscript{27} It may be defined as a judicial order issued by the Supreme Court or a High Court by which a person who is confined by any public or private agency may secure his release. The writ in the form of an order calls upon the person in whose confinement the person is to let the court know the legal justification for the detention, and in the absence of such justification to release the person from his confinement. Regarding this, Lord Halsbury, L.C., states that the right to an instant determination as to the lawfulness of an existing imprisonment is the substantial right made available by this writ.\textsuperscript{28} It was described as writ of ‘immemorial antiquity’ whose first threads are woven deeply within the “seamless web of history” and

\textsuperscript{27} Aliya Shaim v. State, Srinagar L.J.,1999, p.311.
untraceable among countless incidents that constituted a total historical pattern of Anglo-Saxon jurisprudence.\textsuperscript{29}

\textbf{5.2.1.1 Object and Purpose of Habeas Corpus}

The fundamental object of the writ of habeas corpus is to immediate determination of the right of the detenues as to his liberty and freedom.\textsuperscript{30} The main object of proceeding for writ of habeas corpus is to make them expeditious, to keep them as free from technicalities as possible and to keep them as simple as possible.\textsuperscript{31} The writ is of highest constitutional importance being a remedy available to the lowliest subject against the most powerful government. Its efficacy depends, to a large extent, on the operative part of law under which the freedom of an individual has been curtailed. The writ has been described as a great constitutional privilege or the first security of civil liberty\textsuperscript{32} which aimed at to ensure swift judicial review of alleged unlawful detention on liberty or freedom of the prisoner or detenu.\textsuperscript{33}

Though the traditional function of the writ of habeas corpus has been to get the release of a person unlawfully detained and arrested, the Supreme Court has widened its scope by giving relief through the writ against inhuman and cruel treatment meted out to prisoners in jail.\textsuperscript{34} In \textit{Sunil Batra(II) v. Delhi Administration},\textsuperscript{35} the court stated that;

\begin{quote}
The dynamic role of judicial remedies...imparts to the habeas corpus writ a versatile vitality and operational utility that makes the healing presence of the law live up to its reputation as bastion of liberty even within the secrecy of the hidden cell.\end{quote}

\textsuperscript{29} This was observed by the Supreme Court in \textit{Kamusanyal v. District Magistrate}, AIR 1959 SC 843.
\textsuperscript{31} Ibid
\textsuperscript{35} AIR 1980 SC 1579 at 1582: (1980) 3 SCC 488.
The court has thus permitted the use of the writ for protecting the various personal liberties to which the arrested person or prisoners are entitled to under the law and the constitution.36

5.2.1.1.2 Historical Development of the Writ of Habeas Corpus in India

In India, jurisdiction to issue any of the prerogative writs did not form part of the powers of any judge or court until the establishment of the Supreme Court by the Regulation Act in 1773. In 1774, by a Charter under that Act, a Supreme Court was established in Calcutta. Clause 4 of the Charter conferred the power to issue writs on each of the justices of that Court.37 In 1861 the three Supreme Courts were abolished and substituted by the High Courts in the Presidency towns. These High Courts were vested with all powers which existed in Supreme Court. In 1875, the High Court Criminal Procedure Act was passed. Section 148 of the act gave the presidency High Courts the power to issue direction in the nature of habeas corpus on certain conditions.38

In 1882 the High Court Criminal Procedure Act was repealed and Criminal Procedure Code came into being. The provisions relating to habeas corpus under section 491 were substantially the same as that of section 148 of the Act of 1875 with the difference that the power was to be exercised within the limits of ordinary original Civil Jurisdiction and not original criminal jurisdiction.39 The Code of 1882 was again replaced by the Code of 1898 which conferred power on the presidency High Courts to issue directions in the nature of habeas corpus. Then, the Criminal Amendment Act of 1923 amended section 491 of the Cr PC to extend the jurisdiction of habeas corpus to the appellate jurisdiction of the High Court also.40 After 1923, the state of affairs continued without any change until the new Republic Constitution came into force which by

39 Ibid.
40 Supra note 10 at 557.
Articles 32 and 226 gave power of issuing writ in the nature of habeas corpus to the Supreme Court and High Courts within their territorial jurisdiction.

5.2.1.1.3 Constitutional Provisions Relating to Habeas Corpus

The writ of habeas corpus has been described as "a great constitutional privilege".\(^1\) "If the Court comes to the conclusion that there is no legal justification for the imprisonment of the person concerned, the Court will pass an order to set him at liberty forthwith".\(^2\) Article 21 of the constitution of India provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law.\(^3\) Thus, where a person is detained, the detaining authority must show that:

(i) The detention is authorized by law
(ii) It is in accordance with the procedure prescribed by law
(iii) The law authorizing the detention is a valid law.

Article 22 contains further provisions for the protection against arrest and detention in certain cases. Clause (1) and (2) of Article 22 guarantee four rights on a person who is arrested for any offence under an ordinary law\(^4\):

(i) The right to be informed 'as soon as may be' of ground of arrest.
(ii) The right to consult and to be represented by a lawyer of his own choice.
(iii) The right to be produced before a Magistrate within 24 hours.
(iv) The freedom from detention beyond the said period except by the order of the Magistrate.

The above mentioned fundamental rights guaranteed to arrested persons are available to both citizens and non citizens and not to person arrested and detained under any law providing for preventive detention.

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\(^2\) Ibid.

\(^3\) Article 21 deals with Protection of life and personal liberty.

\(^4\) Article 22 deals with Protection against arrest and detention in certain cases.
Under the Constitution of India, by virtue of Article 32 and 226, both the Supreme Court and High Courts have the Concurrent jurisdiction to issue writ of habeas corpus. The main object of these articles is to enforce the fundamental right of illegally detained person.45

5.2.1.1.4 Circumstances under which Writ of Habeas Corpus can be Issued

The writ of habeas corpus would lie against all wrongful deprivation of personal liberty.46 It is available to the weakest against the mightiest with the only exception of prisoner of war and the enemy alien.47 It is issued not only for release from detention by the State but also for release from private detention. It may be issued against any person or authority who has illegal detained, arrested or confined the detenu or prisoner. In such circumstances it is the duty of the police to make necessary efforts to see that the detenu is got released but, if despite such efforts, if a person is not found, the police cannot be put under undue pressure to do impossible.48

This writ can also be issued not only against the person who has actual physical custody but also against even constructive custody of the detenue.49 In Talib Hussain v. State of Jammu & Kashmir,50 the Supreme Court has observed that, ‘a writ of habeas corpus will be issued if on the date of hearing, the court is satisfied as the person has been detained illegally, i.e the question of legality or illegality of the detention by the detaining authority and the grounds will be considered on the date of hearing.’

In B. Ramachandra Rao v. State of Orissa,51 a question arose whether a writ of habeas corpus could be granted to a person undergoing sentence of imprisonment imposed on him by a competent court. This was answered by the Supreme Court

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45 Researchers own idea.
47 Supra note 3 at 12.
negatively and said that no writ of habeas corpus could be granted to a person undergoing sentence of imprisonment imposed by the court. Where a person is arrested or detained in pursuance to the order of remand made by the competent court under Section 344 Cr. P.C., the detention is valid. No writ of habeas corpus would lie against the detaining authority.\(^{52}\) A writ of Habeas corpus would also lie if the law which deprives a person of his liberty is not fair and just.\(^{53}\)

The remedy under habeas corpus lies against the three organs of the State legislature, executive and judiciary, local authorities, other instrumentalities of the state, any administrative authority, and private persons including company or any association of persons. The writ was also issued when a ban was imposed on law student to conduct interviews with prisoners for affording them legal relief.\(^{54}\)

### 5.2.1.1.5 Person Entitled to Apply For Habeas Corpus

There is no hard and fast rule for making an application for a writ of habeas corpus under Article 32 before the Supreme Court or under Article 226 before the High Court. An application for habeas corpus can be made by any person on behalf of the prisoner as well as the prisoner himself.\(^{55}\) The wife or the father of the detene can bring a petition.\(^{56}\) In view of the growth of PIL, the rule of *locus standi* stands further relaxed. Habeas corpus is available even against private persons,\(^{57}\) to the wife against the husband,\(^{58}\) or for the custody of minor children if they are illegally detained.\(^{59}\) However, this will depend upon whether in the Court’s view it is in the interest of the child to give such custody. Where a child was well looked after by her grandparents, custody was denied to the

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\(^{55}\) *Charanjit Lal v. Union of India*, AIR 1951 SC 41.

\(^{56}\) *Sundarajan v. India*, AIR 1970 Del 29.


\(^{58}\) *Veena Kapur (Dr) v. Varinder Kumar*, AIR 1982 SC 792.

An alternative remedy under the Hindu Minority and Guardianship Act 1956 is no bar to a petition for habeas corpus by a wife asking for custody of her children. In case of an application seeking a writ of habeas corpus for custody of minor child is concerned, it is well settled principle that in a matter of custody of a child the welfare of the child is of paramount consideration for the court. In *Nirmaljit Kaur (2) v. State of Punjab*, the Supreme Court issued a writ of habeas corpus to grant the custody of the child to its natural mother.

In *Icchu Devi v. Union of India*, Justice Bhagwati observed that in case of application for a writ of habeas corpus, the practice evolved by the Supreme Court was not to follow strict rules of pleading nor place undue emphasis on the question of on whom the burden of proof lay. Even a postcard written by a detenu from jail has been sufficient to activise the Court into examining the legality of detention. So anybody acting pro bono publico can knock the door of the Court for his relief. In *Sunil Batra v. Delhi Administration (II)*, the court initiated the proceedings on a letter by a co-convict, alleging inhuman torture of his fellow convict. Krishna Iyer, J. treated the letter as a petition for habeas corpus. He dwelt upon American Cases where the writ of habeas corpus is filed for the neglect of State penal facilities like overcrowding, understaffing, insanitary facilities, brutality, constant fear of violence, lack of adequate medical and mental health, censorship of mail, inhuman isolation, segregation, inadequate or non-existent rehabilitative or educational opportunities.

In *Kanu Sanyal v. District Magistrate, Darjeeling*, it was held that production of a person who had applied for habeas corpus before the Court was not absolutely necessary. The Court pointed out that what it was concerned with was the legality of the detention

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66 Ibid
67 AIR 1973 SC 2684: (1973) 2 SCC 674.
and if it could be examined without the presence of the detene, the formality of production could be dispensed with.

5.2.1.1.6 When Habeas Corpus does not Lie

The writ of habeas corpus would not lie against the decision pronounced by a court of competent jurisdiction. In *Rama Chandra v. State of Orissa*, the Supreme Court states that no writ of habeas corpus would lie if the arrested person is to face an execution of a sentence of a court of law. Regarding the jurisdiction of trial court, the Supreme Court observed that, even if the order passed by the trial court is wrong or erroneous, no writ of habeas corpus would lie against the order except where the order is without jurisdiction. Under such circumstances, appeal is the only remedy if appellate court is satisfied with the jurisdiction of the lower court. The writ court cannot examine the alleged irregularities in procedure in Court Martial. It can only examine its jurisdiction of the Court Martial. Once a writ petition challenging an order of detention is dismissed by a competent court on merits, the second petition on the same grounds in the absence of any new circumstances is not maintainable under Article 226 of the Constitution.

