CHAPTER - III

Judicial Review of Administrative Action: Principles

3.1 Introduction

The most important aspect of the study of administrative law is the judicial Control of administrative action. The tremendous increase in the powers of the administrative authorities in the modern times and evolution of a new socio-economic order having its repercussions on the increased activities of the State has resulted in new vistas of administrative functions. In the context of increased powers of the administration, judicial control has become an important area of administrative law, because courts have proved more effective and useful than the legislature or the administration in that matter and it provides for control over the administration by an outside agency strong enough to prevent injustice to the individual while leaving the administration adequate freedom to enable it to carry on effective Government.¹ According to Professor, Jain & Jain², the real Kernal of democracy lies in the Courts enjoying the ultimate authority to restrain all exercise of absolute and arbitrary power. Without some Kind of judicial power to control the administrative authorities, there is a danger that they may commit excess and degenerate into arbitrary authorities, and such a development would be inimical to a democratic Constitution and the concept of rule of Law.³

In a rule of law society, it is a statute which is the source of the power of administration and the administrative agencies. Since both legislation and administration of justice—including its enforcement are the prime components of rule of law and directly concern the governance of the country, the possibility of a conflict, in particular, in the field of law-making may be more pronounced in the area of “judicial review”, a function

¹ Garner, Administrative Law, (1963) 95.
³ Ibid.
specially entrusted by the Constitution to the judiciary under Article 141\(^4\)-to test the validity of a legislation on the touchstone of the Constitution and declare it as valid or invalid. In doing so, the judiciary interprets the legislation concerned in the context of the provisions of the Constitution under which it is challenged and proceeds to formulate declare and lay down its own statement of law, in the form of a judicial pronouncement, on the subject.\(^5\) Judicial review is thus the most effective instrument of governance of the State by administration of justice, established way back in 1903 by Chief Justice John Marshall, who held the belief that legislative enactment must be subservient to the Constitution and it was the function of the Court alone to decide whether the legislation was valid or not.\(^6\) Judicial review is a highly Complex and developing subject. It has its roots long back and its scope and extent varies from case to case. It is considered to be the basic features of the constitution. The court in its exercise of its power of judicial review would zealously guard the human rights, fundamental rights and the citizens’ rights of life and liberty as also many non-statutory powers of government bodies as regards their control over property and assets of various kinds, which could be expended on building, hospitals, roads and the like or compensating victim of crime.\(^7\)

Therefore, the power of judicial review of which is in principle and originally very vast but Court itself has developed certain principle for the proper regulation of the judicial review of the administrative actions keeping in view the independence of the three organs of the government.\(^8\)

3.2 Scope of Judicial Review

The judicial control of administrative action provides fundamental safeguards against the abuse of power. Since our Constitution was built upon the deep foundations of rule of law, the framers of the Constitution made sincere efforts to incorporate certain

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\(^4\) Article 141: The law declared by the Supreme Court shall be binding on all courts within the territory of India.


\(^6\) *Marbury v. Madison*, 2 L Ed 60:5 US (1 Cranch) 137 (1803).

\(^7\) *Union of India v S.B. Vohra*, (2004) 2 SCC 150.

article in the Constitution to enable the courts to exercise effective control over administrative action. Pure administrative action involves both statutory and non-statutory functions which can be covered subjected to judicial review through various modes for which the proper remedy may be to issue an appropriate writ. In *State of Bihar v. Subhash Singh*, the Court held that, judicial review of administrative action under Arts. 32 and 226 of the Indian Constitution is valid, judicial review of administrative actions is an essential part of the rule of law.\(^\text{10}\)

In *Federation of Railway Officers Association & others v. Union of India*,\(^\text{11}\) the Supreme Court observed that, where a policy evolved is inconsistent with the Indian Constitution and the law is arbitrary or irrational or its leads to abuse of power, the court will interfere with such matters because judicial review of administrative actions is an essential part of rule of law.

### 3.2.1 Jurisdiction of Supreme Court

India has a hierarchical judicial system in which Supreme Court of India is the Apex Court. It is the final and ultimate Court of appeal in all civil, criminal and constitutional matters. It is also the final protector of people’s Fundamental Rights.\(^\text{12}\)

#### 3.2.1.1 Writ Jurisdiction

Article 32 provides a guaranteed, quick and summary remedy for the enforcement of Fundamental Rights. It confers one of the “highly cherished rights”.\(^\text{13}\) It is the right to move the Supreme Court for the enforcement of the fundamental rights. This right has been held to be “an important and integral part of the basic structure of the Constitution”\(^\text{14}\) and it cannot be abrogated by any act.\(^\text{15}\) The significance of incorporating Article 32 in the
Constitution was explained by Dr. B.R. Ambedkar when he observed, If I was asked to name any particular article in the Constitution as the most important article without which this Constitution would be a nullity – I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it.

Article 32 has been described as the corner-stone of the democratic edifice raised by the Constitution. The power under Article 32 has been described as the “heart and Soul” of the Constitution. It is because of this Article that the Supreme Court should be declared “as the protector and guarantor of fundamental rights”. It was said that the Supreme Court could not, consistently with the responsibility laid upon it, refuse to entertain applications seeking protection against infringements of such rights. It must be regarded as the solemn duty of the Supreme Court to protect the fundamental rights. In discharging the duty, the Court has to play the role of a ‘sentinel on the qui vive’, and being a fundamental right itself it is the duty of the Supreme Court to ensure that no fundamental right is contravened or abridged by any statutory or constitutional provision.

In Express Newspapers Ltd. v. Union of India, Parliament enacted the Working Journalists Act, 1965 which provided for the constitution of a wage board for fixing the

16 Article 32: (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the right conferred by this part is guaranteed.
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this part.
(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).
(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.
17 Narender Kumar, Administrative Law, (2011) 428.
20 Rupa Ashok Hurra v. Ashok Hurra, JT 2002 (3) SC 609.
23 Ibid
rates of wages of the working journalists. The Act made no specific provision requiring
the wage board to give reasons for its decision. This was challenged as unconstitutional on
the plea that absence of an obligation to give reasons rendered the petitioner’s right to
approach the Supreme Court nugatory because in the absence of reasons, the court would
not be able to investigate the validity of the order made by the board. Rejecting the
contention, the court held that the Act would have been invalid had it prohibited the wage
board from giving reasons for its decision. But as there was no such provision in the Act
and as it left it to the board’s discretion to give reasons for its decision or not, Art.32 was
not infringed in any manner whatsoever.

