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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 extra-ordinary judicial powers in a particular matter. At the initial 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 extra-ordinary power remained almost the same.

Though the development of the common law courts in various forms had also been constant, but the origin of writ court had a specific reason. The jurisdiction of common law was more or less static. It did not recognize rights except those already prevalent and admitted by it. Similarly, common law courts worked under a prescribed procedure with many limitations on it. Its forms, under which rights were to be enforced, were fixed and limited. Thus, there had been number of cases, which did not fall under any of the fixed remedies and so these cases remained beyond the jurisdiction of the common law courts. In such cases, these courts were powerless to grant relief. Thus, the deficiency of remedy or failure of the common law courts to grant relief in time, became the cause/ground of petition to the king in council to exercise their extra-ordinary judicial powers. These petitions were heard and disposed of by or on behalf of the King’s Bench. A written order was issued in the name of the king called — a writ, which was to act as a foundation to the subsequent proceedings. Originally, writs were intended to be issued only by the crown and in the interest of the crown. However, in due course of time, the writs became available to the ordinary citizens also. A prescribed fee was charged for these writs and that is why the filing of writ used to be called as 'Purchase' of a writ. These writs were used to establish royal supremacy also. This form of adjudication was called-prerogative writs also.
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 Courts 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.

Under the above status of the law of writs our country got independence and the constitution of free India came into force. The law of writs as inherited from the English colonial regime was having a limited scope but its effectiveness was time-tested. Therefore, the constitutional forefathers decided to retain the concept as such in its ‘nature’ as a broad parameter, but its scope was enlarged by adding some new words to it and it was left open ended also. This was essential also, keeping in view the hopes and aspirations of the people. The people had suffered the peril of the foreign yoke for centuries and their faith and confidence in the new set-up was bubbling with spontaneous feelings of freedom wherein they dreamt of endless liberties. However, it was not to be allowed to go as a dream only and to fulfil these hopes a vast scope of liberty, justice and equality was provided in the constitution. The fundamental rights were incorporated in the constitution, which fully ensured the basic human liberties. To fructify these rights into actual liberties, a detailed legal provision was incorporated in the constitution itself to safeguard these rights. Under Article 32, the enforceability of these rights was included as a fundamental right and an almost parallel
provision was provided under Article 226 as a constitutional right. To understand these two provisions in their true spirit and context, it would be desirable to first see them in their literal context.

Article 32 of the constitution is provided in the constitution in the following form:-

"Article 32. Remedies for enforcement of rights conferred by this part:

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs in the nature of habeas corpus, mandamus, prohibition, quo warrant and certiorari, which ever 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 Clause (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 Cl. (2).

(4) The right guaranteed by this Article shall not be suspended except as otherwise provided by this constitution."

A close scrutiny of the contents of Article 32, as reproduced above, would reveal that it gives a new force to the contents of fundamental rights as enshrined in Chapter III of the constitution. It does not provide a simple protection of these rights but the remedy available under this article is 'guaranteed'. It means that once it is established that a particular fundamental right as provided in the constitution is violated or breached, its remedy is guaranteed under this article. The Supreme Court is not empowered to refuse to hear the writ petition on any ground whatsoever it is. However, the relief would flow from the merits of the writ petition filed in this regard. The guarantee stands in the form of right to move the Supreme Court by way writ petition. The Supreme Court considered this issue and S.R. Das J. thus observed,
This court cannot, on a similar ground, decline to entertain a petition under Art. 32, for the right to move this court by appropriate proceedings, for the enforcement of the rights conferred by Part III of the Constitution is itself a guaranteed right. It has accordingly been held by this Court in Romesh Thappar v. State of Madras, 1950 SCR 594: (AIR 1950 SC 124), that under the Constitution this Court is constituted the protector and guarantor of fundamental rights and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking the protection of this court against infringement of such rights, although such applications are made to this court in the first instance without resort to the High Court having concurrent jurisdiction in the matter. The mere existence of an adequate alternative legal remedy cannot per se be a good and sufficient ground for throwing out a petition under Art. 32, if the existence of a fundamental right and a breach, actual or threatened, of such right is alleged and is prima facie established on the petition.

Clause (2) of the Article contains the powers of the Supreme Court to be exercised in this regard. It may be noticed that the constitution has mentioned all the writs by name, which were available under the English law. But the framers of the constitution were well aware of the fact that the conditions governing such law in India were entirely different from those of England. Hence, the same could not be transplanted in the constitution of India as such. Therefore to explore the scope of this jurisdiction to a far wider extent the words ‘directions’ and ‘orders’ were also incorporated in addition to the writs. Moreover, the scope of such directions and orders had again been left open. Such orders or directions may be passed to any extent and in any form to protect the fundamental rights incorporated in the constitution. The only rider appears to be tagged with such writs, orders or directions is that the same could be issued ‘in the nature of’ the five writs mentioned in the constitution under this article. Again, a choice has been left to the court to decide which order, direction or writ would be appropriate in a particular matter for the enforcement of any of the fundamental rights conferred by the constitution and the relief could be moulded accordingly. The Supreme Court in Nilabati Behra’s case considered this issue and it was held,

“The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation as exemplary damages, in proceedings under Art. 32 by this court and under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting “compensation” in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it sees so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making ‘monetary amends’ under the public law for the wrong done due to breach of public duty of not protecting the fundamental rights of the citizen. The compensation is in the nature of ‘exemplary damages’ awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or and prosecute the offender under the penal law.”

However, keeping in view the growth and development of law in India, it is submitted that it may not be desirable to keep such orders strictly in the nature of English writs as mentioned in the constitution. It is because of the fact that the possibilities of a situation arising before the court, which may not be covered under any of the five writs, cannot be ruled out. In such a situation the court may feel helpless to pass such orders as required by the facts and circumstances of the case. Moreover, had it been the intention of the constituent assembly to keep such ‘orders’ or ‘directions’ within the strict nature of writs mentioned in this article, they could restrict it to ‘writ’ only and there was no need to mention the additional words— ‘directions’ and ‘orders’. However, these words were consciously added to reach the farthest point of

its scope to remedy the breach of fundamental rights and to enforce these rights in an effective manner. The court was given liberty to issue either of them as per the requirement of the situation. At the most the phrase —“in the nature of” could be termed just as a tentative indication of the mode of the orders to be passed in such cases. However, any strict interpretation of this phrase would reduce the scope of writ jurisdiction which is very wide and open by all implications.

Clause(3) of this article indicates the importance of this article from its requirement point of view. While incorporating this provision in the constitution, it was there in the minds of the framers that keeping in view its role and effectiveness and keeping in view the vast size of the country, the Supreme Court alone may not be able to cater to the needs of the people for this purpose. It could be in their mind that these powers might be needed more and more. Anticipating this situation, they specifically provided it in the constitution and empowered the parliament to empower any other court also to exercise these powers within the local limits of jurisdiction of such court. It is further submitted that the situation was anticipated and visualized rightly by the constitutional forefathers. Keeping in view the growing pendency of such petitions in the Supreme Court and the limited capacity of the Apex Court to adjudicate such petitions, sooner or later the parliament may have to think on these lines to extend the availability of this right to the people.