In *Rajiv Bhatia v. Government of NCT of Delhi*, the question arose whether the petitioner is entitled to file a writ petition before a High Court under Article 226 of the Constitution when the petition for habeas corpus has already been dismissed by another High Court on merits? The Supreme Court answered negatively. Where the physical restraint is imposed on a under a law, there is no right to ask for habeas corpus unless the law under which restraint is imposed is unconstitutional and ultra vires. But the petitioner can challenge the constitutionality of a law in habeas corpus proceeding and the court is bound to release him if the law is held to be constitutional. The Court shall

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68 1972(3) SCC 256.
69 Supra, Note 49 at 1974(3) SCR 141.
also not interfere with the subjective satisfaction of the authority in respect of an order for detention passed under the maintenance of Internal Security Act, 1971.

5.2.1.2 Mandamus

The writ of Mandamus is regarded as one of the highest remedies in the Indian judicial System which literally means ‘command’. It is in the form of specific orders from the Supreme Court or High Court to the inferior court, tribunal, a board, corporation or any administrative authority, or a person requiring the performance of a specific duty fixed by law or associated with the office occupied by the person.\(^\text{73}\) In other words prerogative writ of Mandamus is imposed for securing judicial enforcement of public duties, performance of which has been wrongfully refused.

In the modern era the mandamus is also called a wakening call. It awakes the sleeping authority to perform their duty. It demands an activity and sets the authority in action.\(^\text{74}\) It is of a most extensive remedial nature. The function of mandamus is to keep the public authorities within the limits of their jurisdiction while exercising public functions. It can be issued to any kind of authority in respect of any type of function-administrative, legislative, judicial and quasi-judicial. Thus, \textit{in Birendra Kumar v. Union of India},\(^\text{75}\) when the telephone of the applicant was wrongfully disconnected in spite of his paying his due regularly, the High Court directed the telephone authorities to restore the connection within a week. It is a residuary writ and issued in favour of a person who establishes a legal right in himself.

Professor \textit{A.T. Markose} writes in his book “Judicial Control of Administrative Actions”\(^\text{76}\).

Mandamus is a judicial remedy, which is in form an order from superior Court (In India the Supreme Court and the High Court in each State) to any

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\(^{74}\) Types of writs in the Constitution of India, 10\textsuperscript{th} March 2013, available on www.gktoday/types-of-writs-in-the-constitution-of-india/. Visited on 3.5.13 at 12.40.pm.

\(^{75}\) AIR 1983 Cal. 273.

\(^{76}\) \textit{Supra} note 37.
Government, Court, Corporation or public authority to do or to forbear from doing some specific act which that body is obliged under law to do or to refrain from doing, as the case may be, and which is in the nature of a public duty and in certain cases of a statutory duty.77

5.2.1.2.1 Object of Mandamus

The main object of mandamus is to prevent disorder from the failure of justice and is required to be granted in all cases where law has established no specific remedy and whether justice despite demanded has not been granted.78 It normally issues only when an officer or an authority by compulsion of statute is required to perform a duty and which despite demand in writing has not been performed. Under this writ, duties to be performed may be directory or mandatory. If intended to be mandatory, the duties are indicated by use of the words “shall”, “must” and if not compelling the word used is more often than not “may”. But, in all circumstances, the character of duties must depend on interpretation of the relevant law or statute.79

The purpose is to enforce any specific legal right, including a public right, e.g., right of way along a public road, pavement, public varanda on the side of the city street, which is infringement by non performance of his duty by an officer of the Government, a municipal authority or any public authority in cases wherein no specific legal remedy is provided by law.80

5.2.1.2.2 Historical Development of The Writ of Mandamus in India

The word ‘mandamus’ appeared in a number of orders issued by sovereigns who ruled England in the five centuries following the Norman Conquest. These orders, however, were not concerned with the grievances of citizens. The first instance of mandamus being used for enforcing the right of a private citizen was in 1615, when it

77 Ibid.
78 Union of India v. S.B. Vohra, AIR 2004 SC 1402.
was issued to the mayor and the corporation to restore a burgess to his office unless they could show cause to the contrary. In India, Mandamus was introduced by the Letters Patent establishing a Supreme Court in Calcutta in 1773. The Supreme Courts in the presidency town were empowered to issue the writ. 81

In 1877, the Specific Relief Act was passed which inserted a chapter bearing the title “Of the Enforcement of Public Duties” was included in it. In this chapter, it was thought a separate provision for issuing the writ of mandamus which has no meaning in the circumstances of the present Act, and, therefore, the prerogative writ of mandamus was taken away by Section 5 in that chapter which stated as follows:

Neither the High Court nor any Judge thereafter issues any writ of mandamus.82

Thus, the inclusion of this section in Chapter VIII caused the disappearance of the writ of mandamus. From 1877 to 1950 the writ disappeared from India. But by the Specific Relief Act, an equivalent remedy could be availed by the incorporation of certain sections in the Act. Section 45 of the Specific Relief Act stated that any of the High Courts of judicature at Calcutta, Madras and Bombay may make order requiring any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction by any person holding a public office whether of a permanent or temporary nature or by any corporation or inferior Court of Judicature.83

5.2.1.2.3 Against Whom Writ of Mandamus Lie

The writ of mandamus can be issued to the following:

(i) The three organs of the Government-legislature, executive and judiciary
(ii) Local authorities and instrumentalities of government. But it will not be issued against the President or the Governor of a State for the exercise of powers and

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81 Supra note 10 at 561.
82 Supra note 38 at 401.
83 Ibid.
performance of duties. It will not lie against the State legislature to prevent from considering enacting a law alleged to be violative of Constitutional provisions. It will also not lie against an inferior or ministerial officer who is bound to obey the orders of his Superior.

In *Sohan Lal v. Union of India*, it was observed by the Supreme Court that the writ of mandamus normally does not issue to, or an order in the nature of mandamus is not made against a private individual. But now the rule is well established that a writ of mandamus cannot be issued to a private individual, unless he acts under some public authority. Therefore, in *Afay Hasia v. Khalid Mujib*, it was held that a writ can be issued to enforce a public duty whether it be imposed as private individual or a public body.

In *Society for Cancer in Oral Cavity Prevention Through Education, Hyderabad v. Union of India and others*, the petition came up for issuance of mandamus directing legislature to enact law banning manufacture of Gutkha or tobacco or allied products. In this case the court held that court cannot issue a writ of mandamus to direct the legislature to enact a law banning manufacture of Gutkha or tobacco or the allied products. It is entirely for the executive branch of the government to decide whether or not to introduce any particular legislation.

In *State of Jammu and Kashmir v. Ghulam Mohd. Dar and others*, Supreme Court observed that writ of mandamus would issue only when question involving public law character arises for consideration.

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84 Article 361, Constitution of India.
87 AIR 1957 SC 529.
88 AIR 1981 SC 487.
89 AIR 2003 AP 158.
90 AIR 2004 SC 510.
5.2.1.2.4 Conditions for the Grant of Mandamus

A writ for mandamus can be issued in the following conditions:

(i) There must be public or Common Law duty- Mandamus is employed to enforce a duty the performance of which is imperative and not optional or discretionary with the authority concerned. Generally, it would lie only to enforce a duty which is public in nature. The duty private in nature and arising out of contract was not enforceable through this writ. Therefore, the Court in CIT v. State of Madras, refused to issue mandamus where the petitioners wanted the Government to fulfill its obligation arising out of a contract. However, in another case, in Gujarat State Financial Corpn. v. Lotus Hotels (P) Ltd., the Supreme Court issued writ of mandamus for the specific performance of a contract to advance money. In this case, the Gujarat Financial Corporation, a government instrumentality, had sanctioned a loan of Rs 30 lakhs to Lotus Hotel for the construction but later refused to pay the amount.

The expression 'public duty’ does not imply that the person or body whose duty it is must be a public official or an official body. Therefore, mandamus would lie against a company constituted under a statute for the purpose of compelling it to fulfill its public responsibilities.

A Public duty is one which is created by a statute, rules or regulations having the force of law, the Constitution, or by some rules of common law. Mandamus is not issued when Government is under no duty under the law. Accordingly, mandamus could

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92 AIR 1954 Mad 54.
96 Rashid Ahmad v. Municipal Board, AIR 1950 SC 610.
not be issued directing the Government to grant the allowance to its employees.\footnote{99} Mandamus cannot be issued directing the State Government to appoint a commission to inquire into changes in climate cycle, floods in the State etc. The reason behind that under the Commissions of Inquiry Act, the power of the Government to appoint a commission is discretionary except when the legislature passes a resolution to appoint an enquiry commission.\footnote{100} Even Mandamus can be issued to compel an income tax officer to carry out the instructions issued by the income tax appellate tribunal exercising its appellate power.\footnote{101} Again it can be issued to a municipality to discharge its statutory duty, e.g., to provide for drains and sewers.\footnote{102}

(ii) **There must be a specific demand and refusal** - Second conditions of mandamus is that, there must be a specific demand for the fulfillment of a duty and there must be a specific refusal by the authority. In a petition for mandamus the petitioner must state his right to the performance of a legal duty by the administrative authority against which the writ is sought, and also the fact of his demand for justice which has been denied to him.\footnote{103} The demand for justice and its denial are not merely the technical points, but make the points of substance in a petition of the writ.\footnote{104} The main idea behind it is the requirement of a demand is that the authority should have an opportunity to redress the wrong caused by official in-action or non-action. The rule is intended to ensure that the defaulting public authority gets an opportunity to know what was required of him, and to decide whether he would do it of his own without being required to act by the court. If the defrauding authority is made aware of the default or the necessity to do what the law requires; no formal demand is necessary. If it appears from the circumstances that the authority is aware of the illegality charged against him, it would be an exercise in futility.

\footnote{101}{Bhopal Sugar Industries v. I.T.O., AIR 1961 SC 182: (1961) 1 SCR 474.}
\footnote{102}{Rampal v. State, AIR 1981 Raj.121; Bombay Municipalities v. Advance Builders, AIR 1972 SC 793: (1971) 3 SCC 381.}
\footnote{103}{Gadadhar Ghosh v. State of West Bengal, AIR 1963 Cal 565.}
to make a demand. More so if there is a public duty imposed by law and the public is inconvenienced by its non-performance, no formal element need be made by the petitioner.  

However, express demand and refusal are not necessary. Demand and refusal can be inferred from the circumstances also. Therefore, in *Venugopalan v. Commr., Vijayawada Municipality*, the court inferred demand and refusal from the situation in which the petitioner filed a suit for injunction restraining the municipality from holding elections and the suit was contested by the municipality. Thus, for issuance of mandamus it has to be shown that a statute imposes legal duty, the aggrieved party has a legal right under the statute to enforce its performance, and there is a failure on the part of the officer concerned to discharge statutory obligation. It can also be issued when an authority in discharge of its statutory duty does not act independently.

(iii) **There must be a clear right to enforce the duty** - Mandamus is issued to enforce a mandatory duty which may not necessarily be a statutory duty. In the modern era, by and large, duties of public authorities are statutory but there may be a case where a non-statutory duty may be enforceable and then mandamus may be the appropriate remedy. In the absence of any right-duty relationship, no mandamus could be prayed for by the petitioner. The Scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought.

In some cases, mandamus can be issued to compel a public authority to perform its statutory duty of a public nature or general nature, e.g., to run the railway efficiently and economically. The courts are reluctant to grant relief in such cases because they raise complicated questions of financial resources, accounting, manpower, technical knowhow,
management skills and so on- the tasks which the judicial process is not in a position to handle. In *S.P. Manocha v. State of M.P.*, the court refused to issue mandamus to the college to admit the petitioner because the petitioner could not establish a clear right to admission in the college. In the same manner the court did not grant mandamus for payment of interest on delayed refund under the Customs Act as the claim was not backed by a statutory right at the relevant time.