In *Ujjam Bai v. State of U.P.*, 25 again consider the validity of Art.32. In this case
the assessing authority acting upon a misconstruction of statute assessed the tax and it was
held that such an assessment cannot be attacked on the sole ground that it was based on
misconstruction of a provision of the Act and is therefore violative of Art. 19(1)(f) and
(g). The validity of an order passed under the provisions of the Act cannot be questioned
under Article 32 of the constitution. In such cases, there is no breach of the fundamental
rights, because every wrong decision does not give rise to a breach of a fundamental right.
Such error can be corrected only by appeal or revision if prayed for. This point has been
further emphasized by the court in *Gulam Abbas v. State of U.P.*, 26 where the court held
that an order under section 144 of Criminal Procedure Code, 1973 is an executive order. It
is neither a judicial nor a quasi-judicial order. Hence such an order would be amenable to
writ jurisdiction under Article 32. No fundamental right is said to be infringed by a
judicial or quasi-judicial order and hence it would not be amenable to Article 32. But in
such cases Arts. 226 and 227 of the Constitution can be invoked. The rule of
maintainability of petition under Article 32 held above is subject to three exceptions.

*First*, if the statute for a provision thereof ultra vires any action taken there under
by a quasi-judicial authority which infringes or threatens to infringe a fundamental right,

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25 AIR 1962 SC 1621.
26 AIR 1981 SC 2221.
will give rise to the question of enforcement of that right and petition under Article 32 will lie.\footnote{27}

\textit{Second}, if a quasi-judicial authority acts without jurisdiction or wrongly assumes jurisdiction by committing error as to a right, the question of enforcement of that arises and a petition under Article 32 will lie even if the statute is intra vires.\footnote{28}

\textit{Third}, if the action taken by a quasi-judicial authority is procedurally ultra vires, a petition under Article 32 would be competent.\footnote{29}

\subsection*{3.2.1.2 Appropriate Proceedings}

In the Indian Constitution, Clause (1) of Article 32 explains: "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed."\footnote{30}

It means the expression "appropriate proceedings" in Clause (1) of Article 32 denotes that only those proceedings can be taken under Article 32 which are considered "appropriate" and not all sorts of proceedings. In \textit{Daryao Singh v. State of U.P.}, \footnote{31} the Supreme Court observed:

The expression ‘appropriate proceedings’ has reference to proceedings which may be appropriate having regard to the nature of the order, direction or writ which the petitioner seeks to obtain from this court. The appropriateness of the proceedings would depend upon the particular writ or order which he claims and it is in that sense that the right has been conferred on the citizen to move the Court by appropriate proceedings.

In \textit{Bandhua Mukti Morcha v. Union of India},\footnote{32} The Supreme Court said that the Constitution makers deliberately did not lay down any particular form of proceeding for the enforcement of a fundamental right nor did they stipulate that such proceeding should

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conform to any right pattern or straight jacket formula because they knew that in a country like India, where there was so much of poverty, ignorance, illiteracy, deprivation and exploitation, any insistence on a rigid formula of proceeding for enforcement of a fundamental right, would become self-defeating.

In proceeding by way of Public Interest Litigation, the Court need not strictly follow ordinary procedure. It may not only appoint committees but also issue directions upon the state from time to time.33

In N. D. Jayal v. Union of India,34 it has been held, that proceeding arising under Article 32 need not always be dealt with the Supreme Court alone. In appropriate cases, suitable directions including transfer of the matter to the High Court or other authorities (like N.H.R.C.), can be issued to deal with such matter. In certain cases, it has been held that under Article 32, court can direct Central Bureau of Investigation to conduct investigation in certain offences.35

3.2.2 Appeal By Special Leave (Article 136)

Clause (1) of Article 136 of the Indian Constitution provides: “Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.”36

Article 136 which is in the nature of a residuary or reserve power of judicial review in the area of public law lays down that the Supreme Court may, in its discretion, grant special leave to appeal before from any judgment, determination, sentence, order passed

34 JT 2003 (supp. 2) SC 1.
36 Bare wording of Article 136 (1) of the Indian Constitution.
or made by any court or tribunal in any cause or matter. Thus Article 136 does not confer a right to appeal on any party, but it confers a discretionary power on the Supreme Court to interfere in suitable cases to advance the cause of justice. Even in cases where special leave is granted, the discretionary power vested in the Court even at the stage when appeal comes for hearing. Power under Article 136 of the Constitution, on the one hand, is an exceptional power to be exercised sparingly, with caution and care and to remedy extraordinary situations of gross failure of justice; on the other hand, it is an overriding power where under the Court may generously step in to impart justice and remedy injustice.

The important aspect of Article 136 is the use of the word “tribunal” therein. It means that the Supreme Court can hear appeals from orders and determinations of such bodies as may not be courts strictly speaking. The Court can bear appeals from any tribunal even though the statute under which the tribunal functions makes no provision for such an appeal. Further, being a jurisdiction conferred by the Constitution, it cannot be diluted or circumscribed by ordinary legislative process and thus, the Supreme Court may hear an appeal even where the legislature declares the decision of a tribunal as final. In Raigarh Jute Mills v. Eastern Rly., the Supreme Court heard an appeal from an order passed by the Railway Rates Tribunal in spite of S. 46-A of the Railways Act, 1890 declaring that the decision of a tribunal shall be final.

The following are the salient features of the administrative tribunal:

(i) Where the proceeding starts with application in the nature of plaint.