Clause (4) of this article again gives a guarantee against the suspension of the right guaranteed by this article except as otherwise provided in the constitution. In the constitution there is only one such provision available under Article 359 wherein under the proclamation of National Emergency the rights provided under Part III could be suspended. Even under this provision, after 44th amendment to the constitution of India, fundamental rights as available under Article 21 and 22 cannot be suspended even in the state of emergency. The right provided under this Article can only be suspended by a specific constitutional provision alone and not by any statute. Otherwise also, there is a constitutional bar under Article 13(2) to enact any law violating the fundamental rights. Therefore, no such law could be enacted.
Thus the only possibility of enactment of such law under the constitution is under Article 368 only i.e. by way of a constitutional amendment. However, after the pronouncement of the Supreme Court judgement in Kesavananda Bharti's® case, the scope of such amendment has further receded. The doctrine of 'basic structure' laid down by the Apex Court in this case, although does not specifically prohibit the amendment of fundamental rights under Article 368 of the constitution, but it puts a specific rider on this power of the constitution. If such amendment takes away any of the fundamental rights in its form or substance, it would amount to the amendment to the basic structure of the constitution and that is prohibited under the law laid down by the Supreme Court in Kesavananda Bharti's case as already mentioned. Thus any scope of suspension of this right beyond the present provisions of Article 359 is very limited and thus the right available under Article 32 has a very limited scope of suspension in the given scenario.

Before discussing the further aspects of the right under Article 32, it is desirable to discuss in brief other analogous provision of the constitution under Article 226 with respect to the writ jurisdiction. It would facilitate in carrying out a comparative graph of these two separate but identical provisions of the constitution. Article 226 as available in the constitution is reproduced below:

"Article 226. Power of High Courts to issue certain writs —

(1) Notwithstanding anything in Article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories, directions, orders or writs, including, quo warranto and certiorari, or any of them for the enforcement of any of the right conferred by Part III and for any other purpose.

(2) The power conferred by Cl. (1) to issue directions, orders or writs in any government, authority or person may be exercised by any High Court exercising jurisdiction in relation to the territories within the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such

Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made or in any proceedings relating to petition under Cl. (1) without—

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and documents in support of the plea for such interim order; and

(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within the period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of the period, before the expiry of next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by Cl. (2) of Article 32.”

Cl. (1) of Article 226 reveals that the power of the High Court to issue writs orders and directions in appropriate cases are independent of such powers of the Supreme Court under Article 32 of the constitution. The scope of these powers is not only restricted to the fundamental rights only but it extends to “any other purpose” also. This power is more or less similar in nature with such powers of the Supreme Court under Article 32, of course different in its scope.

Cl. (2) of Article 226 puts a territorial restriction on its jurisdiction under this provision. The High Courts are restricted to exercise these powers within their territorial jurisdiction if the cause of such action has taken place, partly or
wholly within such jurisdiction. Therefore, the powers of the High Courts are limited as far as the area of jurisdiction is concerned.

Cl. (3) of Article 226 provides a safeguard against the adverse impact of ex-parte interim orders passed by the High Courts under Article 226. The constitution has provided a meticulously drafted provision which is primarily based on the principles of natural justice i.e. no one should be proceeded against unheard. No adverse order may be passed behind the back of the person who is adversely affected by such order. If such order is passed the other party has to be heard within a period of two weeks as provided under this clause. But, it is submitted that practically this provision is not being adhered to by the High Courts. The grant of ex-party stay or injunction is a normal affair at the notice stage itself and in most of the cases notice is returnable within a period of more than a month. Apart from it, even if the parties apply vacation of stay, even such applications remain without disposal for many months. It is also a fact that practically, this practice is not protested even by the advocates and notwithstanding this specific provision of the constitution under Article 226(3), the delayed disposal of vacation applications of stay, has been accepted as a standard practice. This may be seen in the following cases. Thus this mandatory provision is being operated as discretion rather than a constitutional mandate.

Clause (4) of Art. 226 clarifies that the powers to be exercised by the High Courts under this Article would not be in derogation of such powers of the Supreme Court under Article 32. Notwithstanding the parallel nature of the two provisions, the Supreme Court enjoys a superior status in this regard.

After, going through the broad contours of the powers of the Supreme Court under Article 32 and that of the High Courts under Article 226 of the constitution, it is revealed that the nature of these powers is almost the same but still they can be distinguished in their scope. The first and foremost

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(iii) Ghanshyam Das v. Presiding Officer, Labour Court, Ambala, CWP No. 11362 of 1988 (unreported)
difference between the scope of these powers is that the powers of the Supreme Court under Article 32 of the constitution are 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. Therefore the High Court encompasses a wider area of jurisdiction as far as the subject of the writ jurisdiction is concerned. On the other hand the Supreme Court has a wider territorial jurisdiction than the High Courts. Although the parliament is duly empowered under Article 139 of the constitution to invest the Supreme Court with powers to issue writs, directions or orders for the purposes other than the enforcement of fundamental rights. But no such law has been enacted by the parliament so far. Moreover, being Apex Court of the country, it would not be practically in the interest of justice to thrust more responsibility on the Supreme Court under Art. 139 of the constitution and rightly so, the parliament did never attempt it.

The powers of the Supreme Court are further fortified under other provisions of the constitution apart from art. 32. If to see the powers of the Apex Court in the entirety of the constitutional provisions, including the powers being exercised by the court under Article 32, 136 and 142 of the constitution, it has enormous powers to safeguard the rights of the citizen in any manner and at any place. No doubt the scope of writ jurisdiction is wider with the High Courts than that of the Supreme Court, but the Supreme Court has got open and undefined powers under Article 142 to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it. Therefore Art. 142 grants a sort of residuary powers to the Supreme Court under which any cause or matter may be decided by passing any decree or order. Similarly, under Art. 136 of the constitution, the Supreme Court has got powers to grant special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter, passed or made by any court or tribunal in the territory of India. The powers of the Supreme Court under Art. 136 are discretionary and even an appeal against the interim orders of a court or tribunal can be entertained by the Supreme Court under this provision. Thus practically the Supreme Court has got wider powers of discretion than the High Courts because the High Courts
have got no such powers as are with the Supreme Court under Art. 136 and Art. 142 of the constitution.