In *Bombay Municipality v. Advance Builders*, the court directed the municipality to implement a town planning scheme which was prepared by it and approved by the Government under the relevant statute but on which no action was taken for a considerable time. Again in *Rampal v. State*, the High Court directed a municipality to perform its duties of providing a proper system for the flow of filth and removal of filth and rubbish from public places.

**(iv) The right must be subsisting on the date of the petition** - Existence of a legal right to the performance of a legal duty by the public authority on the date of the petition is one of the conditions precedent for issuance of writ of mandamus. When the governing body of a college appointed a new principal after interviewing the candidates and considering their applications, mandamus would not be issued on a petition of an unsuccessful candidate as he has no legal right to be appointed.

The right to enforce the duty must subsist till the date of the petition. If the right has been lawfully terminated before filing the petition, mandamus cannot be issued. In *Director of Settlement, A.P v. M.R. Apparao*, when a High Court upheld the unconstitutionality of a law and directed interim payment, but the Supreme Court in appeal, disagreeing with the High Court upheld the validity of the law and further

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113 AIR 1973 MP 84; *Shabi Construction Co. v. City & Industrial Development Corp.*, (1995) 4 SCC 301.
116 AIR 1981 Raj 121.
provided that interim payment could be made only until the date of determination by the Director under the Law. The apex Court held that the High Court committed serious error in issuing mandamus for the enforcement of so called right which never subsisted on the date of issue of mandamus in view of the decision of the Supreme Court to the contrary.

5.2.1.2.5 Grounds for the Application of Mandamus

Mandamus can be issued on all those grounds on which certiorari and prohibition can be issued. It can be issued on the following grounds:

(i) Error of jurisdiction- it includes excess of jurisdiction and lack of jurisdiction.
(ii) Jurisdictional facts
(iii) Violation of the principles of natural justice
(iv) Error of law apparent on the face of record
(v) Abuse of jurisdiction

In the modern age, administrative agencies enjoy vast discretionary powers. Judicial review of the administrative actions often becomes necessary. The judicial review of administrative functions also comes under the scope of mandamus. When an administrative authority who has the power of discretion fails to act bonafide or if it abuses or exceeds the jurisdiction and if it does not apply ‘mind’ in solving issues then, the writ of mandamus acts as an extraordinary remedy.

5.2.1.2.6 When Mandamus Does Not Lie

The writ of mandamus would not lie against the president, the governor, ministerial officer, private officer etc. It is also not issued to enforce a civil liability

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arising under the law of torts or contracts. In *Suganmal v. State of Madhya Pradesh*, the Supreme Court refused to issue mandamus to command the Government to refund money illegally collected by it where the sole prayer was for the refund of money and the statute had not expressly provided for its refund. However, the writ may be issued to give consequential relief by ordering the refund of tax where the petitioner is challenging the validity of the law imposing the tax, or the validity of an order of assessment, or it may be issued where a statute expressly provides for refund of the tax collected illegally.

The writ is an inappropriate remedy where a person claims damages against the Government for its tortious action. Thus in *Jivan Mal Kochar v. Union of India*, the Supreme Court held that the petitioner cannot claim damages under Art. 32 against the Government and its officials for the loss, humiliation and indignity suffered by him due to the government action. Even no mandamus can be issued based on a civil court decree which would be in the nature of executing or giving effect to a civil decree for which the remedy would be only before the civil court. The Court cannot issue any writ of mandamus to the police for enforcing the interim order of a civil court. It can be issued to a police officer only if it is shown that the Officer had failed to discharge his statutory duties.

The High Court under Art. 226 cannot issue mandamus straightway without examining the implication and impact of giving directions. In *Union of India v. Pradeep Kumar Dey*, where the petitioner was a radio operator with CRPF and demanded equal pay scale with the radio operator working in civil side with Central Water Commission

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128 Prasannakumari v. Kausalya, AIR 2008 (NOC) 2763 (Ker)(DB).
130 2001 (3) RSJ 235 (SC).
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and Directorate of Police Wireless. No material was placed before the Court for comparison in order to apply the principle of equal pay for equal work. Court should normally leaves such matters for the wisdom of administrative except the proven cases of hostile discrimination.

In *M. Pakeera Reddi v. District Collector Cuddapali*, the Andhra Pradesh High Court held that a petition under Article 226 for the issue of mandamus would not lie to compel the authority under the Essential Commodities Act to release the groundnut oil seized from the godown of X, on the plea that the said goods belonged to the petitioner and not to X. It could also not be issued for the purpose of establishing title in property. It could be used only for protecting rights in property.

The Patna High Court in *Karpoori Thakur v. Abdul Gafoor, Chief Minister of Bihar*, has held that the High Court by issue of writ of mandamus cannot compel the Chief Minister to resign, in the absence of dismissal by the Governor on an implied assumption of lack of confidence by the Legislative Assembly. Mandamus cannot be issued to give a direction for the removal of a Home Minister or any Minister in the Council of Minister. The power to remove a Minister is entirely discretionary and is not regulated by any statutory provisions.

In *R. K. Singh v. Union of India*, the PIL filed by the petitioner to issue writ of mandamus for directing the respondents to take immediate steps and bring an enactments or get promulgated an ordinance by the President of India under Art 123 of the Constitution of India to the effect of prescribing higher qualifications for the legislature within reasonable period of time. The Delhi High Court held that writ of mandamus cannot be issued to legislature to enact provisions in particular manner or even to legislate particular act of provision.

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132 AIR 1985 NOC 136.
133 AIR 1975 Pat 1.
135 AIR 2001 Delhi 12 (F.B.).
From all above mentioned case laws it is clear that a writ of mandamus is not a writ of right, but is, as a rule, discretionary and the Court will only enforce the performance of statutory duties by public bodies on application of a person who can show that he was himself a legal right to insist on such performance.\textsuperscript{136}

5.2.1.3 Certiorari

Certiorari is an extraordinary common law remedy of ancient origin. It is not a writ of right but one of discretion. It is a Latin word which means “to certify”. It is in a form of judicial order issued to the lower judicial authority by the High Court or Supreme Court to show the record of proceeding ‘pending with’ such lower judicial authority for scrutiny and if necessary for quashing the same. In other words, it is issued to quash proceeding and is, therefore, issued when the administrative process has ended in a decision. It lies against judicial or quasi-judicial authorities. It is issued only if the act done by the inferior court or tribunal or administrative authority is bound to act judicially.\textsuperscript{137}

The main object of a writ of certiorari is to bring up the records of an inferior Court, an administrative tribunal or other administrative body discharging some quasi-judicial function, for examination before the higher judiciary so that it may be certified by higher judiciary that works and acts of the lower courts or tribunals does not exceed the limits of jurisdiction fixed by law. In \textit{Bharat Bank v. Employees of Bharat Bank},\textsuperscript{138} the Supreme Court has held that the object of the writ of certiorari is to keep the exercise of powers by judicial and quasi judicial tribunals within the limits of the jurisdiction assigned to them by law and to restrain them from acting in excess of authority. But a writ of certiorari can never be raised to call for the record or papers and proceedings of an Act or Ordinance and for quashing such Act or Ordinance.\textsuperscript{139}

\textsuperscript{137} \textit{Supra} note 25 at 229.
\textsuperscript{138} 1950 SCR 459.
5.2.1.3.1 Against Whom Certiorari Lie

A writ of Certiorari lies against judicial or quasi-judicial authorities but will not issue against a civil court, though it can issue against a tribunal. The jurisdiction of the High Court to issue a writ of certiorari is a supervisory jurisdiction and the court exercising it is not entitled to act as an appellate court. It means that finding of facts reached by the tribunals as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. In regard to a finding of fact by a tribunal, a writ of certiorari can be issued if it is shown that in arriving at such a finding, the tribunal had erroneously admitted inadmissible evidence, which had influenced the impugned finding. Similarly if a finding of fact is based on no evidence that would be regarded as an error of law which can be corrected by certiorari. The writ is not issued against bodies like a court of inquiry entrusted with the work of merely carrying out the investigation into a charge against an employee and submitting a report to an officer in the Ministry of Defence, Government of India.

5.2.1.3.2 Conditions and Grounds for the issue of Certiorari

The followings are the conditions and grounds for the writ of certiorari:-

In Hari Vishnu Kamath v. Syed Ahmed Ishaque, it was held that the writ of certiorari can be issued to correct an error of law. But it is essential that it should be something more than a mere error and it must be one which must be manifest in the face of the record.

In Dwarka Nath v. I.T. Officer, it was held that a writ of certiorari can be issued only to quash a judicial or a quasi-judicial act and not an administrative act. The writ can be issued only when the following conditions exist:-

141 Syed Takooib v. Radhakrishnan, AIR 1964 SC 477, 479, per Gajendragadkar J.
143 AIR 1955 SC 233:(1955) 1 SCR 1104.
144 AIR 1966 SC 81.
(i) The body of persons must have legal authority.
(ii) There must be authority to determine question affecting the right of subject and
(iii) Body of persons should have a duty to act judicially.\(^{145}\)

In *Surya Dev Rai v. Ram Chandra Rai*,\(^{146}\) it was stated that Certiorari under Article 226 is issued for correcting gross error of jurisdiction i.e. when a subordinate court is found to have acted on following grounds:

(i) without jurisdiction or by assuming jurisdiction where there exist none, or
(ii) in excess of its jurisdiction by over stepping or crossing the limits of jurisdiction or
(iii) Acting in flagrant disregard of law or rules of procedure or acting in violation of principles of natural justice where there is no procedure specified and thereby occasioning failure of justice.\(^{147}\)

A writ of certiorari can also be issued when there is infraction of fundamental rights of the petitioner,\(^{148}\) or where the order passed by the agency is mala fide, fraudulent or otherwise unjust.

5.2.1.4 Writ of Prohibition

Writ of prohibition means to forbid or to stop and it is popularly known as ‘Stay Order’.\(^{149}\) It is in the nature a preventive writ with a view to an injunct or prevents order against a Court or tribunal. It literally means to prohibit the lower Court or tribunal. It is a command by the Superior Court to inferior courts and tribunals to refrain from doing what it is about to do. It prevents from assuming jurisdiction which is not vested in him.

\(^{145}\) Ibid.
\(^{147}\) Ibid.
The term "inferior courts" comprehends special tribunals, commissions, magistrates and officers who exercise judicial powers, affecting the property or rights of the citizen and act in a summary way or in a new course different from the common law. In India, prohibition is issued to protect the individual from arbitrary administrative actions.

In *East India Commercial Co. v. Collector of Customs*, the Supreme Court observed:

A writ of prohibition is an order directed to an inferior Tribunal forbidding it from continuing with a proceeding therein on the ground that the proceeding is without or in excess of jurisdiction or contrary to the laws of the land, statutory or otherwise.

Prohibition is in the form of judicial writ which is issued by the higher authority to lower Court or tribunal. It issues only against an authority discharging judicial function. It means the writ of prohibition does not lie against an authority discharging executive functions. In *S. Gobinda Menon v. Union of India*, it was held that the jurisdiction for grant of a writ of prohibition is primarily supervisory and the object of the 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.

### 5.2.1.4.1 Grounds for Issuance of Prohibition

Prohibition can be issued on the same grounds on which certiorari can be issued except in one ground the error of law apparent on the face of the record. The grounds for the issue of prohibition are as following:

(i) Lack or excess of jurisdiction.