38 N.Natarajan v. B.K.Subha Rao, AIR 2003 SC 541; Durga Shankar Mehta v. Thakur Raghuraj Singh, AIR 1954 SC 520. In state of U.P. v. Harish Chandra, AIR 1996SC 2173, it was held that the Supreme Court might grant special leave against judgement by single judge of High court. Availability of remedy of appeal to Division Bench, would not bar exercise of power by the Supreme Court under Article 136.
42 Supra note 8 at 152-153.
(ii) That administrative authority has the power of a civil court to require the attendance of the witness, and search.

(iii) That administrative tribunal allows chance of hearing to the parties, in the nature of cross-examination on the witness or evidence produced before the tribunal.

(iv) Such tribunal has trapping of Court in the form of qualification of judges like regular Court and it also allows legal representation.

3.2.2.1 Essential Conditions for Article 136

The following two conditions must be satisfied for invoking Article 136(1): \(^{43}\)

1. The proposed appeal must be against a judicial or quasi-judicial and not a purely executive or administrative order; and

2. The determination or order must have been or passed, by any Court or tribunal, in the territory of India.

The quasi-judicial or a purely executive act depends on the facts and circumstances of each case. If there is a contest between two contending parties and a statutory authority is required to adjudicate upon the competing contentions, then the act is a quasi-judicial one. \(^{44}\) While an order would be judicial if it is in substance a determination upon investigation of a question, by the application of objective standards to facts found in the light of pre-existing legal rules; it declares rights or imposes upon parties obligation, affecting their civil rights \(^{45}\) and that the investigation is subject to certain procedural attributes contemplating an opportunity of presenting its case to a party.

Article 136 does not confer any right of appeal in favour of any party as such and it is not that any and every error is envisaged to be corrected in exercising power under this Article. It is a special power extraordinary in nature and the main object of conferring


\(^{46}\) Supra note 35.
power under Article 136 is to ensure that there has been no miscarriage of justice. 47

In *Arunachalam v. P.S.R. Sadhanantham*, 48 the Supreme Court explaining the scope of Article 136 observed:

appellate power vested in the Supreme Court under Article 136 of the Constitution is not to be confused with ordinary appellate power. It is a plenary power exercisable outside the purview of ordinary law to meet the pressing demands of justice. Article 136 neither confers on anyone the right to invoke the jurisdiction of the Supreme Court nor inhibits anyone from invoking the courts' jurisdiction. The power is invested in the Supreme Court but the right to invoke the Courts jurisdiction is vested in no one. The exercise of the power of the Supreme Court is not circumscribed by any limitation as to who may invoke it. 49

3.2.3 Jurisdiction of the High Court (Article 226)

Article 226 empowers the High Courts to issue directions, orders or writs for the enforcement of Fundamental Rights and for any other purpose also. Thus the power of judicial review of the High Court is wider than that of Supreme Court. The jurisdiction of the High Court under Article 226 for the enforcement of fundamental Right is mandatory whereas for the enforcement of ordinary legal rights it is discretionary. 50 The power of judicial review of High Court under Article 226 is constitutional power, therefore no measure of finality given by the legislature to any action or decision can take away this power 51 and can be exercised by the High Court “to reach injustice wherever it is found”. 52 Where no legally enforceable right exists, the writ petition is clearly not available. 53 Although the writs have been borrowed from English Law, but the technicalities of the English Law for the issuance of the writs are not required to be

49 Ibid.
observed in India, because of the express provisions regulating these writs. The powers of the High Court under Article 226(1) are however held to be much wider than those of the British Courts.

3.2.3.1 Scope and Extent of Article 226

In *State of U.P. v. Johri Mai*, the Apex Court has explained the scope and extent of the power of judicial review, vested in the High Court under Article 226, varied from case to case, the nature of the order, the relevant Statute as also the other relevant factors including the nature of power exercised by the public authorities, namely, whether the power is statutory, quasi-judicial or administrative. The power is not intended to assume a supervisory role or don the robes of omnipresent.

In *C.I.D. Corporation v. Dosu Aardeshir Bhiwandiwala*, the Supreme Court has explained that the High Court while exercising its extraordinary jurisdiction under Article 226 is duly bound to take all the relevant facts and circumstances into consideration and decide for itself even in the absence of proper affidavits from the State and its instrumentalities as to whether any case at all is made out requiring its interference on the basis of the material made available on record. The Court is duty bound to consider whether-

(i) adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;
(ii) petitions reveals all material facts;
(iii) the petition has any alternative or effective remedy for the resolution of the dispute;
(iv) person invoking the jurisdiction is guilty of unexplained delay and laches;

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56 AIR 2004 SC 3800.
58 AIR 2009 SC 571.
(v) *ex facie* barred by any laws of limitation;

(vi) grant of relief is against public policy or barred by any valid law; and host of other factors.59

In this case,60 the Apex Court set aside the orders passed by the High Court and remitted the matter for fresh consideration by the Court for consideration in the light of the parameters so spelt out. In this case the question related to unauthorized use of land by Government Corporation without its acquisition.

3.2.3.2 General Principles Regarding the Writ Jurisdiction under Article 226

There are certain general principles relating to Article 226 which can be described as follows:

(i) Article 226 empowers the High Courts to issue the writs, directions or order in the nature of habeas corpus, mandamus, certiorari, prohibition and quo warranto. The directions, orders or writs, can be issued for these purposes-

(a) for the enforcement of the fundamental rights conferred by Part III of the Constitution;

(b) for any other purpose, which includes the enforcement of any legal right.61

(ii) Where there has been infringement of fundamental rights, an application under Article 226 should not be thrown out simply on the ground that the proper writ has not been prayed for.62 The petitioner is, in such case entitled to a suitable order for the protection of his fundamental right or enforcement of the legal duty of the respondents.63

(iii) The Article confers very wide powers in the matter of issuing writs which

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59 Ibid.