Since, the nature of powers of the Supreme Court under Art. 32 and that of High Court under Art. 226 are substantially the same to the extent they relate to the violation of fundamental rights, there is an implied element of equality also between the two to that extent. There is no bar to approach the Supreme Court directly under Art. 32, but if a petition has been filed under Art. 226, the Supreme Court cannot be approached if such petition is pending in the High Court. Moreover, if the High Court has decided the matter on merits, the petitioner cannot move the Supreme Court under Art. 32 on the same cause of action. The only remedy in such cases could be an SLP under Art. 136 of the constitution in the Supreme Court. But there could be possibility of filing a writ petition under Article 32, in case the High Court dismisses the petition on various discretionary grounds under Art. 226. The powers of the High Court under Art. 226 are discretionary and a petition can be dismissed, if there is any alternative remedy available under law or if the writ petition involves a disputed question of facts, which could be better dealt with by the civil court. It may also be dismissed on account of delay and latches or on some other ground, which in the eye of the court, is sufficient to dismiss the petition without going into the merits of the case. The petition could be dismissed in limine also by the High Court under its discretion. But the same discretion is not available with the Supreme Court under Art. 32 as far as the violation of fundamental rights are concerned. Therefore once the Supreme Court is moved on account of violation of fundamental rights, it cannot refuse to entertain the writ petition and the same is likely to be disposed of on merits. Thus the principle of res-judicata cannot be applied if the matter has not been decided by the High Court on merits. This issue was discussed at length by the Supreme Court and Gajendragadkar J thus observed on the principle of res-judicata,

“Now the rule of res-judicata as indicated in S.II of the code of civil procedure has no doubt some technical aspects, for instance the rule of constructive res-judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is the interest of the public at large that a finality
should attach to the binding decisions pronounced by courts of competent jurisdiction and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of general rule of res-judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32°

Based on this importance of the principle of res-judicata the court established a clear relation of the powers of the Supreme Court under Art. 32 and that of the High Court under Art. 226. It was finally held by the court in the same case,

“We hold that if a writ petition filed by a party under Art. 226 is considered on the merits as a contested matter and is dismissed, the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the constitution. It would not be open to a party to ignore the said judgement and move this court under Art. 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs. If the petition filed in the High Court under Art. 226 is dismissed not on the merits but because of the latches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Art. 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Art. 32.” (page 1365 – 66)

The above findings of the Supreme Court bring the writ jurisdiction of both the courts very close to each other. In substance they appear to be at par and the application of mind by the High Court under Art. 226 on a particular matter does not require to be repeated by the Supreme Court in the same fashion on the same issue for the same relief.

But this equality of powers binds both of the courts to keep a judicial decorum to avoid mismanagement in the application of such powers. The parity of powers does not mean that the High Court can entertain the matters inspite of the fact that the Supreme Court was already seized of the matter. This would be against the norms of judicial propriety. Such matter came


In this case when an order passed by the Supreme Court was being implemented, a writ was filed in the High Court and the same was entertained and some interim orders were passed by the High Court which interfered with the directions issued by the Supreme Court in a petition under Art. 32. The Supreme Court took a serious view of it and observed,

"It is a clear case where the High Court ought not to have exercised jurisdiction under Art. 226 where the matter was clearly seized of by this court in petition under Art. 32..... The learned Single Judge's perception of justice of the matter might have been different and the abstinence that the observance of judicial propriety, counsels might be unsatisfactory; but judicial discipline would require that in a hierarchical system it is imperative that such conflicting exercise of jurisdiction should strictly be avoided. We restrain ourselves from saying anything more."

Thus it is the judicial propriety, which is an imperative force whereby such conflicting exercise of jurisdiction may be avoided.

Before examining the other salient features of the writ jurisdiction of the High Court and the Supreme Court, a brief description of all the five writs mentioned in both Art. 32 and Art. 226 may be desirable.

Habeas Corpus: This writ is basically meant for remedy against illegal confinement of a person. If a person is caused injury or wrong by wrongful confinement that person has to be discharged and delivered as a matter of swift remedy under this writ. The only pre-condition for the issuance of it is that the person should have been confined and such confinement should be illegal. It is available to the weakest against the mightiest with the only exception of prison of war and the enemy alien. A petition under Art. 32 would not lie where the detention was by a private person and not by or under the authority or orders of the state. Writ of habeas corpus is a writ for determining the legality or illegality of detention and not for punishing a person for a past offence. The legality of the detention has to be seen on the date when application is heard by the court. If at any time before the court directed the release of the detainee, a valid order of detention is produced, the court may
refuse the release even if the earlier detention was illegal. The application of detention if once dismissed may be filed again on the basis of fresh evidence and the principle of *res-judicata* would not be application in such cases. If the right to move the Supreme Court under Art. 32 was suspended under Art. 32(4) in accordance with the provisions of Art. 359, the Supreme Court cannot be moved under Art. 32. However, even if fundamental rights are suspended under Art. 359, the right to move the High Court under Art. 226 is not suspended and therefore the High Court could be moved in such a situation. In a writ of *Habeas Corpus* the court cannot invalidate the provisions of the Act under which detention is ordered.

However, the court at all times are entitled to have an account of why the liberty of an individual was restrained, under the inherent powers of the higher judiciary.

*Quo Warrato:* This writ is issued basically to prevent the usurpers to occupy Public Offices. Broadly stated, the proceedings of *quo-warranto*, offered a judicial inquiry by way of notice to a person who occupies a public office for which he is not eligible. The court asks him to show cause by what right he holds the office in question. It is a device to control executive action in the matter of making appointments to public offices.

In this process the usurper of public office may be removed and the rightful person may be allowed to occupy this office. As a pre-condition to such order to be passed by the court, the claimant of a writ for *quo-warranto*, has to satisfy the court that the office in question is a public office and has been held by the usurper without any legal authority. The court has to examine under such proceedings whether the appointment of such person was made in accordance with law or not. The validity of the rules or statute under which such appointment was made cannot be challenged under these proceedings. A stranger to such post can also apply for a writ of *quo-warranto*. The office against which the disputed appointment was made should be a public office of a substantive character. The writ of *quo-warranto* operates against the holder of the office and not against the Govt. The person so removed shall not be re-appointed.
Though there is no such legal bar but the court may refuse a writ on the availability of alternative remedy. Similarly, if the petitioner is not being affected prejudicially, the court may refuse the writ. Such writ would not be issued if the person concerned ceases to occupy the office. However, a resignation after the notice would not stop the proceedings. Such writ would also be not issued if it is futile in the cases where the alleged defect of appointment can be cured by way of reappointment.

A writ of *quo-warranto* is issued to prevent a continuous exercise of unlawful authority. However, it cannot undo the actions already taken by such authority. It cannot jeopardise the lawful rights accrued to individuals in this process. Although a writ of mandamus can also be issued on the grounds of malafides and arbitrariness, but when the office is filled up a writ of *quo-warranto* is preferable. Mandamus is desirable to be issued when the office is vacant.