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150 Arvind kumar, *Short essay on the writ of prohibition*, available on www.preservearticles.com/2011111216899/Short-essay-on-the-writ-of-prohibition.html, visited on 3.5.13 at 11.42am
152 Brij Khandelwal v. Union of India, AIR 1975 Del 184.
(ii) Violation of principles of natural justice.
(iii) Infringement of fundamental rights.
(iv) Fraud
(v) Contravention of the law of the land.

In *Thirumala Tirupati Devasthanamas v. Thallappaka Anantha Charyulu*,\(^\text{155}\) it was held that a writ of Prohibition is normally issued when inferior court or tribunal

(i) proceeds to act without jurisdiction or in excess of jurisdiction
(ii) proceeds to act in violation of the rules of natural justice or
(iii) proceeds to act under a law which is itself ultra vires or unconstitutional, or
(iv) proceeds to act in contravention of fundamental rights.

Same grounds are also mentioned in the *Standard Chartered Bank v. Directorate of Enforcement*\(^\text{156}\) Regarding the grounds of writ of prohibition, Lord Denning said,

It is available to prohibit administrative authorities from exceeding their powers or misusing them. In particular, it can prohibit a licensing authority from making rules or granting licenses which permit conduct which is contrary to law.\(^\text{157}\).

Existence of an alternative remedy is not generally a bar to issuance of writ of prohibition.\(^\text{158}\)

5.2.1.5 Writ of Quo Warranto

The word quo warranto means what is your authority. It is a judicial order against a person who occupies a substantive public office without any legal authority. In other words the writ calls upon the holder of a public office to show to the court under what

\(^{157}\) *Supra* note 128.
authority he is holding the office in question. It has been stated thus:

An information in the nature of quo warranto is the modern form 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. It also lay in cases of non-user, abuse or long neglect of an office.

In English law, under Edward I, the writ of quo warranto was effectively used against the usurpers of franchise which was replaced in 1938 by injunction. In India, although quo warranto was not mentioned in the charters of the Supreme Courts of the presidency towns, the powers to issue that writ was claimed under the general power in the charters to exercise the jurisdiction and powers of the king’s bench. Under the Constitution, High Courts have power to issue it and the jurisdiction extends to their appellate jurisdiction.

It is a very effective method of judicial control which reviews the actions of the administrative authority which appointed the person. It gives the judiciary a weapon to control the executive, the legislature, statutory and non-statutory bodies in matters of appointments to public offices. Conversely, it protects a citizen from being deprived of a public office to which he has a right.

5.2.1.5.1 Conditions for Issuance of Quo-Warranto

The necessary conditions for issuance of writ of quo warranto are as follows:

(i) **Office must be a public office** - Before a citizen can claim a writ of quo warranto, he must satisfy the court that the office in question is a public

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161 Section 9, the Administration of Justice (Miscellaneous Proceedings) Act 1938.
162 *Supra* note 10 at 568-569.
In Anand Behari v. Ram Sahai, the court held that public office is one which is created by the Constitution or a statute and the duties of which must be such in which the public is interested. In this case, it was held that the office of the speaker of the Legislative Assembly is a public office.

In G. D. Karkare v. Shevde, it was held that the office of Advocate-General is a Public office. In the same manner the office of members of a municipal board or the office of a university official are public offices but the office of the principal of a private college has been held to be not a public office.

(ii) **It must be substantive in nature**—The office must be of substantive character. The words ‘substantive character’ means the office in question must be an independent and permanent in character and is not terminable at will. In other words, the official must be an independent official and not merely one discharging the functions of a deputy or servant at the pleasure of the officer.

(iii) **The person must be in actual possession of the office**—A person who has been elected or appointed to a particular post cannot be sued upon unless he has not accepted the post. In Centre for Public Interest Litigation v. Union of India, a writ petition challenge was made to the appointment of Chief Secretary of the State of U.P. The Supreme Court considered the scope of the grounds for challenge of appointment in public office in quo warranto proceedings. It was observed that time has come when posting of officers holding sensitive posts should be done in transparent manner giving no scope for any grievance. In the peculiar facts and circumstances of the case the

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165 AIR 1952 Mad 31.
166 AIR 1952 Nag 333.
168 Rajendra Kumar v. State of M.P., AIR 1957 MP 60; Ram Singh Saini v. H.N. Bhargava, (1975) 4 SCC 676: AIR 1975 SC 1852, where the post of a university professor was held to be a public office.
Supreme Court directed the State of U.P. to transfer the respondent to some other post.

(iv) The office must be held in contravention of law- The appointment of a person to a public office must be a clear violation of law. If there is a mere irregularity in procedures etc, quo warranto will not lie. It means in proceeding for issuance of writ of quo warranto clear infringement of law should be shown.\(^{173}\) In State of Assam v. Ranga Muhammad,\(^{174}\) the court found the transfer and posting of two district judges contrary to law, but did not issue quo warranto as it was a case of mere irregularity that did not make the occupation of office wrongful. Thus, a writ of quo warranto can only be issued when the appointment is contrary to statutory rules.\(^{175}\) In Arun Singh v. State of Bihar,\(^{176}\) also held that a writ of quo warranto should not be issued only upon a clear finding that appointment to a public office was contrary to statute.

### 5.2.1.5.2 Who may Apply

Any member of the public can seek the remedy of quo warranto even if he is not personally aggrieved or interested in the matter.\(^ {177}\) He may be a stranger. In Satish Chander Sharma v. University of Rajasthan,\(^ {178}\) it was held that a registered graduate of a university could challenge the election of a person to the syndicate though he was neither a voter for the election nor a candidate. In the same manner a Citizen has a right to move the High Court for quo warranto against a chief minister who is occupying the post unauthorisedly.\(^ {179}\) However, where the petitioner is not qualified for the post of Director, it does not debar him to challenge the selection of the respondent to the post.\(^ {180}\) Quo

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174 AIR 1967 SC 903.
warranto does not lie where the nature of the office is private but a private person can challenge such appointment in the petition.

5.2.1.5.3 When Quo-Warranto does not Lie

The writ of quo warranto will not be issued if there is an alternative legal remedy provided by the statute. Where the constitution or any statute provides that a specific question of law is to be decided by a tribunal, the higher judiciary cannot assume jurisdiction to issue the quo warranto. This writ does not lie for quashing the order for creation of the post before incumbent was appointed. In *V.D. Deshpande v. State of Hyderabad*, the court refused the writ against members of Legislatures who had become disqualified since they held offices of profit as Article 192 of the Constitution provided an adequate remedy.

In *State of Haryana v. Haryana Coop. Transport Ltd.*, the Supreme Court issued the writ against the appointment of a presiding officer of a labour court on the ground that the officer did not possess the prescribed qualifications, holding that the remedy provided under Section 9(1) of the Industrial Disputes Act cannot detract the High Court from exercising its jurisdiction to issue the writ under Article 226 of the Constitution.

5.2.2 Private Law Review

Private law review refers to powers of ordinary courts of the land, exercised in accordance with ordinary law of land to control administrative action. It is exercised through specific remedies under certain statutes. They are known as equitable remedies and may be described as following:

(i) Injunction

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182 AIR 1955 Hyd 36.
184 *Supra* note 121 at 289.
(ii) Declaratory relief
(iii) An Action for damages

Therefore, the researcher feels that these ordinary equitable remedies are of great importance. This non-constitutional mode of judicial review of any administrative action can be exercised by the civil and criminal courts, tribunals, special courts like the one constituted under the Scheduled Castes, Scheduled Tribes (Prevention of Atrocities) Act, Consumer Courts and environmental authorities, etc.

5.2.2.1 Injunction

Injunction may be defined as an ordinary judicial process that operates in personam by which any person or authority is ordered to do or to refrain from doing a particular act which such person or authority is obliged to do or to refrain from doing under any law.\textsuperscript{185}

Injunction is an equitable remedy. It is a judicial process by which one who has invaded, or is threatening to invade the rights, legal or equitable, of another is refrained from continuing or commencing such wrongful act.\textsuperscript{186} The remedy is coercive but not rigid and can be tailored to suit the circumstances of each individual case. The court in its proceeding for injunction can review all actions Judicial, quasi-judicial, administrative, ministerial or discretionary. As an equitable remedy, it leaves a discretion with the court to prevent its abuse.\textsuperscript{187}

At present, the law relating to injunctions is laid down in the Specific Relief Act, 1963 which has repealed the corresponding Act of 1877. Injunction is divided into three categories:\textsuperscript{188}

(I) Prohibitory injunction

(II) Mandatory injunction

\textsuperscript{187} Supra note 121 at 290.
\textsuperscript{188} Ibid.
(I) Prohibitory Injunction

A Prohibitory injunction forbids a defendant to do a wrongful act which would be an infringement of some right of the plaintiff, legal or equitable. It is of two types:

(a) Temporary injunction
(b) Perpetual injunction

(a) Temporary Injunction - Temporary injunction is granted as an interim measure which is preventive in character. It is granted on an application by the plaintiff to preserve status quo until the case is heard and decided. According to section 37(1) of Specific Relief Act, 1963 injunction is to continue until a specified time or until further order of the court. It may be granted at any stage of a suit. Rules 1 and 2 of Order 39 of the C.P.C., deal with temporary injunctions.\(^{189}\) A court grants an interim injunction if three conditions are satisfied:

(i) making out a prima facie case
(ii) showing that the balance of convenience is in the applicant’s favour in that the refusal of the injunction would cause greater inconvenience to him
(iii) whether on refusal of the injunction he would suffer irreparable loss.\(^{190}\)

In Chandulal v. Delhi Municipal Corporation,\(^{191}\) the court refused to grant an interim injunction against the Corporation in a matter of cancellation of the plaintiff’s license to use a Kisok. Delivering the judgment, the Court observed that such an injunction can be granted only if the plaintiff shows that he has a legal right which has been infringed and to disclose existence of a prima facie case. For this the balance of convenience must be in favour of grant of injunction. As a principle ex parte injunction would be granted under exceptional circumstances.\(^{192}\) In Hindustan Petroleum Corporation Ltd. v. Sriman Narayan,\(^{193}\) it was held that the purpose of grant of

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\(^{189}\) Ibid.
\(^{190}\) Ibid.
\(^{191}\) AIR 1978 Del. 174.
temporary injunction is to lessen the risk of reparable injury and injustice, which cannot be compensated in terms of money, which would result from the violation by the defendant of some right of the plaintiff. In another case it was also held that the conduct of the party seeking the injunction has to be fair.

(b) **Perpetual Injunction**- A perpetual injunction is granted on final disposal of the case on merits to prevent the infringement of those rights to which the plaintiff is entitled permanently. It is similar to a decree and decides a right. Sections 36 to 42 of the Specific Relief Act, 1963 deal with permanent injunction. Section 38 of the Specific Relief Act deals with perpetual injunction which may be granted in the following circumstances:

- (i) Where the defendant is a trustee of the property for the plaintiff
- (ii) Where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;
- (iii) Where the invasion is such that compensation in money would not afford adequate relief; and
- (iv) Where the injunction is necessary to prevent multiplicity of judicial proceedings.

In some circumstances the injunction will not be granted. These are as following:

- (i) To restrain a person from instituting or prosecuting any judicial proceeding, civil or criminal
- (ii) To restrain any person from petitioning to any legislative body;
- (iii) To prevent the breach of a contract which cannot be specifically enforced, i.e., service contracts.

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195 Supra note 188.
196 Ibid.
197 Ibid.
(II) Mandatory Injunction

A mandatory injunction not only involves prohibition but also imposes a positive duty on the defendant to do something. Under section 39 of the Specific Relief Act, the court may, at its discretion, grant an injunction as a final decision to prevent the breach of an obligation to compel the performance of certain acts. According to section 40, the plaintiff in a suit for perpetual injunction or mandatory injunction may claim damages either in addition to, or in substitution of, such injunction. The court may, at its discretion, award such damages.