60 Ibid


63 Ibid
they never possessed before.64 There are only two limitations placed upon the exercise of these powers by a High Court under this Article: (a) that the power is to be exercised throughout the territories in relation to which it exercise jurisdiction, that is to say, the writs issued by the court cannot run beyond the territories subject to its jurisdiction; (b) that the person or authority to whom the High Court is empowered to issues the writs must be within those territories. And this implies that they must be amenable to the jurisdiction of Court either by residence or location within those territories.65

(iv) But though the powers of the High Courts under Article 226 are discretionary and no limit can be placed upon that discretion it must be exercised along recognized lines and not arbitrarily and subject to certain self imposed limitations.66 These limitations are as under:

(a) In the exercise of this discretionary jurisdiction, the High Courts should not act as court of appeal or revision to correct errors of law67 or question of facts.68

(b) The jurisdiction under Article 226 was not intended to be invoked as an alternative remedy for relief which may be obtained by suit69 or other mode prescribed by statute.70 Where it is open to the petitioner to seek redress in some other tribunal or otherwise in a manner provided in the statute, the High Court will not permit the machinery by the statute to be by-passed.71

(c) The High Court does not enter a determination of question which demands an elaborate examination of evidence to establish the

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67 Dwarka v. Income-tax, AIR 1966 SC 81 (85)
68 Veerappa v. Raman, 1952 SCR 583.
70 Supra note 44.
right to enforce, claimed through the writ.\(^\text{72}\)

From these points it is clear that the power of the high Court to issue writs under this Article can be exercised for two-fold purposes, viz., the enforcement of fundamental rights as well as of ordinary legal rights,\(^\text{73}\) the courts have assumed very wide power under it. The Jurisdiction of Supreme Court under Article 32 can be invoked only when there is infringement of fundamental right whereas Article 226 can be invoked for the enforcement of a fundamental right as well as for other purpose, i.e., for the enforcement of any legal right. 'Any other purpose' has been interpreted as the enforcement of any legal right, and the performance of any legal duty.\(^\text{74}\) In *Chairman All India Railway Recruitment Board v. K. Shyam Kumar*,\(^\text{75}\) the Supreme Court examined the correctness of an order passed by the Railway Board directing the re-test for recruitment to certain posts. The order was passed on the anvil of large scale irregularities being noticed. The Supreme Court observed that the view expressed by this court earlier that the Wednesbury Principles have been replaced by proportionality principles is not correct and that Wednesbury Principles are still alive and is applicable for judicial review where no fundamental rights are involved.

3.2.4 Provisions under Article 227

Article 227 of the Constitution of India provides that every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction but no corresponding right is conferred upon a litigant to invoke the jurisdiction under this Article as a matter of right. In fact power of superintendence casts a duty upon a High Court to keep the inferior Courts and tribunals within the limits of their authority and they do not cross the limits, ensuring the performance of duty by such courts and tribunals in accordance with the law. Only wrong decision may not be ground for the exercisable of jurisdiction under Article 227 unless the wrong is referable


\(^{73}\) *State of Orissa v. Madan Gopal*, 1952 SCR 28 (33).

\(^{74}\) *Calcutta Gas Co. v. State of West Bengal*, AIR 1962 SC 1044.

to grave dereliction of duty and flagrant abuse of power by the subordinate Courts and tribunals resulting in grave injustice to any party.\textsuperscript{76}

The jurisdiction vested in High Court under the Article is revisional jurisdiction,\textsuperscript{77} which is to be exercised sparingly to correct errors but not to upset pure findings of fact, which fall on the domain of an appellate Court only.\textsuperscript{78} The power under this Article may be exercised under the following Circumstances.

(i) When the Subordinate Court/ tribunal acts arbitrary or in capricious manner.\textsuperscript{79}

(ii) When subordinate Court or tribunal acts in violation of the principles of natural justice.\textsuperscript{80}

(iii) When the subordinate Court or tribunal acts in excess of jurisdiction vested in it or fails to exercise jurisdiction vested in it.\textsuperscript{81}

(iv) When there is error of law apparent on the face of the record.\textsuperscript{82}

(v) When the subordinate Court or tribunal arrives at a finding which is perverse or based on no material.\textsuperscript{83}

Power under this Article could be exercised when no appeal or revision lies to the High Court. But ordinarily this Article is not applicable in cases where there is alternative remedy is available.\textsuperscript{84}

The term tribunal has the same meaning under this Article as under Article 136\textsuperscript{85}.

\textsuperscript{79} Santosh v. Mool Singh, AIR 1958 SC 312.
\textsuperscript{80} Trimbak v. Ramchandra. AIR 1977 SC 1222.
\textsuperscript{81} Dahya Lal v. State of Maharashtra, AIR 1964 SC 1320.
\textsuperscript{83} Nibaran v. Mahendra, AIR 1963 SC 1895.
\textsuperscript{84} Supra note 8 at 156.
\textsuperscript{85} Ibid.
3.3 **Principles for exercise of Writ Jurisdiction**

The writ jurisdiction exercised by the Supreme Court under Article 32 and High Court under Article 226 for the enforcement of Fundamental Rights is mandatory and not discretionary. But the writ jurisdiction exercised by the High Court under Article 226 for any other purpose is discretionary. It confers discretion of a most extensive nature on the High Courts. But the very vastness of the jurisdiction conferred on the High Courts imposes on it the responsibility to use it with circumspection. Therefore, the High Court will necessarily exercise the jurisdiction in accordance with judicial considerations and well established principles. The main principles which would regulate the exercise of jurisdiction are following:

### 3.3.1 Discretionary and Prerogative Remedy

Writs are meant as prerogative remedies which are in the form of five writs incorporated under articles 32 and 226. In England, it is known as prerogative writs because they were originated in the king's prerogative power of superintendence over the due observance of law by his officers and tribunals. Blackstone in his commentaries on the laws of England has stated that prerogative is

that special pre-eminence which the king has, over and above all other persons, and out of the ordinary course of the common law, in right of his royal dignity.\(^8^7\)

The term 'prerogative', then, refers to power, which are unique to the sovereign and which the King or the queen has by common law as opposed to statute. In U.K. prerogative writ is no longer there. Now it is regulated by statute.\(^8^8\)

The Indian Constitution under Article 226 grants an extraordinary remedy which is essentially discretionary, although founded on legal injury. This remedy, therefore, cannot be claimed as a matter of right. It will be exercised only in furtherance of interests of