**Mandamus:** The primary purpose of this writ is to make the Govt. machinery work properly. An order of mandamus is a command directed to any person, corporation or an inferior tribunal, requiring them to do some particular thing which pertains to their/his office and which is in the nature of a public duty. The public servants are responsible to the judiciary for the lawfulness of their public duties and their actions under it. If a public authority fails to do what is required under law or does beyond what was to be done, a writ of mandamus may be issued to make him do what was required under law. Ayyangar J. thus observed,

“The Constitution enshrines and guarantees the rule of law and Art. 226 is designed to ensure that each and every authority in the State, including the Government acts bona fide and within the limits of its power and we consider that when a Court is satisfied that there is an abuse or misuse of power and its jurisdiction is invoked, it is incumbent on the Court to afford justice to the individual.”

Mandamus may also be issued to a tribunal to compel it to exercise the jurisdiction vested in it, which it has refused to exercise. Mandamus may also

be issued where there is a specific legal right but no specific remedy for enforcement of such right.

It may be refused if there is effective alternative remedy available. A writ of mandamus may not be decided on merits and it can be dismissed on the grounds of delay and latches, disputed questions of facts and on account of other reasons related to the act and conduct of the petitioner.

The basic purpose of this writ like others is to supply the defects of justice and wherever the need to correct such defects is felt, this writ can be issued in the relevant matters.

Normally, a writ of mandamus is not issued to an authority for exercise of powers, which are discretionary in nature. But if such discretion is not utilised at all, or if used in an arbitrary manner or with malafides, a writ of mandamus can be issued to compel the authority to use the discretion properly. It is because of the reason that surrender of discretion, by adopting a policy pursued by a superior authority, is not less objectionable. It amounts to exercising authority under dictation of another person.

The writ of mandamus is the most sought after writ in the present legal and administrative scenario. With the growing complexity of the administration and the increasing workload of public authorities, the resultant lapses in the exercise of such authority have increased manifold. The public has become aware of their rights and legal remedies and therefore, the tendency to move the courts for a writ of mandamus has also increased. Even very small issues are taken to the courts in writ to expedite the remedy.

Certiorari and Prohibition: The operation of these writs goes to control the proceedings of bodies, which do not claim to be and would not be recognised as courts of justice. Wherever any body of persons having legal authority to determine question affecting the rights of subjects and having the duty to act judicially, act in excess of their authority, they are subject to the controlling jurisdiction of the writ of certiorari and prohibition to ensure this check on the bodies performing judicial or quasi-judicial functions.

An order of certiorari is an order directing the inferior tribunal requiring the record of the proceedings in some cause or matter to be transmitted to the
High Court to be dealt with there. Certiorari is appropriate to quash the directions of a tribunal, which has assumed jurisdiction, it does not possess or where the order contains an error of law apparent on the face of the record. A writ or order of certiorari would not lie to a private domestic tribunal, but it would lie, if the statute provides for the appointment of an arbitrator. Similarly, certiorari will not be issued to persons or bodies exercising a jurisdiction without any colour of legal authority, because the actions of usurpers are a nullity and the same are not required to be set aside. It is because of the fact that an order, which is absolutely without any colour of legality, cannot be recognised by the law as an order. Therefore it is not at all an order, which can be enforced. Thus certiorari is not required to undo such orders. Certiorari will normally be not issued to quash reports or recommendations, because these do not normally amount to determination of rights of the subjects.

To determine whether a particular act may be called judicial or not for this purpose, the formal, procedural and substantive characteristics and their combination may be seen. An act may be judicial because it declares and interprets pre-existing rights or because it changes those rights, however, such power to change these rights is not unfettered. Similarly, a duty to act judicially in conformity with natural justice may be inferred from the impact of an administrative act or decision on individual rights. The main features of a judicial function are firstly, the action performed by such body results in a binding order. It is obligatory in nature for its compliance. Secondly, it determines the issue conclusively by way of application of pre-existing legal rules or any fixed objective standard applicable to the facts of the situation of the matter to be determined. Thirdly, it has the trappings of court. Though it may not function just like a court but it should have a resemblance to it.

In the same context we may discuss the writ of prohibition also, which also functions under a similar background. An order of prohibition is also directed to an inferior judicial body or tribunal forbidding such court or tribunal from continuing the proceedings in a particular matter. A writ of prohibition is appropriate to restrain a tribunal, which threatens to assume or assumes a jurisdiction not vested in it, so long as there is something in the proceedings left to prohibit. Thus like certiorari, the writ of prohibition can only be issued if
the person, body or tribunal is charged with judicial or quasi-judicial duties. However, the order of prohibition is issued when the error of law is apparent on the face of the record, wherein it is issued as a matter of right and not as of discretion.

Thus certiorari and prohibition are two different writs, which are issued at different stages of a judicial proceeding to check and regulate the inferior court or tribunal to exercise the jurisdiction appropriately while remaining within the prescribed limits of such jurisdiction. It checks the errors of law in this process. Orders of prohibition are issued before the conclusion of the proceedings whereas order of certiorari is issued to undo the error of law even after the proceedings are concluded. However, the validity of the statute under which such proceedings are lodged cannot be challenged or decided under such writs.

While coming to the general nature and scope of writ jurisdiction, it would be necessary to mention that it is not a routine jurisdiction of the Supreme Court or High Courts but it is an extra ordinary jurisdiction meant for extra ordinary purpose. It is to grant an efficacious and speedy remedy against any violation of fundamental rights, however under Art. 226 the High Court may issue such writs for other purposes also. The basic philosophy behind the extra-ordinary nature of this jurisdiction emanates from the time consuming legal proceedings of the civil courts. The jurisdiction of the civil courts is regulated and conducted as per the specific procedure of law and the technical rules of procedure have to be strictly followed. Thus the time factor involved in civil suits cannot be curtailed beyond reasonable limit and the scope of immediate justice cannot be conceived under civil proceedings. This fact was considered while providing an effective safeguard against the violations of fundamental rights. Since the fundamental rights as conceived in the constitution had great emotional value and their protection had also to be ensured so as to fructify the cherished aspirations of the people. Secondly, the place of preference given to these rights in the constitutional scheme also made it compulsory to ensure their effectiveness. These rights were in a way the foundation of democratic set up of the country and so the enforcement of these rights was essential. Under this extra-ordinary jurisdiction was
conceived in the constitution, a constitutional guarantee under Art. 32, for the protection of these rights. The Powers of the High Court under Art. 226 though does not contain specific constitutional provision of such guarantee like that provided under Art. 32(4), but the analogous provisions in both these articles convey an implied guarantee under Art. 226 to the exception of entertainment of writs which may be refused on various grounds to be discussed subsequently. But once the writ is admitted and the factum of violation of such rights is proved beyond reasonable doubt, the High Court cannot refuse to grant relief.