An injunction is a discretionary remedy, but it must be exercised judicially. For this it is necessary that the plaintiff must be an aggrieved person. Since injunction is an equitable remedy, it may be refused, if the conduct of the plaintiff disentitles him for the assistance of the Court198 or when equally efficacious relief can be obtained by any other usual mode of proceedings.199 Thus, in case of breach of contract, an injunction will not be granted when damages would be an adequate remedy to the aggrieved party.200

In *Vaish Degree College v. Lakshmi Narain*,201 the Supreme Court has laid down the important points:

(i) The relief of injunction is purely discretionary.

(ii) The plaintiff cannot claim it as a matter of right.

(iii) It is more in the nature of equitable relief than a legal remedy.

(iv) The court grants the relief according to the legal principles.

(v) The court must keep in mind the principles of justice and fair play.

Accordingly, the Court refused to grant the relief to plaintiff teacher because it was a matter of employer-employee relationship. It would have caused undue hardship to...
the college authorities. However, the Court awarded some monetary compensation to the plaintiff.202

Injunction is also an effective method of judicial control of administrative discretion. There are certain instances where the injunction can be granted as follows203:

(i) where the administrative authority has not exercised its discretion at all or
(ii) has exercised it at the instance of some other body, or
(iii) its exercise is arbitrary or
(iv) has been exercised on extraneous considerations or for an improper purpose or
(v) if its exercise is malafide.

5.2.2.2 Declaratory Relief

Declaratory relief can be defined as a judicial remedy which conclusively determines the rights and obligations of public and private persons and authorities without the addition of any coercive or directory decree. The essence of declaratory remedy is that it states the rights or legal positions of the parties as they stand, without changing them in any way though it may be supplemented by other remedies in suitable cases.204 A declaratory judgment by itself merely states some existing legal situation. It requires no one to do anything and to disregard it will not be contempt of court.205

In the sphere of administrative law, the declaratory actions have an important role to play. In an age when more and more an individual action is liable to bring him in conflict with administration, declaratory action satisfies the need of a simple but all embracing method of redress against the administration. Regarding this de smith says that,206

202 Ibid.
203 Supra note 163 at 427.
A public authority uncertain of the scope of powers which it wishes to exercise but which are disputed by another party may be faced with the dilemma of action at the risk of exercising its powers or inaction at the risk of failing to discharge its responsibilities, unless it is able to obtain the authoritative guidance of a Court by bringing a declaratory action. It is equally for the public benefit than an individual whose interest are immediately liable to sustain direct impairment by the conduct of the Administration should be able to obtain in advance a judicial declaration of the legal position.

In Common Law, under the Crown Proceedings Act, every claim against the government may be by a declaratory action. Being an ordinary law remedy it is free from the technicalities of writs relating to locus standi, choice of remedy, character of administrative action and the nature of the administrative authority.207

In India, provision for declaratory relief appeared first in section 15 of the CPC of 1859, which was repealed by the Code of 1877 but it reappeared in section 42 of the Specific Relief Act and is now contained in section 34 of the Specific Relief Act 1963. In order to obtain relief under section 34, the plaintiff must establish that:208

(i) the plaintiff is at the time of the suit entitled to any legal character or to any right as to any property
(ii) the defendant has denied or is interested in denying the character or title of the plaintiff
(iii) the declaration asked for is a declaration that the plaintiff is entitled to a legal character or to a right to property.
(iv) the plaintiff is not in a position to claim further relief than a bare declaration of right.

The declaratory decree cannot be obtained as a matter of right. The Court has discretion to grant or not to grant it.209

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207 Supra note 163 at 428.
209 State v. Sardarmal, AIR 1987 MP 156.
5.2.2.2.1 Characteristics of Declaratory Relief

These are the main characteristics of declaratory relief.\(^{210}\)

(i) Declaratory is an ordinary remedy.
(ii) Declaratory remedy is discretionary.
(iii) Declaratory judgment is not enforceable.
(iv) There is no sanction behind declaratory action.
(v) Declaratory decree is binding on the parties.
(vi) Declaratory action is not a coercive relief.

In *K. K. Kochunni v. Madras*,\(^{211}\) the Supreme Court observed that in an application under Article 32, declaration and injunction are proper reliefs. Declaratory relief, like injunction, can, therefore sought against public authorities where other requirements of the relief are satisfied. Declaratory relief can be given by the writ court while exercising its power under Article 226.\(^{212}\)

From above mentioned provisions it is clear that the declaratory remedy lies by way of suit which normally has to be filed before the district court. But in spite of several advantages in favour of the declaratory action, it is not as popular and effective a remedy as the writs. The reasons are as following:

*Firstly*, since a declaratory decree is a statutory remedy it can be excluded by a statute.\(^{213}\)

*Secondly*, two months’ notice under s. 80, C.P.C., has to be given before a suit for declaration against the government can be filed.\(^{214}\)

*Thirdly*, a suit for declaration is to be filed in a lower court where its disposal takes long while a person can go straight to the High Court for a writ.\(^{215}\)

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\(^{210}\) *Supra* note 121 at 293.

\(^{211}\) AIR 1959 SC 725.

\(^{212}\) *Aswini Kumar Pati v. University of Burdwan*, AIR 1982 Cal 7 (NOC).

\(^{213}\) *R.T. Rangachari v. S.S. for India*, (1936) 64 IA 40; *Munni Devi v. Gokal Chand*, 1969 (2) SCC 879.


5.2.2.3 Action for Damages

The third remedy against administrative action is a suit for damages. In Civil law, any person who is wronged by administrative action or negligent acts of the public authorities can challenge its validity in action for damages by filing a suit in the Civil Court of first instance and its procedure is regulated by the Civil Procedure Code. The requirement of two months’ notice is mandatory under section 80 before filing the suit, unless it is waived by the Court in special circumstances.216

In number of cases, the Supreme Court has come to hold that where there has been a breach of a public duty causing injury to the general public, any person who is not merely a busy body, would be allowed to bring action to seek enforcement of such public duty. In *Ratlam Municipality v. Vardi Chand*,217 section 133 of Criminal Procedure Code, which authorises a Magistrate on receiving the report of Police Officer or other information to make an order for remedying public nuisance, was invoked by one of the residents of a locality against the municipality for failure to carry out the duty of constructing a drain pipe. Turning down the plea of lack of funds with the municipality, the Supreme Court directed the Committee to follow a time bound programme laid down by it for the purpose. In this case the provision of the Criminal Procedure Code was invoked for the enforcement of public duties.

From above all, it is observed that power of Supreme Court and High court under Articles 32 and 226 are very wide. They are remedial in scope and empower the Court to grant relief against a breach of a fundamental rights and misuse of discretionary powers by administrative authorities. Thus, the constitutional remedies provided under the constitution operate as a check and keeps the administration of government within the bounds of law.218

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216 Ibid.
218 Researchers own ideas.
5.2.3 Other Remedies

5.2.3.1 Civil Suit

This is the traditional remedy available to a person to vindicate his legal right if he is aggrieved by any action of an administrative authority. In India, Section 9 of the Civil Procedure Code, 1908 declares that civil courts shall have jurisdiction to try “all suits of a civil nature excepting suits of which their cognisance is either expressly or impliedly barred”. This provision confers jurisdiction on civil courts to hear and decide all disputes of a civil nature, unless the jurisdiction of a civil court is barred either expressly or by necessary implication. In *Ganga Bai (Smt) v. Vijay Kumar*, the Supreme Court stated:

There is an inherent right in every person to bring a suit of civil nature and unless the suit is barred by statute one may, at one’s peril, bring a suit of one’s choice. It is no answer to a suit, however frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit.

Apart from this, civil procedure code also deal with provision relating to the appeal, review and revisions, etc. But the object and scope of judicial review of administrative action is different from that of appeal. The object of judicial review of administrative action by the ordinary courts is to keep the administrative authorities within the bounds of their powers under the law. Appeal, on the other hand, means that the superior administrative tribunal or court to whom appeal lies under the law, has the power to reconsider the decision of the inferior tribunal on the merits. Appeal, however, is a creature of statute and there is no right of appeal unless there is a specific statutory provision creating that right.

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220 Id at 397.
The power of revision is usually placed at the hands of the highest authority, e.g., the State Government, to correct any illegality or irregularity in the proceedings before the inferior authorities. There are:

(a) Sometimes the statue expressly states that the power of revision may be exercised suo motu as well as on the application of the party aggrieved;

(b) Sometimes the statue only authorizes the superior authority to use his power or revision suo motu or of his own motion, e.g., original s. 33 of the Income-tax Act, 1922. In such a case the party aggrieved has no right to relief and the revisional authority has no duty to perform, on the application of such party;

(c) Difficulty of interpretation arises where neither the words 'suo motu', nor 'on application' are used by the statue.

Section 80 of the Civil Procedure Code says that before any suit is filed against the government including for the purpose of the judicial review of administrative action, the plaintiff should give two months notice to the government. Therefore, remedy in ordinary could not be speedy. However, in cases of suitable cases where the situation demands, the condition of two months notice can be waived off by the court. The Law Commission in its XVIth Report made similar suggestion in this connection.

All decisions of the Civil Courts are subject to the appellate jurisdiction of higher judiciary. So the matters which may not be taken by the higher judiciary in its extraordinary writ jurisdiction shall come before it through appellate jurisdiction.

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223 Ibid.


225 Supra note 25 at 250.
5.2.3.2 Ombudsman-Lokpal

The term “Ombudsman” means a delegate, agent, officer or Commissioner. He is an nominee of the legislature “who investigates complaints from citizens against government departments, that they have been unfairly dealt with and if he finds that the complaint is justified, helps to obtain a remedy.”226 In short, he is the “watchdog” or “public safety valve” against the administration.

Ombudsman is said to be an officer of parliament, having his primary function, the duty of acting as an agent for parliament, “for the purpose of safeguarding citizens against abuse or misuse of administrative power by the Executive.”227 According to Dictionary228 meaning ombudsman is an official who is appointed by the government to investigate complaints that people make against the government or public organisation. It was created for first time in Swedan in 1809, to provide an adequate and effective control mechanism over the administration.229 In England it is known as “Parliamentary Commissioner” and “Lokpal” in India.

With corruption in India reaching the highest proportions, the faith of its people appears to be dwindling in the democratic structure. All this fraud and corruptions paves a way for the generation of a Lokpal similar to the ombudsman, which acts like a strong anti-corruption institution. All previous efforts towards this over the last 63 years have been unsuccessful due to lack of political will and initiative from the government. Over decades of inaction has precipitated into widespread protests led by figures like Anna Hazare and Baba Ramdev, who have resorted to coercive measures such as fasting unto death to pressurise the government in heeding to their demands.230

226 Supra note 10 at 492.
227 Justice Report, Para 2, submitted in 1961 by a Committee of Justice with Sir John Whyatt, as its chairman, appointed by the British Parliament for an investigation into the Scandinavian institution of the ‘Ombudsman’.
5.2.3.2.1 Institution of Lokpal in India

In India, it was in 1962 that Shri M.C. Setalvad, the first Attorney-General of India, in his speech at the All India Lawyers' Conference, suggested the idea of creation of institution, similar to the Scandinavian 'Ombudsman'. The idea was seriously investigated by the Administrative Reforms Commission which was appointed on 5th January 1966 by the President of India. The Commission made a definite suggested in its interim Report dated October 14, 1966. The Commission recommended two categories of Ombudsman for India—a Lokpal to investigate the actions of ministers and secretaries, and one or more Lokayuktas to investigate the action of officials below the rank of secretaries. On the recommendation of the Administrative Reforms Commission (ARC), 1966, a Bill providing for Ombudsman-Lokpal was introduced in the Lok Sabha (House of People) on May 9, 1968 but due to dissolution of Lok Sabha in 1971, the above Bill Lapsed. Another Bill was introduced again in August 1971. It was a replica of the previous Bill. It never came up for discussion in either of the houses and lapsed again when Parliament was dissolved in 1977. In 1977, third attempt was made when the Bill was referred to the Joint Select Committee of the two Houses of Parliament but it also lapsed with the dissolution of Lok Sabha. Again, in 1985 a new version of the Lokpal Bill was introduced in parliament, but except meeting violent protests from the opposition on some provision of the new Bill, was withdrawn by the Government.