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\(^8^7\) *Supra* note 8 at 165,

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The court has to weigh the public interest vis-à-vis the private interest while exercising the power under Article 226\textsuperscript{89} and must keep in mind the well established principle of justice and fair play and should exercise the discretion if the ends of justice require it.\textsuperscript{90}

The Court may refuse to grant any remedy if the petitioner seeks to invoke its writ jurisdiction in order to secure a dishonest advantage or perpetuate an unjust gain. It has been held that the High Court and consequently the Apex Court, while exercising its extraordinary jurisdiction under Articles 226 or 32, may not strike down an illegal order, though it would be lawful to do so,\textsuperscript{91} or when it would be opposed to public policy or in a case, where quashing of an illegal order would revive another illegal order.\textsuperscript{92}

3.3.2 Laches or delay

Laches or delay is one of the fundamental principles of administration of justice which is based on the maxim of equity *vigilantibus non dormientibus jura subveniunt*, i.e., equity aid the vigilant and not the indolent. It means courts will help those who are vigilant about their rights and who do not sleep on their rights. It is a rule of practice based on sound and proper exercise of discretion and there is no inviolable rule that whenever there is delay the court must necessarily refuse to entertain the petition. Each case is to be decided on its facts and circumstances.\textsuperscript{93} Laches or inordinate delay on the part of petitioner may disentitle him to move a writ petition under Articles 32 and 226 to enforce his fundamental right.\textsuperscript{94}

Under the English law, an application for leave for judicial review should be made

\textsuperscript{89} Ramlal N. Bhutta v. State of Maharashtra, AIR 1997 SC 1236.
“promptly”. If it is made tardily, it may be rejected. The Supreme Court in India has accepted the above principles of English law and has ruled that a writ Court, taking into account delay and laches on the part of the petitioner in approaching the Court, might refuse to grant relief if the delay was found to be gross or unexplained. In an appropriate case, the court may condone the delay. For instance, in *R.S. Deodhar v. State of Maharashtra*, a writ petition under Art.32 filed after ten or twelve years of the accrual of the cause of complaint was still entertained by the Supreme Court.

Art. 32 and 226 does not prescribe any period of limitation. What is the measure of delay? According to the Supreme Court:

No hard and fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. That is a matter which must be left to the discretion of the High Court and like all matter left to the discretion of the Court, which must be exercised judiciously and reasonably.

Even a delay of a few months for which there is no reasonable explanation may be fatal to an individual’s case. The Court may be more indulgent when a Fundamental Right is involved, or where the order complained of is manifestly erroneous or without jurisdiction. It is a rule devised on the principle of judicial circumspection and has to be applied wisely. Since laches is a flexible matter, a High Court cannot fix a hard and fast period of 90 days for filing a writ petition. No such period of limitations can be laid down either under the rules made by the court or by practice. However, if the delay is properly explained and if the third party rights are not going to be affected, the High Court may entertain the petition and consider the case of the aggrieved person on merits.

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said, the Apex Court in *Basanti Prasad v. Chairman, Bihar School Education Board*, held the appellant entitled to relief.

In this case, the services of the appellant’s husband (now deceased) were terminated only on the ground, that he was convicted by a judicial Magistrate for certain offences under the provisions of the Penal Code. Till that order was set aside by the superior forum, the appellant’s husband or the appellant could not have questioned the same. In view of these peculiar circumstances, the supreme Court set aside the order of the High Court rejecting the prayer of the appellant for grant of retirement benefits primarily on the ground of delay and laches on the part of the appellant in questioning the order of termination passed on 4-8-1992, in a petition filed in the year 2005.

Again, the rule that the Court may not inquire into a belated or stale claims is not a rule of law but a rule of practice based on sound and proper exercise of discretion. Thus, if the delay can satisfactory and properly be explained, the Court would not refuse to grant relief to the petitioner. If the wrong complained of is a continuing wrong, delay in invoking the writ jurisdiction may not be a ground for refusal to grant relief.

### 3.3.3 Alternative Remedy

Under Article 226 the remedy provided is a discretionary remedy. The High Court has always discretion to refuse to grant relief where an alternative remedy, equally efficient and adequate, exists, unless there is an exceptional reason for dealing with the matter under the writ jurisdiction. In *State of U.P. v. Mohd. Nooh*, it has, however, been held that the rule that when there is an alternative remedy, the High Court will not interfere under Article 226, is only a rule of policy, convenience and discretion rather than a rule of law.

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103 AIR 2009 SC 3162.
104 Ibid.
108 AIR 1958 SC 86. See also Harbanslal Sahnia v. Indian Oil Corporation, JT 2002 (10) SC 561.
In spite of availability of the alternative remedy, it has been held that the High Court may still exercise its writ jurisdiction in at least three contingencies, viz.,

(i) Where the writ petition seeks enforcement of any of the fundamental rights;
(ii) Where there is failure of principles of natural justice; and
(iii) Where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. Refusal to entertain writ petition on the ground of existence of alternative remedy, in very exceptional situation, has been held to be unjustified.

From this, it is clear that the remedy under Article 226 being discretionary, the High Court could refuse to grant a writ if it is satisfied that the petitioner could have an adequate or suitable relief elsewhere. For example, the Motor Vehicles Act, 1939 contains a complete and precise scheme for regulating the issue of permits and provides remedies for redressal of grievances and correction of errors. It was therefore, held that a person aggrieved by the refusal of a permit to him should first take recourse to the remedies provided under the Act and not straightaway invoke Art.226. Similar was ruling with reference to the Income-tax Act, 1961. In *Prafulla Chandra v. Oil India Ltd.*, the High Court dismissed a writ petition filed for staying the implementation of an order dismissing some of the employees of Oil India on the ground that an alternative remedy existed under the Industrial Disputes Act.

In *Avinash Chand Gupta v. State of U.P.*, the apex Court dismissed a writ petition filed under Article 32, seeking direction against demolition of unauthorized construction by the State, as the petitioner had an efficacious remedy available under

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110 Ibid.
Article 226. In other words, where a remedy under Article 226 is available the Supreme Court would not normally entertain a petition under Article 32.