This extraordinary power of writ jurisdiction has many important features attached to it to expedite the delivery of justice under it. It basically originates from the existence of a right. Without right there is no remedy. Once the existence of right and its violation is established, the right to move the Supreme Court under Act. 32, is guaranteed and subject to a few grounds of discretion the High Court is also bound to entertain writs under Art. 226. Then the technical rules of procedure attached to the civil courts are not strictly applicable in the writs. The provisions of civil court, related to locus standi and limitation, are not strictly applicable here. The High Court enjoys a wide discretion in case of limitation. Under Art. 226 of the Constitution the jurisdiction of the High Court is undoubtedly very wide. Appropriate writs can be issued by the High Court under the said article even for purposes other than the enforcement of the fundamental rights and in that sense, a party, who invokes the special jurisdiction of the High Court under Art. 226, is not confined to cases of illegal invasion of his fundamental rights alone. But though the jurisdiction of the High Court under Art. 226 is wide in that sense, the concluding words of the article clearly indicate that before a writ or an appropriate order can be issued in favour of a party, it must be established, that the party has a right and the said right, is illegally invaded or threatened. The existence of a right is thus the foundation of a petition under Art. 226.

There are no hard and fast provisions like that of limitation act. The only purpose to be achieved through these writs is the remedy of infringement of right so violated. The imparting of justice is the end result. There have been cases where the court had refused to condone the delay of even a few days
or months. But on the other hand the court has allowed the delay of 15-20 years. Thus the facts and circumstances of individual case have to determine this issue strictly in the interest of justice. The Supreme Court had tried to lay down a tentative parameter to decide the delay in such cases and Das Gupta J. observed,

“Learned Counsel is right in his submission that the provisions of the Limitation Act do not as such apply to the granting of relief under Art. 226. It appears to us however that the maximum period fixed by the legislature as the time within which the relief by a suit in a civil court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Art. 226 can be measured. This Court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy but where the delay is more than this period, it will almost always be proper for the Court to hold that it is unreasonable.”

But with due respect to the court, to lay down even the tentative criterion in such matters could be an attempt to circumscribe the wide discretion of the court. Since it is an extra-ordinary jurisdiction, let the court decide such issues in an extra ordinary manner. The end object of justice should determine the course of action in such matters. Bose J. has rightly observed,

“For the provisions of a constitution are not mathematical formulae which have their essence in mere form. They constitute a framework of government written for men of fundamentally differing opinions and written as much for the future as the present. They are not just pages from a textbook but form the means of ordering the life of a progressive people. There is consequently grave danger in endeavoring to confine them in watertight compartments made up of ready made generalisations like classification.”

Then this extra-ordinary power of the court is to correct the defects of law and not to decide the disputed issues of facts. It does not declare the rights and titles under this jurisdiction. Therefore, where the disputed questions of facts are involved, such matters cannot be decided in a summary proceeding just on the pleadings of parties. Therefore, the disputed issues

7 State of M.P. v. Bhailal Bhai, AIR 1964 SC 1006 at page 1012
8 State of West Bengal v. Anwar Ali, AIR 1952 SC 75 page 102
must be decided by the civil courts after recording of due evidence in such matters. Thus such matters are not entertained under writ jurisdiction. However, mere assertion of a disputed question of fact does not deny the right of remedy under writ jurisdiction. The court has to specifically arrive at such conclusion. Moreover, the Supreme Court has observed that if the fact of violation of fundamental right is proved beyond doubt, even a disputed question of fact can be entertained and decided under writ jurisdiction, of course in exceptional cases. The court in such cases may proceed to record evidence or it may obtain such evidence in the form of affidavits or take the assistance of some other court or agency in the recording of such evidence. But if the circumstances so warrant the ends of justice should be allowed to meet, even by going out of the way, in such cases. But it is only in exceptional cases and not in routine. The Supreme Court perceived this issue as early as in the year 1959 in the following words:

"The court may in some appropriate cases, be inclined to give an opportunity to the parties to establish their respective cases, by filing further affidavits, or by issuing a commission, or even by sending the application down for trial or evidence, as has often been done on the original side of the High Courts of Bombay and Calcutta, or by adopting some other appropriate procedure. Such occasions will be rare indeed and such rare cases should not, in our opinion, be regarded as a cogent reason for refusing to entertain the petition under Art. 32 on the ground that it involved disputed questions of fact."9

The extra-ordinary nature of the writ jurisdiction also requires the court not to entertain matters in writs where an effective alternative remedy is available to the petitioner. The basic idea behind it is to prevent the people from approaching this court indiscriminately. If it is allowed in routine the writ courts would be overburdened with the flood of litigation under writ jurisdiction and other alternative forms would become redundant. In addition to it, the matters requiring evidence in detail and where the appreciation of evidence is required, those matters would also tend to come before the High Court. In addition to it, the jurisdiction of the High Court as an appellate court would also be adversely affected. Apart from this, in most of the cases the statutory

remedies of appeal and revision are provided in the statute itself and if such remedies are bypassed it would create a chaotic situation wherein everybody would be running to the High Court or the Supreme Court in writs. Therefore, as a matter of practice where alternative remedy is readily available the High Courts normally refuse to entertain such matter in writs. Shah J thus observed,

"The jurisdiction of the High Court under Art. 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy for relief, which may be obtained in a suit, or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Art. 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact and does not by assuming jurisdiction under Art. 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for a statute, the High Court normally will not permit by entertaining a petition under Art. 226 of the Constitution the machinery created under the statute to be bypassed and will leave the party applying to it to seek resort to the machinery so set up." \(^{10}\)

However, the availability of alternative remedy is a rule of convenience rather than a constitutional bar. The prime object of this extra-ordinary remedy is to grant efficacious and immediate relief to those who move the court. As already indicated, the position of the Supreme Court is more straight than the High Courts. When the factum of violation of fundamental rights is glaring the Supreme Court cannot direct the petitioner to seek alternative remedy because the Apex Court has to move as per the constitutional guarantee as

\(^{10}\) Than Singh v. Supdt. of Taxes, A.I.R. 1964 SC 1419 page 1423
envisaged under Art.32 of the constitution. However, there is a scope of
discretion with the High Court in such cases. The High Court on its
satisfaction can direct the petitioner to seek alternative remedy. But this
discretion is again bound by self-discipline of the High Court. The court has to
see whether the alternative remedy would be effective enough to grant timely
justice to the petitioner. If the court is satisfied regarding the efficacy of the
alternative remedy, the court may pass such directions. However, if the court
so directs and the petitioner is not sure of getting relief in alternative remedy
efficaciously, the burden of proof to satisfy the court regarding the
insufficiency of alternative remedy would lie on the petition.

This tradition set by the court, though may sometimes result in denial of
justice, but as submitted earlier, it is necessary to allow the statute to own
responsibility for statutory violations. The in-built remedies could be more
efficient and subject- oriented. The Supreme Court thus held,

"The jurisdiction under Art 226 of the Constitution is limited to seeing that the
judicial or quasi-judicial tribunals or administrative bodies exercising quasi-judicial
powers, do not exercise their powers in excess of their statutory jurisdiction but correctly
administer the law within the ambit of the statute creating them or entrusting those
functions to them. The Act has created its own hierarchy of officers and appellate
authorities as indicated above, to administer the law. So long as those Authorities
function within the letter and spirit of the law, the High Court has no concern with the
manner in which these powers have been exercised. In the instant cases, the High Court
appears to have gone beyond the limits of its powers under Art. 226."