In 1989, a modified Lokpal bill was introduced in parliament, but it met the same fate. Further attempt was made in 1996, when The Lokpal Bill was introduced in the Eleventh Lok Sabha. Thereafter, it was referred to the Department related Parliamentary Standing Committee on Home Affairs for examination and report. The Committee presented its report to the Parliament on 1997. Before the Government could finalize its

232 The Lokpal and Lokayukta Bill 1968.
233 Bill no 3 of 1971.
234 The Bill was entitled as the Lokpal Bill, 1977.
235 Bill no 166B of 1985.
stand on the various recommendations of the committee, the Eleventh Lok Sabha was dissolved and the Bill also lapsed. Then again The Lokpal Bill, 1998 was introduced in the Lok Sabha which was lapsed on the dissolution of twelfth Lok Sabha. In 2001, again the Lokpal Bill was presented before the Parliament in the year 2001, but lapsed on account of dissolution of 13th Lok Sabha. Each time the Bill was introduced in the House, it was referred to some committee for improvement and before the Government could take a final decision in the matter the House was dissolved. In 2003 and 2005 the Lokpal Bill was again introduced in the Parliament but failed to see the light of the day. The Lokpal Bill 2011 is another step towards bringing an end to the corruption and strengthening the beliefs of individuals in democracy. However, apprehensions still remain about the effectiveness of the institution of the Lokpal as envisaged in the Bill tabled before Parliament.  

At the state level, 18 states have created the institution of the Lokayukta through their respective Lokayukta Acts. They are Andhra Pradesh, Assam, Bihar, Chhattisgarh, Delhi, Gujarat, Jharkhand, Haryana, Himachal Pradesh, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Orissa, Punjab, Rajasthan, Uttarakhand and Uttar Pradesh. Due to difference in structure, scope and jurisdiction, the effectiveness of the State Lokayuktas vary from state to state. Some states have made provisions for suo moto investigation by the Lokpal. In some states, the Lokayukta has also been given powers for prosecution and also power to ensure compliance of its recommendation. Of the states which have the enactment, four states have no actual appointment in place for a period ranging from two months to eight years. In Karnataka, the Lokayukta’s investigation led to the dismissal of the then Chief Minister Yedurappa.

The Lokpal draft approved by the Union Cabinet was placed on Dec 22, 2011 in Lok Sabha. The bill proposes to establish autonomous and independent institutions called Lokpal at the central level and and Lokayukta for states. These shall have powers of

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superintendence and direction for holding a preliminary inquiry, causing an investigation
to be made and prosecution of offences in respect of complaints under any law for the
prevention of corruption.\textsuperscript{238}

5.2.3.2.2 Main Features of Lokpal Bill, 2011

The main features of Lokpal Bill are as following\textsuperscript{239}:

(i) The Lokpal bill has two parts: First part is constitution amendment bill which
seeks to provide constitutional status to Lokpal.

(ii) The second part seeks to set up the institution of Lokpal and Lokayuktas,
which will act as anti-corruption agencies in states.

(iii) Lokpal will have nine members including a chairperson who is or has been a
Chief Justice of India, or has been a judge of Supreme Court or an eminent
person.

(iv) Fifty percent of the members of Lokpal shall be persons belonging to SC, ST,
OBC and women.

(v) Prime Minister will be chairperson of the selection committee which will
appoint Lokpal and its members. It will comprise of Speaker of the house,
Leader of opposition, Chief justice of India or a judge of Supreme Court
nominated by him, one eminent jurist nominated by the president.

(vi) The Lokayukta in every state will consist of a chairperson and eight other
members.

(vii) Lokayukta and other members will be appointed by governor of which CM of
the state will be chairman of the selection committee.

(viii) The Lokpal will be accountable to Parliament.

(ix) The Central Bureau of Investigation will not be controlled administratively by
Lokpal.

\textsuperscript{238} Available on Indiatoday.online, New Delhi, December 22, 2011. Also visited at

visited on 20-04-2012 at 7.30 pm.
(x) Lokpal shall constitute as an inquiry wing. Provided that till such time it is constituted central government shall make available such number of officers and other staff from its ministries or departments.

(xi) Lokpal shall also constitute as a prosecution wing. Provided that till such time it is constituted central government shall make available such number of officers and other staff from its ministries or departments.

(xii) Lokpal cannot have power to initiate proceedings against an officer on its own; a complaint has to be lodged with the ombudsman before it orders an inquiry.

(xiii) Jurisdiction of Lokpal to include Prime Minister, Ministers, Members of parliament, Groups A, B, C and D officials of central government.

(xiv) Lokpal will have no jurisdiction as far as Prime Minister is concerned with issues related to international relations, external and internal security, public order, atomic energy and space.

(xv) Lokpal has the power to recommend central government transfer and suspension of public servant with allegation of corruption.

(xvi) Lokpal can recommend corruption cases to agencies like Central Vigilance Commission (CVC) and will have to submit report to Lokpal after an inquiry.240

5.2.3.2.3 Jan Lokpal Bill, 2011

The Jan Lokpal Bill (Citizen’s ombudsman Bill) is a draft anti-corruption bill which is drafted by Justice Santosh Hegde (former Supreme Court Judge and former Lokayukta of Karnataka), Prashant Bhushan (Supreme Court Lawyer) and Arvind Kejriwal (RTI activist). The draft Bill envisages a system where a corrupt person found guilty would go to jail within two years of the complaint being made and his ill-gotten

240 Ibid.
Wealth being confiscated. It also seeks power to the Jan Lokpal to prosecute politicians and bureaucrats without government permission.  

5.2.3.2.4 Differences between Lokpal Bill, 2011 and Jan Lokpal Bill, 2011

The differences between Lokpal Bill, 2011 and Jan Lokpal Bill, 2011 are as following:

(i) **Differences on the jurisdiction** - There is a difference on the jurisdiction of the Lokpal. Both bills include ministers, MPs for any action outside Parliament, and Group A officers (and equivalent) of the government. The Lokpal Bill includes the Prime Minister after he demits office whereas the Jan LokPal includes a sitting Prime Minister. The Jan Lokpal includes any act of an MP in respect of a speech or vote in Parliament (which is now protected by Article 105 of the Constitution). The Jan Lokpal includes judges; the Lokpal bill excludes them. The Jan Lokpal includes all government officials, while the Lokpal Bill does not include junior (below Group A) officials. The Lokpal Bill also includes officers of NGOs who receive government funds or any funds from the public; Jan Lokpal does not cover NGOs.

(ii) **Composition** - The two Bills differ on the composition. Lokpal bill has a chairperson and up to 8 members out of which at least half the members must have a judicial background whereas the Jan Lokpal has a chairperson and 10 members, of which 4 have a judicial background.

(iii) **Differences in selection criteria** - The process of selecting the Lok Pal members is different. The Jan Lok Pal has a two stage process. A Search Committee will shortlist potential candidates. The search committee will have 10 members; five of these would have retired as Chief Justice of India, Chief Election Commissioner or

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243 Ibid.
Comptroller and Auditor General; they will select the other five from civil society. The Lok pal chairperson and members will be selected from this shortlist by a selection committee. The selection committee consists of the Prime Minister, the Leader of Opposition in Lok Sabha, two Supreme Court judges, two high court chief justices, the Chief Election Commissioner, the Comptroller and Auditor General and all previous Lokpal chairpersons.244

Whereas Lokpal bill has a simpler process. The selection will be made by a committee consisting of the Prime Minister, the leaders of Opposition in both Houses of Parliament, a Supreme Court judge, a High court chief justice, an eminent jurist and an eminent person in public life. The selection committee may, at its discretion, appoint a search committee to shortlist candidates.245

(iv) As regards the differences in the qualifications- There are some differences in the qualifications of a member of the Lok Pal. The Jan Lok Pal requires a judicial member to have held judicial office for 10 years or been a high court or Supreme Court advocate for 15 years. The Lok bill requires the judicial member to be a Supreme Court judge or a high court chief justice. For other members, the Lok pal bill requires at least 25 years experience in anti-corruption policy, public administration, vigilance or finance. The Jan Lok Pal has a lower age limit of 45 years, and disqualifies anyone who has been in government service in the previous two years.246

(v) Removal of members- The process for removal of Lok Pal members is different. The Lokpal bill permits the president to make a reference to the Supreme Court for an inquiry, followed by removal if the member is found to be biased or corrupt. The reference may be made by the president (a) on his own, (a) on a petition signed by 100 MPs or (c) on a petition by a citizen if the President is then satisfied.

244 Ibid
245 Ibid.
246 Ibid.
that it should be referred. The President may also remove any member for insolvency, infirmity of mind or body, or engaging in paid employment. Whereas the Jan Lok Pal has a different process. The process starts with a complaint by any person to the Supreme Court. If the court finds misbehavior, infirmity of mind or body, insolvency or paid employment, it may recommend his removal to the President.247

(vi) Offences covered by both the Bills- The offences covered by the bills vary. The government Bill deals only with offences under the Prevention of Corruption Act. The Jan Lok Pal, in addition, includes offences by public servants under the Indian Penal Code, victimization of whistleblowers and repeated violation of citizen's charter.

(vii) Investigation Process- The Lokpal Bill provides for an investigation wing under the Lok Pal whereas the Jan Lok Pal states that the CBI will be under the Lok Pal while investigating corruption cases.248

(viii) Prosecution Process- The Lok Pal bill provides for a prosecution wing of the Lok Pal. In the Jan LokPal, the CBI's prosecution wing will conduct this function. In the Lok pal bill, the Lok Pal may initiate prosecution in a special court. A copy of the report is to be sent to the competent authority. No prior sanction is required. In the Jan LokPal, prosecution of the Prime Minister, ministers, MPs and judges of Supreme Court and high courts may be initiated only with the permission of a Seven-judge bench of the Lok Pal.249

(ix) As regard the redressal of grievance- Jan Lokpal deals with grievance redressal of citizens, in addition to the process for prosecuting corruption cases. It requires

247 Ibid.
248 Ibid.
249 Ibid.
every public authority to publish citizen's charters listing its commitments to citizens. The Lok pal bill does not deal with grievance redressal.250

After the detailed study of both the bills Lokpal bill, 2011 and Jan Lokpal bill, it is found that none of the bill is adequate and sufficient to create an effective deterrence against corruption. Both the bills are having some loopholes. In government Lokpal bill, the Prime Minister is excluded from the purview of Lokpal and it does not contains provisions for Lokpal to act against business class who indulge in corrupt practices in relation to the government whereas in Jan Lokpal bill, there is need to bring certain improvements. Anna Hazare and its team calls the Lokpal bill of the government an "eyewash" but Jan Lokpal bill is again eyewash. For example, in a jan lokpal there is provision that if a person has to file a complaint to lokpal against a corrupt officer, the lokpal will do investigation within one year. He will have to lodge a FIR to police and it he has no right to prosecute that officer. He has only right to sue that corrupt officer in court only and at the end, the court will take a long time to resolve the complaint and mean time the police will destroy the evidence. For this effective lokpal should have power to arrest, prosecute and to execute its decision. Now it is needed that a new lokpal bill containing the effective provisions of both the existing bills be enacted and implemented. Some hard provisions with deterrent effect must also be incorporated. In the end, it is felt that corruption can be eradicated in the society only by change of mind set of the people and public cooperation.251

5.2.3.3 Central Vigilance Commission

Central Vigilance Commission as an integrity institution was set up by the Government of India in 1964 for checking corruption amongst Government servants.252 It was established as a result of the recommendations of Santhanam Committee. However, it was not a statutory body at that time. According to the recommendations of the

250 Ibid.
251 Researchers own ideas,
Santhanam Committee, Central Vigilance Commission, in its functions, was supposed to be independent of the executive. The sole purpose behind it was to improve the vigilance administration of the country.  