In *M/s Dhampur Sugar Mills Ltd. v. State of H.P.*[^16] the State Government acting under the U.P. Sheera Niyantran Adhiniyam, 1964, directed the appellant Mills to supply 20% of molasses to manufactures of country liquor. The Government had taken a policy decision in that respect. The appellants had challenged the order as violative of their fundamental rights under Article 14 and 19 (1)(g) of the Constitution. The Act, 1964 had contained provision for appeal against the order of the Government. Holding that once a policy decision had taken by the Government, filing of appeal was virtually from “Caesar to Caesar’s wife”, an empty formality or ‘futile attempt’.

Besides, “alternative remedy” to be a bar to a writ petition must relate to the issue arising in the petition. If it is relating to some other issue, it would not be a bar to petition under Article 226[^17].

In *National Sample Survey Organisation v. Champa Properties Ltd.*[^18], the appellant was a tenant in respect of premises belonging to the respondent. The lease agreement contained an arbitration clause in respect of any dispute or differences concerning the subject matter of said lease agreement. The respondent had made representation to the Government for revision of the rent. In term of the Government Memorandum, a Hiring Committee was appointed which recommended the increase in the rent. This recommendation was challenged by the appellant. Holding that the subject matter of the writ petition was not covered by the arbitration clause in the lease agreement, the Apex Court ruled that the clause would not be a bar to the petition under Article 226.[^19]

However where a dispute relates to enforcement of a right or obligation created

[^18]: AIR 2010 SC 31.
under a statute and the statute provides a remedy, the High Court may not deviate from the general rule. Where a question of law is raised which is of fundamental character the writ petition should be entertained instead of leaving the matter to statutory appeal.

In England, the Court distinguishes an administrative appeal on the merits of the case from judicial determination of the legality of the whole matter. As a general rule, the Courts are reluctant to hold that ordinary remedies by way of judicial review are impliedly excluded where the statutory remedy is in the hands of an administrative body. There is no requirement for the exhaustion of alternative remedy if the action is unlawful.

In *Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee*, a doctor contesting the legality of a deduction from his pay by a health service Committee was not required to first follow the prescribed procedure of making representation to the Secretary of State. It has been stated that if an order is one which the applicant is entitled, for any reason, to have quashed as a matter of law, it is pointless to require him first to pursue an administrative appeal on the merits.

Craig categories the exceptions, recognised by the Courts in England allowing the judicial review application, even though an alternative statutory remedy exists. These are as follows:

**Firstly,** Judicial review is unlikely to be ousted where doubt exists as to whether a right of appeal exists or whether such an appellate right covers the circumstances of the case.

**Secondly,** the statutory appeal mechanism is deemed inadequate as compared to

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123 *Cooper v. Wilson*, (1937) All ER 726.
124 *Supra* note 122 at 705.
125 *P.P.Craig, Administrative Law, (2007)* 842-44.
126 Ibid.
Thirdly, where the Courts would take into account more general factors concerning the nature of the appellate procedure and consider how onerous it is for the individual to be restricted to the statutory mechanism.

Fourthly, where the alleged error is one of law. It has been held that judicial review was more appropriate and suited to errors of law.

Fifthly, where the case does not involve disputed questions of fact.

From this, it may be noticed that case law in England has produced a crop of judicial statements which conflicts with the rule discussed above. It has been impressed that where there is some right of appeal, judicial review would not be granted, save in the most exceptional circumstances and that the normal rule be that the applicant should first exhaust whatever other rights he has by way of appeal. The Law Commission, in 1994, also supported this rule requiring the exhaustion of alternative remedies before judicial review is allowed.

3.3.4 Res Judicata

The doctrine of res-judicata is founded on considerations of public policy as it envisages that finality should attach to the binding decisions pronounced by courts of competent jurisdiction and that individuals should not be made to face the same litigation twice. This rule has been extended to writ jurisdiction as well through the process of judicial interpretation. Once, therefore, a writ petition has been moved in a High Court or the Supreme Court and is rejected there on merit, and then a subsequent writ petition

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128 Ibid.
133 Law Com. No. 226(1994) paras 5.33, 5.35.
cannot be moved in the same Court on the same cause of action. It is also known as “estoppel by record”, i.e., estoppel per rem judicatam.

The principle of res judicata is based on the need of giving a finality to judicial decisions which prevents the same case being twice agitated is said to be, of general application and is not limited by the specific words of Section 11 of the Code of Civil Procedure, 1908. The principle is applicable to writ proceedings. In order to sustain the plea of res judicata it is not necessary that all the parties to two litigations must be common. All that is necessary is that issue should be between same parties or between parties under whom they or any of them claim.

The principle of res judicata is held not applicable in the following circumstances:-

(i) Where the petition is dismissed or withdrawn, as in such cases the matter is not decided on merits. The Karnataka High Court has held that when the petitions filed by the petitioners on an earlier occasion under Article 226 of the Constitution were not dismissed on merits, but were dismissed on a point of law, the order passed in the petitions would not operate as res judicata in the subsequent writ petition.

(ii) Where the petition is dismissed in limine, without passing speaking order or without making any pronouncements on merits.

(iii) When the petition is dismissed on the ground that the petitioner has no locus standi.

(iv) Where the petition has been rejected on the ground that it was premature.

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139 S.N. Sheshadri v. L.J.C., 1977 Karn LJ 176.
140 Supra note 112.
142 Surat Kumar v. chnatni, AIR 1959 Punj 157.
(v) Where the petition has been dismissed on the ground of delay or there was no alternative remedy.

(vi) Where the question involve a subject matter which could properly be adjudicated in a suit.\textsuperscript{143}

(vii) Where the cause of action is different.

(viii) Where the statute upon which the previous decision was based has been changed on the material point.\textsuperscript{144}

(ix) Where the order is passed without jurisdiction. It is a nullity. It will be a coram non-judice. It is non-est in the eye of law.\textsuperscript{145}

(x) The doctrine of res judicata has been held applicable in petitions by way of PIL.