This thing could have been obliquely visualized by the Constituent
Assembly also. That is why in case of election matters special provisions
under Art. 329 (b) have been provided wherein an application under Art.226 is
barred which challenges election to a legislature, unless the remedies
provided under this article are exhausted. Similarly, in tax matters also, the
Supreme Court has repeatedly held that unless something glaring on the face
of the record attracts the jurisdiction under Art.226, the High Court should not
interfere in the recovery of the State revenue. The interim stay against the

recovery or assessment of Tax has been strongly resented unless it is very essential in the interest of justice. (Siliguri Municipality v. Amalendy Das A.I.R. 1984 SC 653). Jeevan Reddy J observed in this regard,

"It has been repeatedly held by this Court that the power of the High Court under Article 226 of the constitution is not akin to appellate power, it is a supervisory power. While exercising this power, the court does not go into the merits of the decision taken by the authorities concerned but only ensures that the decision is arrived at in accordance with the procedure prescribed by law and in accordance with principles of natural justice wherever applicable. Further, where there are disputed questions of fact, the High Court does not normally go into or adjudicate upon the disputed questions of fact. Yet another principle which has been repeatedly affirmed by this Court is that a person who solemnly enters into a contract cannot be allowed to wriggle out of it by resorting to Art. 226 of the Constitution."

But such issues regarding the direction to seek alternative remedy have to be settled by the High Court at the initial stage. If the party concerned or the office fails to raise this issue and the court accepts/admits the petition for hearing, such issues cannot be considered after a lapse of considerable time. It would be too harsh to the petitioner if the writ petition is thrown away at a letter stage on this account. The Karnataka High Court has observed in this regard,

"The question however arises as to the stage at which the court will take such a decision. It needs to be noted that if a litigant has approached a wrong forum or an inappropriate form, that it is certainly open to that forum or authority to redirect the litigation to the most appropriate or correct one. This presupposes the fact that the objection will be canvassed by the office or the opponent at the very threshold and the court will decide it. One needs to take cognizance of time factor and the other significant aspect involved and it is equally good law that in those of the cases where a petition has been admitted, in other words where the court has exercised jurisdiction and where the case has come up for final hearing after several years, that the court would not at that late point of time redirect the litigation elsewhere. Apart from the wastage of judicial time, appropriateness and the timing of the order are all of consequences in such instances. Therefore, the objection must be raised at the earliest point of time so that if it is pointed

12 State of M.P. v. MV Vyavsaya (1997) SCC 256 page 162
out to the court that a clear alternative is available, the petitioner can be directed to go there. In the circumstance of the case and at this late stage it is not either proper or appropriate to uphold such an objection at the final hearing of the petition.\textsuperscript{13}

In the light of the above observations of the High Court it is submitted that in the present study, while discussing individual cases subsequently, it would be seen that the writ petitions were dismissed on the grounds of delay and latches, disputed questions of facts and availability of alternative remedy, even after years of admission. Such dismissal is not tenable in the interest of equity and justice.

Moreover, it is not even accepted under the doctrine of legitimate expectation. It is based on the principle of equity and justice where arbitrariness and unreasonableness has no place. The Supreme Court in various decisions\textsuperscript{14} has held that the doctrine of legitimate expectation is akin to natural justice, reasonableness and promissory estoppel. It primarily conceives a situation where justice and fair play get a place of pride and perfection in the delivery of justice. Though in the above referred cases the Court has applied this doctrine in the cases related to the administrative decisions, but the same doctrine may very well cover the justice delivery system also at every level, including the High Courts and the Supreme Court itself. It is basically due to the fact that every road of justice delivery system leads to justice and nowhere else. So it does not matter whether the decision making body is legislative, executive, or the judiciary. Coming up specifically


\textsuperscript{14} i. Navjyoti Coop. Group Housing Society V Union of India (1992) 4 Section 477.


to the writ jurisdiction of the High court, the legitimate expectation of the parties to the writ petition is to get justice within the legal framework, regulating this particular jurisdiction of the High Court. The High Court once admits the writ for consideration and adjudication of the issues involved in it, the legitimate expectation resulting thereby is the expeditious decision on merits. But when the writ is admitted for indefinite period, it results in negation of justice in the majority of the cases, which blatantly transgress and emasculate the legitimate expectation of justice and fairplay. The intensity of this transgression further intensifies when the writ is dismissed on account of preliminary issues after a long admission.

It violates the Wednesbury principle also, as discussed by the Supreme Court in similar cases while examining the administrative decisions, the apex Court observed that it must be within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principle. But the same principle may be equally applicable in the administration of justice at all levels. The credibility of justice is based on the faith of the people and the same is very sensitive to arbitrariness, unreasonableness and irrationality. This test if applied to the indefinite admission of writs, it would not be able to sustain the faith of the people and the reliability of justice delivery system. Thus, neither it would be covered under the doctrine of reasonable expectation nor under wednesbury principle. Both these principles are based on reasonableness and equity and demolish arbitrariness, wherever, it appears.

The writ jurisdiction is supervisory in nature and it is different from appellate or revision jurisdiction. The basic purpose of writs is to supply the defects of justice and for that matter while exercising the writ jurisdiction the court has to examine the application of law rather than facts. The court has to see the conduct of the body or authority whose actions are under challenge before the court. The court has to enforce the right and not to create a right. Similarly, it has to enforce the law and not to enact law. The writ jurisdiction

\[\text{\textsuperscript{15}}\text{ i. Om Kumar v. Union of India (2001) 2 Section 386.}\]
\[\text{\textsuperscript{15}}\text{ ii. Union of India v. G. Ganayutham (1997) 7 Section 463.}\]
supervises the proceedings of the subordinate courts or authorities in the applications of law, the jurisdiction of such bodies or authorities exercising the judicial and quasi-judicial functions. B.P. Singh J so observed,

"The jurisdiction under Art. 226 of the Constitution is limited to seeing that the judicial or quasi-judicial tribunals or administrative bodies exercising quasi-judicial powers, do not exercise their powers in excess of their statutory jurisdiction, but correctly administer the law within the ambit of the statute creating them or entrusting those functions to them. The Act has created its own hierarchy of officers and Appellate authorities, as indicated above, to administer the law. So long as those Authorities function within the letter and spirit of the law, the High Court has no concern with the manner in which those powers have been exercised."

That is why when a particular action is challenged before the court in a writ, it is the validity of that particular action which is examined by the court and not the validity of law under which such action is taken. The limited point to be seen in writs is whether the law is allowed to take its own course or not. The rule of law has to be ensured. V.N. Khare J. aptly remarked in this context,

"It is not permissible for the High Court to direct an authority under the Act to act contrary to the statutory provisions. The power conferred on the High Court by virtue of Article 226 is to enforce the rule of law and ensure that the State and other statutory authorities act in accordance with law."