In September, 1997, the Government of India established the Independent Review Committee to monitor the functioning of Central Vigilance Commission and to examine the working of CBI and the Enforcement Directorate. Independent Review Committee vide its report of December, 1997 suggested that CVC be given a statutory status. It also recommended that the selection of Central Vigilance Commissioner shall be made by a High Powered Committee comprising of the Prime Minister, the Home Minister and the Leader of Opposition in Lok Sabha. It also recommended that the appointment shall be made by the President of India on the specific recommendations made by the High Powered Committee. These recommendations are as following:

(i) the CVC shall be responsible for the efficient functioning of CBI  
(ii) CBI shall report to CVC about cases taken up for investigations  
(iii) the appointment of CBI Director shall be by a Committee headed by the Central Vigilance Commissioner  
(iv) the Central Vigilance Commissioner shall have a minimum fixed tenure and that a Committee headed by the Central Vigilance Commissioner shall prepare a panel for appointment of Director of Enforcement.

On the other hand, in its efforts to check corruption in public life and to provide good governance the Apex Court recommended measures of far-reaching consequence while disposing a public interest litigation petition in Vineet Narain v. Union of India, which is known as Jain Hawala case. In this case, three-judge bench separated four major investigating agencies from the control of the executive. These agencies are: Central Bureau of Investigation, Enforcement Directorate, Revenue Intelligent Department and

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253 Ibid.  
255 Ibid.  
the Central Vigilance Commission. The Court has shifted the CBI under the administrative control of the CVC. Now the CVC is to be the umbrella agency and would coordinate the work of three other investigating arms. In this very important case, the Supreme Court also had directed the Central government to confer statutory status to Central Vigilance Commission, which was hitherto an advisory body, and also made it responsible for effective supervision of the functioning of CBI. In this case, the Supreme Court has given the following directions, regarding the constitution of Central Vigilance Commission (CVC), functioning of Central Bureau of Investigation, Enforcement Directorate and prosecution Agency.\\(^{257}\)

5.2.3.3.1 Central Vigilance Commission (CVC) and Central Bureau of Investigation (CBI)

The Supreme Court has issued the following guidelines regarding Central Vigilance Commission and Central Bureau of Investigation\\(^{258}\):

(i) The Central Vigilance Commission (CVC) shall be given statutory status.

(ii) Selection for the post of Central Vigilance Commissioner shall be made by a Committee comprising the Prime Minister, Home Minister and the Leader of the Opposition from a panel of outstanding civil servants and others with impeccable integrity, to be furnished by the Cabinet Secretary. The appointment shall be made by the President on the basis of the recommendations made by the Committee. This shall be done immediately.\\(^{259}\)

(iii) The CVC shall be responsible for the efficient functioning of the CBI. While Government shall remain answerable for the CBI's functioning, to introduce visible objectivity in the mechanism to be established for over viewing the CBI's working, the CVC shall be entrusted with the responsibility of superintendence over the CBI's functioning. The CBI shall report to the CVC about cases taken up by it for investigation; progress of investigation; cases in which charge-sheets are filed and their progress. The CVC shall review the progress of all cases moved by

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\(^{257}\) Ibid.
\(^{258}\) Ibid.
\(^{259}\) Ibid.
the CBI for sanction of prosecution of public servants which are pending with the
competent authorities, especially those in which sanction has been delayed or
refused.

(iv) The Central Government shall take all measures necessary to ensure that the CBI
functions effectively and efficiently and is viewed as a non-partisan agency.

(v) The CVC shall have a separate section in its Annual Report on the CBI's
functioning after the supervisory function is transferred to it.

(vi) Recommendations for appointment of the Director, CBI shall be made by a
Committee headed by the Central Vigilance Commissioner with the Home
Secretary and Secretary (Personnel) as members. The views of the incumbent
Director shall be considered by the Committee for making the best choice. The
Committee shall draw up a panel of IPS officers on the basis of their seniority,
integrity, and experience in investigation and anti-corruption work. The final
selection shall be made by the Appointments Committee of the Cabinet (ACC)
from the panel recommended by the Selection Committee. If none among the
panel is found suitable, the reasons thereof shall be recorded and the Committee
asked to draw up a fresh panel.

(vii) The Director, CBI shall have a minimum tenure of two years, regardless of the
date of his superannuation. This would ensure that an officer suitable in all
respects is not ignored merely because he has less than two years to superannuate
from the date of his appointment.

(viii) The transfer of an incumbent Director, CBI in an extraordinary situation, including
the need for him to take up a more important assignment, should have the approval
of the Selection Committee.

(ix) The Director, CBI shall have full freedom for allocation of work within the agency
as also for constituting teams for investigations. Any change made by the Director,
CBI in the Head of an investigative team should be for cogent reasons and for
improvement in investigation, the reasons being recorded.
(x) Selection/extension of tenure of officers up to the level of Joint Director (JD) shall be decided by a Board comprising the Central Vigilance Commissioner, Home Secretary and Secretary (Personnel) with the Director, CBI providing the necessary inputs. The extension of tenure or premature repatriation of officers up to the level of Joint Director shall be with final approval of this Board. Only cases pertaining to the appointment or extension of tenure of officers of the rank of Joint Director or above shall be referred to the Appointments Committee of the Cabinet (ACC) for decision.

(xi) Proposals for improvement of infrastructure, methods of investigation, etc. should be decided urgently. In order to strengthen CBI’s in-house expertise, professionals from the Revenue, Banking and Security sectors should be inducted into the CBI.

(xii) The CBI Manual based on statutory provisions of the CrPC provides essential guidelines for the CBI’s functioning. It is imperative that the CBI adheres scrupulously to the provisions in the Manual in relation to its investigative functions, like raids, seizure and arrests. Any deviation from the established procedure should be viewed seriously and severe disciplinary action taken against the officials concerned.

(xiii) The Director, CBI shall be responsible for ensuring the filing of charge-sheets in courts within the stipulated time-limits, and the matter should be kept under constant review by the Director, CBI.

(xiv) A document on CBI’s functioning should be published within three months to provide the general public with a feedback on investigations and information for redress of genuine grievances in a manner which does not compromise with the operational requirements of the CBI.

(xv) Time-limit of three months for grant of sanction for prosecution must be strictly adhered to. However, additional time of one month may be allowed where consultation is required with the Attorney General (AG) or any other law officer in the AG’s office.
(xvi) The Director, CBI should conduct regular appraisal of personnel to prevent corruption and/or inefficiency in the agency.

5.2.3.2 Enforcement Directorate

The guidelines issued by the Supreme Court regarding Enforcement Directorate are as following:260

(i) A Selection Committee headed by the Central Vigilance Commissioner and including the Home Secretary, Secretary (Personnel) and Revenue Secretary, shall prepare a panel for appointment of the Director, Enforcement Directorate. The appointment to the post of Director shall be made by the Appointments Committee of the Cabinet (ACC) from the panel recommended by the Selection Committee.

(ii) The Director, Enforcement Directorate like the Director, CBI shall have a minimum tenure of two years. In his case also, premature transfer for any extraordinary reason should be approved by the aforesaid Selection Committee headed by the Central Vigilance Commissioner.

(iii) In view of the importance of the post of Director, Enforcement Directorate, it shall be upgraded to that of an Additional Secretary/ Special Secretary to the Government.

(iv) Officers of the Enforcement Directorate handling sensitive assignments shall be provided adequate security to enable them to discharge their functions fearlessly.

(iv) Extension of tenure up to the level of Joint Director in the Enforcement Directorate should be decided by the said Committee headed by the Central Vigilance Commissioner.

(v) There shall be no premature media publicity by the CBI/ Enforcement Directorate.

(vi) Adjudication/ commencement of prosecution shall be made by the Enforcement Directorate within a period of one year.

260 Ibid.
(vii) The Director, Enforcement Directorate shall monitor and ensure speedy completion of investigations/adjudications and launching of prosecutions. Revenue Secretary must review their progress regularly.

(ix) For speedy conduct of investigations abroad, the procedure to approve filing of applications for Letters Rogatory shall be streamlined and, if necessary, Revenue Secretary authorized to grant the approval.

(x) A comprehensive circular shall be published by the Directorate to inform the public about the procedures/ systems of its functioning for the sake of transparency.

(xi) In-house legal advice mechanism shall be strengthened by appointment of competent legal advisers in the CBI/ Directorate of Enforcement.

(xii) The Annual Report of the Department of Revenue shall contain a detailed account on the working of the Enforcement Directorate.261

5.2.3.3.3 Nodal Agency

These are the guidelines by Supreme Court regarding Nodal Agency:262

(i) A Nodal Agency headed by the Home Secretary with Member (Investigation), Central Board of Direct Taxes, Director General, Revenue Intelligence, Director, Enforcement and Director CBI as members, shall be constituted for coordinated action in cases having politico-bureaucrat-criminal nexus.

(ii) The Nodal Agency shall meet at least once every month.

(iii) Working and efficacy of the Nodal Agency should be watched for about one year so as to improve it upon the basis of the experience gained within this period.

5.2.3.3.4 Prosecution Agency

These are the guidelines by Supreme Court regarding Prosecution Agency:263

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261 Ibid.
262 Ibid.
263 Ibid.
(i) A panel of competent lawyers of experience and impeccable reputation shall be prepared with the advice of the Attorney General. Their services shall be utilized as prosecuting counsel in cases of significance. Even during the course of investigation of an offence, the advice of a lawyer chosen from the panel should be taken by the CBI/ Enforcement Directorate.

(ii) Every prosecution which results in the discharge or acquittal of the accused must be reviewed by a lawyer on the panel and, on the basis of the opinion given, responsibility should be fixed for dereliction of duty, if any, of the officer concerned. In such cases, strict action should be taken against the officer found guilty of dereliction of duty.

(iii) The preparation of the panel of lawyers with the approval of the Attorney General shall be completed within three months.

(iv) Steps shall be taken immediately for the constitution of an able and impartial agency comprising persons of unimpeachable integrity to perform functions akin to those of the Director of Prosecutions in U.K. On the constitution of such a body, the task of supervising prosecutions launched by the CBI/ Enforcement Directorate shall be entrusted to it.

(v) Till the constitution of the aforesaid body, Special Counsel shall be appointed for the conduct of important trials on the recommendation of the Attorney General or any other law officer designated by him.