The Supreme Court in \textit{State of Karnataka v. All India Manufacturers Organisation},\textsuperscript{146} ruled that if the previous litigation was in respect of a rights in public interest and was bona fide, it would be a judgement in rem and would bar a subsequent PIL raising the same issues as were raised in the earlier litigation or connected issues by persons interested in such right. Besides, res judicata, the rule of constructive res judicata has been held applicable to writs.

In \textit{Food Corporation of India v. Ashis Kumar Ganguly},\textsuperscript{147} the petitioners deputationists from State Government was absorbed in service of F.C.I. First writ petition filed was against their absorption in Grade III was allowed. In second writ petition filed by them for grant of advance increments was held not barred under principle of constructive res judicata, since the claims made in second writ, could not have been raised in 1st petition when the petitions were not certain as to grade in which they would be fitted.

\textsuperscript{143} \textit{Joseph v. State of Kerala}, AIR 1965 SC 1514.

\textsuperscript{144} \textit{Amritsar Municipality v. State of Punjab}, AIR 1969 SC 1100 (1104).


\textsuperscript{147} AIR 2009 SC 2583.
The rule of res judicata discussed in the sense as above, does not apply to administrative jurisdiction.\textsuperscript{148} It is so in order to provide flexibilities to the administrative process. Yet, this principle has been firmly grounded in the area of public law reviewed, as a matter of public policy.

In England, res judicata plays a restricted role in the field of Administrative Law. The rule it is said must yield to two fundamental principle of public law, i.e., that jurisdiction cannot be exceeded and that statutory powers and duties cannot be fettered.\textsuperscript{149} Within these limits, the principle of res judicata, can extend to a variety of statutory Tribunals and authorities which have power to give binding decisions.\textsuperscript{150}

### 3.3.5 Anticipatory Relief

Under Article 32 and 226 of the Indian Constitution, the jurisdiction conferred on the Supreme Court and High Court is very vast and comprehensive. The words writs, orders or directions in Art. 32 as well as 226 are not qualified in any way, and, therefore, the court can pass any order including a declaratory order. The vastness of the power has, however, induced the courts to introduce some self limitations. One such limitations is that while a writ petition can be entertained when the petitioner has already suffered damage or injury or when there is a reasonable likelihood of injury being caused,\textsuperscript{151} a court would not pronounce merely on hypothetical questions, or entertain a writ petition without any damage having been caused to the petitioner or without any likelihood thereof. No advisory opinion or declaratory judgment would be given on the constitutionality of a legislation or validity of an administrative action in absence of some concrete injury or controversy.\textsuperscript{152}

\begin{itemize}
  \item \textsuperscript{148} Ganpat Roy v. ADM, (1985) 2 SCC 307.
  \item \textsuperscript{149} Supra note 122 at 243.
  \item \textsuperscript{151} S.K.Agarawalla v. State, AIR 1973 Ori 217.
  \item \textsuperscript{152} M.P.Jain & S.N. Jain, Principles of Administrative Law, (2007) 497.
\end{itemize}
In Sheoshankar v. M.P. State Government,\textsuperscript{153} the constitutionality of the C. P. and Berar Prohibition Act, 1938 was challenged. The act prohibited the import of country liquor into a particular district and also its manufacture, storage or sale but permitted the import of foreign liquor under permits. The petitioner, a consumer of country liquor had neither applied for a permit for foreign liquor, nor had ever been prosecuted for infringement of any provision of the Act. Refusing to issue mandamus, the Court said:

The petitioner has done no act under the Act, nor has any action been taken under the Act to his detriment. He has not even made a demand for a permit and thus there is no demand and refusal. The prohibition Act has not been enforced against him as such. His only complaint is that as a result of the impugned Act he cannot do many things which he has in mind. Mandamus cannot issue unless there is a demand and a refusal or some act or omission is to be ordered.\textsuperscript{154}

In Narasimharao v. State of Andhra Pradesh,\textsuperscript{155} the petitioner challenged the validity of the prevention of Food Adulteration Act, 1954, when a food inspector obtained samples of food exposed to sale by them and sent the same to the public analyst, but before anything further was done under the Act. It was held that the petition was not maintained as the court was invited to determine abstract questions of law.

"A mere possibility of threat of the fundamental rights of any of the petitioners being invaded would not be a ground to invite the Court to pronounce upon the legality of any of the statutory provisions".\textsuperscript{156}

In some cases, the position may be different when the Government expresses an intention to apply the penal provisions of a statute if the individual fails to comply with its provisions. In Himmatlal v. State of Madhya Pradesh,\textsuperscript{157} the petitioner paid sales tax

\textsuperscript{153} AIR 1951 Nag. 58.
\textsuperscript{154} Ibid.
\textsuperscript{155} AIR 1964 AP 501; Rameshwarlal v. Union of India, AIR 1970 Cal 520.
\textsuperscript{157} AIR 1954 SC 403: 1954 SCR 1122. See also State of Bombay v. United Motors, AIR 1953 SC 252: 1953 SCR 1069.
under the C. P. and Berar Sales Tax Act for some time and then refused to pay on the
ground that he was not liable to pay the tax, certain provisions of the statute being ultra
vires. It was argued that the petitioner had not even filed a return and no demand for the
tax had been made from him and that the court should not grant anticipatory relief. Rejecting the contention, the Supreme Court stated: “it is plain that the state evinced an
intention that it could certainly proceed to apply the penal provision of the Act against the
appellant if it failed to make the return or to meet the demand and in order to escape from
such serious consequences threatened without authority of law, and infringing
Fundamental Rights, relief by way of a writ of mandamus was clearly the appropriate
relief.”158

From a review of these cases it seems that whether there is an actual case or
controversy will depend upon the circumstances of each case, and the court may be guided
by such factors as the actual involvement of the individual in the matter and his interest in
the outcome of the case, curtailment of Fundamental Rights or constitutionality of a
statute, the penal consequence of the non-compliance of the administrative action by the
individual and the court’s own overall view of “imminent” action.159 At times, an
individual may face a real dilemma whether to comply with the law to his necessary
detriment if the law be unconstitutional or administrative action ultra vires, or not comply
with it as his own peril. Where the consequence for non compliance of a law are penal,
the courts ought to be more prone to entertain a case even if no overt action has been taken
than otherwise.