It is the original jurisdiction of the High Court as well as that of the Supreme Court. Even if the decision of a tribunal is challenged in writ petition it would be the original and initial jurisdiction of the court and it is not a continuation of the proceedings of the earlier court or tribunal. It is because of the fact that it is different from appellate jurisdiction wherein the facts of the case and appreciation of evidence have to be re-examined. The conclusions reached at by the lower authority or tribunal have to be appreciated in view of the evidence and other related record of that particular matter. The court may change the decision in appeal and appreciation of an evidence, including the

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quantum of penalty or sentence may be varied. But in writ jurisdiction it is none of the function of the court. The facts and evidence are not relevant for the court in writs. The only thing which is important, to be seen by the court, is the appreciation of application of law and the jurisdiction and competency of such application. Therefore, the position of the court is that of a sentinel. Even if a wrong appreciation of fact has led to a wrong conclusion by the lower court or tribunal, the court may not give its decision on this issue and such issues are left for the appellate court to take appropriate decision if approached by the aggrieved party.

"The second essential feature of a writ of 'certiorari' is that the control which is exercised through it over judicial or quasi-judicial tribunals or bodies is not in an appellate but supervisory capacity. In granting a writ of 'certiorari' the superior court does not exercise the powers of an appellate tribunal. It does not review or reweigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal."\(^{18}\)

Since no detailed appreciation of facts and evidence are involved in writs, its proceedings are summary in nature. The pleadings in the court are entertained in the form of affidavits and on the basis of these pleadings and after hearing the arguments of the advocates for both the parties the writ petitions are decided. In exceptional cases, where the court finds that a disputed fact is involved and the court simultaneously feels that it is necessary to decide the matter in the interest of justice, the court may record proceedings or refer it to some subordinate court, to give its findings on the disputed fact after recording due evidence. Sometimes the court may appoint commissions also to verify the veracity of facts produced before it. But these are all exceptional proceedings and normally not applied in writ petitions.

With the development and growth of law of writs in the county, the courts have become increasingly conscious of the rights of the people. Now the courts in certain cases don’t wait for the writ petitions to be filed. The courts may take suo motu notice of the violation of rights and law and

accordingly, suo motu jurisdiction is exercised in such matters. In these matters, if the court comes across a matter, where there is blatant violation of law affecting the public at large adversely, the court issues notice to the respondents at their level itself and the respondents have to explain the courts their position and if required the court may direct them to repair the damage by way of a writ of mandamus. Recently, during the past few years, the problem related to the pollution of environment in some major metros of India including the national capital region had made the court to take suo motu notice of such problems. The traffic pollution in Delhi has been mitigated to a considerable extent by converting the diesel operated buses to CNG operation under the orders of the court.

The law of writs is mainly based on the principles of natural justice, equity, good conscience and fair play. It is because of the fact that the purpose of writs is to deliver efficacious and speedy justice; no formal rules of procedure can help to reach the ends of justice through the shortest route. When there is no fixed procedure and the discretion of the court is open ended there have to be something, which may regulate and direct the proceedings of the court. The principles of fair play and natural justice have thus become guiding stars in the law of writs. Since writs are public remedy, it is naturally expected that any decision in the writ must appeal to the conscience of a common man. In other words the decision of the court must be equitable and fair. The fair play is an informal concept, which cannot be reduced to particular parameters. Without any legal procedures attached to it, it still may be called an embodiment of justice, equity and good conscience. Thus the element or concept of fair play cannot be the same for each case. It is the facts and circumstances of each case, which would determine the role of fair play. Thus the writs have to be decided with fair play in mind wherein justice may be the ultimate goal. It is not a question of gain or loss for the parties but the justice should remain victorious in each case. One such example could be the case of Hira Nath v. Rajendra Medical College, Ranchi19. Wherein the element of fair play went even beyond the principles of natural justice. The victim girl students were not in position to depose in the

19 AIR 1973 SC 1261
presence of the petitioner. The court approved their evidence to be recorded in the absence of the petitioner and on the basis of the evidence of the girls the petitioner was punished. The court rejected the plea of natural justice in this matter and held that the course of action taken by the authorities was appropriate in the interest of justice. Thus the element of fair play has a dominant role in the writ jurisdiction. Natural justice is analogous to fair play, though it is broader in concept and it is more or less defined within the parameters of law. Its basic purpose is also the delivery of justice in a fair and judicious manner. The first ingredient of natural justice is that no one shall be a judge in his own cause. It speaks of impartiality and fairness. The judge should have no interest in the matter to be placed before him for decision. It is of fundamental importance that justice should not only be done but it should manifestly and undoubtedly be seen to have been done. The concept of fair play also means the same thing. The message of justice should go clear and straight and nobody should be allowed to even remotely think that any sort of personal interest could influence it overtly or covertly. Even an implied signal of such, interest or bias would affect the credibility of justice. That is why any element of pecuniary bias if even doubted on the part of the judge, notwithstanding its actual application, the judge has no option but to isolate himself from such decision. If the pecuniary interest were even remotely involved in the matter, the judge would lose the right to decide the matter. It does not leave the scope of further inquiry as to whether or not the mind was actually biased by such interest or not. Once the fact of such interest is established its impact goes without saying.

However, if the interest of bias is other than pecuniary, a real likelihood of bias has to be shown. Such bias could be in the form of close personal or business relations, strong personal animosity or friendship or in the form of employer and employee or that of an advocate or client. The judge or whosoever has to adjudicate upon, should not hear evidence or receive representation from one side behind the back of the other. The court would not go into the likelihood of prejudices but even the risk of it is enough. It is because of the fact that no one who loses the case would believe that he was fairly treated, if the other side had access to the judge without his knowing.
While deciding a writ petition this aspect of natural justice is duly taken care of. It is being observed in the High Court meticulously. The judge normally does not hear the matter involving his earlier client when he was working as an advocate before elevation to the bench. Similarly, the close relatives of the judges, if work as advocates in the same High Court, do not appear before their relative judges. In the matters wherein a judge had earlier been an advocate representing one party, such judge dissociates himself from the matter. Thus apparently the High Court is very careful in such matters to sustain the faith of the people in the judicial system. However a remote possibility of personal bias cannot be ruled out when an advocate after elevation as a judge in the same High Court deals with his old advocate colleagues with whom he had remained associated for years. Similarly, while dealing with the close relatives of the brother judges or the relatives of the judges of the Supreme Court, the element of personal bias may vitiate the mind of a common man coming to the court and losing a case against such relation advocates, notwithstanding the actual existence of such bias.