The judgment in Vineet Narain's case, 264 was followed by the 1999 Ordinance under which CVC became a multi-member Commission headed by Central Vigilance Commissioner. The 1999 Ordinance conferred statutory status on CVC. The said Ordinance incorporated the directions given by this Court in Vineet Narain’s case. Suffice it to state, that, the 1999 Ordinance stood promulgated to improve the vigilance administration and to create a culture of integrity as far as government administration is

264 Ibid
Judicial Review of Administrative Action and Writs Jurisdiction

The said 1999 Ordinance was ultimately replaced by the enactment of the 2003 Act which came into force with effect from 11th September, 2003. The main object of the act is to provide for the constitution of CVC to inquire or cause inquiries to be conducted into offences alleged to have been committed under the Prevention of Corruption Act, 1988 by certain categories of public servants of Central government, corporations established by or under any Central Act, government companies, societies and local authorities owned or controlled by the Central Government and for matters connected therewith or incidental thereto.

The main functions of commission are with matter of corruption, misconduct, lack of integrity or other kinds of malpractices or misdemeanors. Its role is limited but only advisory in nature. The main tasks of the commission are coordination, supervisory and advice rather than investigating the complaints itself. It has no adjudicatory functions as such in disciplinary proceedings against Government servants. It is not even the “competent authority” for giving sanction for criminal prosecutions for offences committed by public servant while discharging their official functions. It has no machinery to investigate or enquire into complaints of corruption except to a limited extent.\(^{265}\)

Recently, in *Union of India v. Alok Kumar*,\(^{266}\) the Supreme Court held that unless the rule so require, advice of the CVC is not binding. The advice tendered by the CVC, is to enable the disciplinary authority to proceed in accordance with law. In the absence of any specific rule, that seeking advice and implementing thereof is mandatory, it will not be just and proper to presume that there is prejudice to the officer concerned. Even in the cases where the action is taken without consulting the Vigilance Commission, it necessarily will not vitiate the order of removal passed after inquiry by the departmental authority.

\(^{265}\) *Supra* note 36 at 999.

In *Mohd. Iqbal Ahmad v. State of Andhra Pradesh*, the Supreme Court has emphasized two significant aspects of sanction for prosecution. First, any case instituted without a proper sanction must fail as the entire proceedings are rendered void *ab initio*. Therefore, the prosecution must prove that valid sanction has been granted by the sanctioning authority. Secondly, the sanctioning authority must be satisfied that a case for sanction has been made out constituting the offence. The sanctioning authority at the time of giving sanction must be aware of the facts constituting the offence and must apply its mind. The grant of sanction is not an idle formality. It is a sacrosanct act which affords protection to the Government servants against frivolous prosecutions. All the facts constituting the offence must be placed before the sanctioning authority and it should then arrive at its satisfaction.

However, an accused facing prosecution for offences under the Prevention of Corruption Act, 1947 or Prevention of Corruption Act, 1988 cannot claim any immunity on the ground of want of sanction, if he ceases to be a public servant on the date on which the court took cognizance of the said offences. But the position is different where Section 197 of Code of Criminal Procedure, 1973 has application.

### 5.2.3.4 Administrative Tribunal

In Indian Constitution, the 42nd constitutional amendment, 1976 provides for the establishment of administrative tribunal which was most debatable and controversial amendment in the constitutional history of India. It brought many drastic changes in several provisions of the Constitution not only affecting the rights of citizen but also restricting, curtailing and even totally excluded power of judicial review of High Courts.

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268 Ibid.
and of the Supreme Court which was held to be a part of the ‘basic structure’ of the Constitution.270

This amendment made two important changes with regard to Administrative Tribunal.271

(i) It took away power of superintendence of High Courts over Administrative Tribunal which they possessed under Article 227 of the Constitution.

(ii) After Part XIV, the Amendment inserted Part XIV-A (containing Articles 323-A and 323-B) enabling the Parliament to constitute Administrative Tribunals by making a Law for the purpose specifies therein.

Articles 323-A provides that Parliament may by law provide for establishment of administrative tribunals in the service matter of public servants of Centre and States. For this Parliament passed the Administrative Tribunals Act, 1985. The Act was enacted with the salutary object of providing for the adjudication or trial by Administrative Tribunals of disputes and Complaints with respect to recruitment and conditions of service of persons appointed to public services and posts.272

It is settled legal position is that the decisions of the administrative tribunals are subject to judicial review of the superior courts. However, such power of judicial review cannot be applied in each and every case. Some of the grounds, which may call for review by the superior courts,273 are as follows:

(i) Authority/Tribunal has acted without jurisdiction

(ii) the tribunal has failed to exercise jurisdiction vested in it;

(iii) if the order passed by the tribunal is arbitrary, perverse or malafide;

(iv) the tribunal has not observed the principles of natural justice; or

(v) there is an error apparent on the face of the record.

271 42nd constitutional amendment, 1976.
272 Clause (1) of Article 323-A of the Constitution of India.
273 Speech on Service Law by Hon’ble Dr. Justice Mukundakam Sharma, Judge, Supreme Court of India in Inaugural Function of the All India Conference of Central Administrative Tribunal on November 1, 2009, New Delhi.
The power of judicial review of the Supreme Court under Article 32 and High Court under Article 226 has been taken away by the establishment of Central Administrative Tribunal and State Administrative Tribunals. This power of judicial review was held to be part and parcel of the basic structure of the constitution and it cannot be taken away by the Parliament neither by amending the Constitution nor by passing a legislation. In *S.P. Sampath Kumar v. Union of India*,\(^\text{274}\) the constitutional validity of the Administrative Tribunal Act was challenged. The Supreme Court while upholding the constitutional validity of the Act observed that, the tribunal has been contemplated as a substitute and not as supplemental to the High Court in the scheme of administration of justice. Therefore, it was held that the impugned Act which excluded the jurisdiction of the High Court under Articles 226 and 227 in respect of service matters can pass the test of constitutionality as being within the ambit and coverage of Art. 323-A, clause 2(d).

In *L. Chander Kumar v. Union of India*,\(^\text{275}\) the larger bench held that power of judicial review is a basic feature of the Constitution and the jurisdiction conferred on the High Court’s under Articles 226 and 227 and the Supreme Court under Article 32 is a part of the basic structure of the Constitution. In this case not only Section 28 of the Administrative Tribunals Act, 1985 which excluded judicial review was ultra vires but also, clause 2(d) of Art. 323-A and clause 3(d) of Art, 323-B as inserted by the 42nd Amendment were also ultra vires and unconstitutional as they destroyed the basic structure of the constitution. The Supreme Court also held that in exercising powers such tribunals cannot act as substitutes for the High Courts and the Supreme Court. Their decisions will be subject to scrutiny by a Division Bench of the respective High Courts.

Researcher’s analyses are that the scope of judicial review in matter relating to disciplinary action against employees has been settled by the Apex Court in a catena of

\(^{274}\) AIR 1987 SC 386.
\(^{275}\) AIR 1997 SC 1125.
decisions, referred to by the Apex Court. The following broad principles may be culled out from these decisions

(i) While considering the quantum of punishment, the role of administrative authority is primary and that of the court is secondary, confined to see if discretion exercised by the disciplinary authority caused extensive infringement of rights.276

(ii) In the exercise of power of judicial review, the High Court/Tribunal, cannot normally substitute its own conclusion or penalty and impose some other penalty.277

(iii) If the punishment is imposed by the disciplinary authority/Court/ Tribunal, it would, appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed or to shorten the litigation, it may itself, in exceptional and rare cases impose appropriate punishment with cogent reasons in support thereof.278

(iv) Where an administrative decision is questioned as “arbitrary” under Article 14, the court is confined to *Wednesbury principles* as a secondary reviewing authority. The Court will not apply proportionality as a primary reviewing Court because no issue of fundamental freedoms nor of discrimination under Article 14 applies in such a context.279

(v) The Court should not interfere with the administrator’s decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards.280

(vi) The scope of judicial review is limited to the deficiency in decision making process and not the decision.281

278 *Om Kumar v. Union of India*, AIR 2000 SC 3689.
279 *Ibid*
281 *Ibid*
5.2.3.5 Self Help

Self help is one of the remedy provided to aggrieved person against an illegal or ultra vires order of the authority. If any person is prosecuted or any action is sought to be taken against him, he can contend that the bye-law, rule or regulation is ultra vires the power of the authority concerned. In case of purported exercise of power, he may disobey the order passed against him.282

Benjamin Curtis, a former judge of the Supreme Court of the United States, while arguing before the senate on behalf of President Andrew Johnson during the latter’s impeachment trial, said:283

I am aware that it is asserted to be civil and moral duty of all men to obey those laws which have been passed through all the forms of legislation until they shall have been decreed by judicial authority not to be binding; but this is too broad a statement of the civil and moral duty incumbent either upon private citizens or public officers. If this is measure of duty there never could be a judicial decision that a law is unconstitutional, inasmuch as it is only by disregarding a law that any question can be raised judicially under it. I submit to Senators that not only is there no such rule of civil and moral duty, but that it may be and has been a high and patriotic duty of a citizen to raise a question whether a law is within the Constitution of the country.

This view has also been adopted by the California Supreme Court. In Shroud v. Bradbury,284 the Sanitary Inspector entered the house of the appellant under the provisions of the Public Health Act, 1936. Even though there was a provision regarding giving of prior notices, that requirement was not heeded by the Inspector. The appellant obstructed the entry of the Sanitary Inspector. The Court held that the appellant had the right to obstruct the entry of the Inspector as ‘the Sanitary Inspector had not done that which the statute required him to do before he had a right of entry’.

284 (1952) 2 All ER 76.
In *Nawabkhan v. State of Gujarat*, an order of externment was passed against
the petitioner on September 5, 1967 under the Bombay Police Act, 1951. In contravention
of the said order, the petitioner reentered the forbidden area on September 17, 1967 and
was, therefore, prosecuted the same. During the pendency of criminal case, the
externment order was quashed by the High Court under Article 226 of the Constitution of
India on July 16, 1968. The trial court acquitted the petitioner but the High Court
convicted him, because according to the High Court, the contravention of the externment
order took place when the order was still operative and was not quashed by the High
Court. Reversing the decision of the High Court, the Supreme Court held that as the
externment order was illegal and unconstitutional, it was of no effect and the petitioner
was never guilty of flouting ‘an order which never legally existed’.

*Kesho Ram v. Delhi Administrator* is another case where the Section
Inspector of the Municipality went to the house of the appellant in the discharge of his
duty to seize the appellant’s buffalo as he was in arrears of milk tax. The appellant struck
the Inspector on the nose causing a fracture. A criminal case was, therefore, filed against
the appellant. The appellant’s main contention was that the recovery of the tax was
illegal inasmuch as no notice of demand as required by the statute was given to him.
Negative the contention, the Supreme Court held that the Inspector was acting in good
faith and was honestly exercising his statutory duty and had sadly erred in the exercise of
his powers. According to the court, the Inspector ‘could not be fairly presumed to know
that a notice...must precede any attempt to seize the buffalo’ and therefore, the right of
private defence was not available to the appellant. Although it appears that Bradbury was
not brought to the notice of the court, it could have been distinguished on the ground that
in the case, the appellant had merely obstructed the entry of the Inspector, whereas in the
case before the Supreme Court, the appellant had assaulted the Inspector. Had he merely

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obstructed the entry of the Section Inspector, probably, relying upon Bradbury, he could have justified his action, contending that the Section Inspector had not done that which the statute required him to do before he had a right of entry.\textsuperscript{287}

\textsuperscript{287} Ibid