It may, however, be mentioned that relief by way of declaration under Article 32 or
226 will be possible in a case where a writ petition is maintainable, otherwise not, because

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159 Even a show cause notice to a person may be sufficient to base a writ petition if the courts finds that causing of
injury is certain to follow or is imminent: Government of India v. National Tobacco Co., AIR 1977 AP 250.
it is a Constitutional remedy.\textsuperscript{160}

3.3.6 **High Court should be Approached First**

The jurisdiction of High Court in dealing with a writ petition under Article 226 is substantially similar as that of the Supreme Court under Article 32 and in this way scope of writs under both the articles is concurrent. Apart from practical convenience, it is also essential that for the breach of fundamental and other rights High Court should be approached first by the aggrieved person. If a writ is dismissed by the High Court only appeal thereto could be filed in the Supreme Court and not a writ under Article 32. In such cases principle of res judicata shall be applicable. Only exception to this rule is the writ of habeas corpus.\textsuperscript{161} In *Union of India v. Paul Manickan*,\textsuperscript{162} it was held that a petitioner in a writ of habeas corpus must approach in High Court first. In order to enable the petitioner to approach the Supreme Court directly under Art. 32, petitioner must state the reasons for not approaching the High Court first.

However, there is growing tendency to file petitions before the Supreme Court even where it could have been filed before the High Court. With a view to discourage this tendency the Supreme Court held in *P. N. Kumar v. Municipal Corpn. of Delhi*,\textsuperscript{163} that in cases where writ can be filed before the High Court parties should not approach the Supreme Court.

3.3.7 **Remedial Measures**

The main object under Article 32(1) of the Constitution is to enforce fundamental right. For this the power of the Supreme Court is not only injunctive in ambit to prevent violation of Fundamental Rights but is also remedial in scope to provide relief in case of breach of such rights. Thus, the court has implicit power to grant remedial assistance by

\textsuperscript{161} *Direct Recruit Class II Engineering Officers Association v. State of Maharashtra*, AIR 1990 SC 1607.
\textsuperscript{163} (1987) 4 SCC 609.
way of compensation in cases involving the breach of the said rights.\textsuperscript{164} The same principle shall apply to High Court also.\textsuperscript{165} However, the award of compensation must be confined to exceptional cases which may include the Fundamental Rights of a large section of society because Article 32 cannot be used as a substitute for the ordinary Civil Court process of compensation.

The compensation granted by the Supreme Court and the High Court is in addition to the private law remedy for tortuous action and punishment to wrongdoer to the wrongdoer under criminal law. In \textit{State of Gujarat v. Hon'ble High Court of Gujarat},\textsuperscript{166} it has been held by the Supreme Court that imposition of hard labour on prisoners undergoing rigorous imprisonment is legal. But prisoners are entitled to equitable wages for work done.

\textbf{3.3.8 Territorial Extent of Writ Jurisdiction}

The powers of the Supreme Court under Article 32 of the Constitution are not circumscribed by any territorial limitation. It extends not merely over every authority within the territory of India but also those functioning outside, provided that such authorities are under the control of the Government of India. The powers of High Courts under Article 226 of the Constitution, on the other hand, have territorial limitations. Such powers extend to any person or authority within their territorial jurisdiction. \textit{Clause (1)} of Article 226 provides that, The High Court may issue writs, etc. to person or authority within those territories in relation to which it exercises jurisdiction.\textsuperscript{167}

In \textit{Election Commission v. Saka Venkata Subba Rao},\textsuperscript{168} the Supreme Court held that the High Court of Madras had no power to issue a writ to the Election Commission, having its permanent office in New Delhi. It means the High Court could not have a writ

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{164} \textit{M. C. Mehta v. Union of India}, (1987) 1 SCC 395.
\item \textsuperscript{165} \textit{Ibid}.
\item \textsuperscript{166} AIR 1998 SC 3165.
\item \textsuperscript{167} Article 226(1) is expressly laid down in Indian Constitution.
\item \textsuperscript{168} AIR 1953 SC 210.
\end{enumerate}
\end{footnotesize}
against the Union of India because the offices are located in New Delhi. This involved considerable hardship to litigants from distant places.

This hardship was provided for by the Constitution (fifteenth Amendment) Act, 1963 which added new clause (1-A) to Article 226 which was renumbered as Clause (2). Clause (2) says that the High Court “may issue writs to any government or authority, notwithstanding that the authority or the government is located outside its territorial limits, if the cause of action, wholly or in part, has arisen within the territory, in relation to which the High Court exercise Jurisdiction.”

Clause (2) of Article 226, thus, enables the High Court to issue writs, etc. against any authority located outside the territorial jurisdiction of the High Court, provided, the cause of action, wholly or in part, arises within its jurisdiction. The effect of the amendment was that the accrual of cause of action was made an additional ground to confer jurisdiction on a High Court under Article 226.

The expression ‘cause of action’ is not defined in any statute. According to Interpretation of Courts, the expression means “every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court.” In other words, it implies a right to sue. The material facts, which are imperative for the suitor to allege and prove constitute the cause of action. However, facts which have no bearing with the lis or dispute involved in the case, do not give rise to a cause of action so as to confer territorial jurisdiction. Again, the facts pleaded which are not essential, integral or material facts, would not constitute a part of cause of action within the meaning of Article 226 (2).

In Dinesh Chandra Gahtori v. Chief of Army Staff, the Supreme Court has ruled

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169 Supra note 17 at 441.
that the Chief of Army Staff may be sued anywhere in the Country. In the instant case, court-martial proceedings against the appellant were conducted in the State of Punjab. The Supreme Court has ruled that dismissal of the writ petition filed by the appellant before the Allahabad High Court, on the ground of lack of territorial jurisdiction, was not justified.