The next important component of natural justice is the due opportunity of being heard. Nobody can be condemned or punished unheard. When a matter comes before the court or the authority exercising judicial or quasi-judicial powers, the prime duty of such court or authority is to ensure judicious proceedings. Under this principle of natural justice both the parties have to be provided an equal and sufficient opportunity of being heard. Right from the service of notice to the delivery of final decision in the matter a continuous association of both the parties has to be ensured in the proceedings. Not only in judicial proceedings, even in disciplinary proceedings including the departmental inquiries, the opportunity of being heard is an essential element of such proceedings.

But unlike the provisions of the civil procedure code, the concept of natural justice is flexible and resilient to acclimatise itself as per the facts and circumstances of the case. The pendulum of natural justice should not be allowed to swing too far to one side so as to ignore the requirement of administrative efficiency and dispatch. Thus with due recognition to the requirement of natural justice and fair play, the remedy of a particular problem
would have to be sought in the circumstances of the case itself. It is because of the fact that too often the people who have done wrong seek to invoke the rules of natural justice to avoid the consequences of their own misdeeds. Our constitution has taken a due care of such circumstances and the provisions of Art. 311 (2) of the constitution reflect such an intention wherein the requirement of inquiry has been done away with, under the circumstances explained in the said Article. It is thus not possible to bind the concept of natural justice by laying down rigid rules regarding its application; everything depends on the facts and circumstances of the matter. The only requirement of natural justice is that the procedure before any tribunal which is acting judicially has to be fair under all circumstances and it would not be fair that this general principle is degenerated into a series of hard and fast rules. There must be a balance between the need for expedition and the need to give full opportunity to the defendant to see the material against him.

However, except the circumstantial requirement in individual cases, it would be contrary to the natural justice for a judicial determination, affecting a person's rights and liabilities to be made without an opportunity of being heard or without making a written representation in that regard.

The most important and powerful result of the writ jurisdiction, under Art. 32 and Art. 226 of the constitution is the advent of public interest litigation. The powers under the aforesaid jurisdiction are so enormous that our proactive higher judiciary forged a new tool in the form of PIL to mitigate the sufferings of the poor millions who had not got the means or capacity to approach these courts against the violation of their fundamental rights. Krishna Iyer J observed,

"Even Art. 226 viewed in wider perspective, may be amenable to ventilation of collective or common grievances, as distinguished from assertion of individual rights, although the traditional view, backed by precedents, has opted for the narrower alternative. Public interest is promoted by a spacious construction of locus standi in our socio-economic circumstances and conceptual latitudinarians permit taking liberties with individualisation of the right to invoke the higher courts where the remedy is shared by a
considerable number, particularly when they are weaker. Less litigation, consistent with fair process, is the aim of adjectival law.”

The courts under compulsion of the circumstances invented this concept of jurisprudence. It was an attempt by the court to ‘infuse the language of the soul’ into the mouths of these ‘dumb pale and meek’. Their hearts have been given the language of humanity; this was possible only on account of the new concepts and meaning given to the traditional procedural terms. The concept of standing or Locus Standi was changed due to the requirement of the circumstances. The court no longer waited for a person to petition before it regarding a particular problem. If the court was satisfied that the fundamental rights of a group or class of people were being infringed and the state was not taking any steps to restore these rights, the court left the traditional procedure of standing and allowed any public spirited person, who may represent the masses suffering from the infringement of their rights. Not only this, in certain cases the court activated itself only on the basis of a letter written to one of the judges of the court. Even in certain other cases the court took cognizance of the reports appearing in the press or the media and issued suo motu notices. Thus this was the novel method of jurisprudence invented by the court to protect the human rights including the fundamental rights from blatant violations. Bose J. did rightly observed,

“I grant that this means that the same things will be viewed differently at different times what is considered right and proper in a given set of circumstances will be considered improper in another age and vice versa. But that will not be because the law has changed but because the times have altered and it is no longer necessary for government to wield the powers which were essential in an earlier and more troubled world. That is what I mean by flexibility of interpretation.”

This was more convenient for the court to apply this new tool, in view of the open procedural powers available under writ jurisdiction in the constitution. Both Art.32 and Art.226 of the constitution speak of the powers and their purpose and nature to issue writs, but neither of these articles speak

of the procedure to use these powers. The framers of the constitution were well aware of the fact that the enormity of powers given under these articles could not be bound down in a fixed procedure. The protection of fundamental rights of the people of such a large country may pose unvisualised and unanticipated problems to the court and under such a situation the court may be left to invent and apply its own procedures to protect the dignity beauty and worth of human existence. Bhagwati J. has also observed,

"We do not think we would be justified in imposing any restriction on the power of the Supreme Court to adopt such procedure as it thinks fit in exercise of its new jurisdiction, by engrafting adversarial procedure on it, when the constitution makers have deliberately chosen not to insist on any such requirement and instead, left it open to the Supreme Court to follow such procedure as it thinks appropriate for the purpose of securing the end for which the power is conferred namely, enforcement of a fundamental rights."21

Moreover, the court speaks of appropriate proceedings and the propriety of these proceedings is directly proportionate to the basic purpose i.e. the protection of fundamental rights that is why the traditional concept of locus standi has been given up in the cases involving public interest.

Another fact, which supports this new concept of justice, is that public interest litigation normally does not involve a confrontation. The basic issue involved in such litigation is a problem violating the rights of a group or class of people at large and the basic purpose of such litigation is not to get somebody punished but to restore the infringed rights. Therefore, practically there is no adversary in the matter. The respondent in such cases is the State or an instrumentality of state as provided under Art 12 and the state has to give their version of the problem and their plan to mitigate such problem. This is practically a win-win situation for all. The public gets due relief through such litigation and the state in due course gets rid of a problem which was the responsibility of the state.

This element of public interest has also resulted in a rapid growth of writ jurisdiction in various fields of life. The court has reinvented its powers in

21 Bandhua Mukti Morcha v. Union of India (1984) 3 SCC 161 at page 189
uncharted lands which were so far not barren but virgin. The growth of Art. 21 and the role of the directive principles in the making of the nation has treaded unseen paths and attained new heights in this process. The concept of human dignity as enshrined in the preamble of the constitution has been given a new incarnation. The human rights have been elevated to a new status and the court has come to the rescue of the people and their rights, as and when the circumstances so required.

However, the inflation of this balloon has been accompanied by a risk of its bursting. This noble and pioneer adventure of the court has impliedly generated a tendency of misuse of this novel tool by a few selfish and mischievous elements in the society. In the garb of public interest, attempts are being made sometimes to serve personal interests. Secondly, more sometimes may mean worse also. No doubt the results of the PIL have been tremendous, but simultaneously an implied threat to the fine balance among the various organs of the Govt. is sometimes felt. The tendency to interfere in the area of the executive and the legislature by the judiciary is seen in this process. Sometimes the courts issue directions in certain matters, which are purely in the jurisdiction of the other two wings of the Govt. The interference of the Supreme Court recently in Jharkhand Assembly case has given birth to a new legal debate. No doubt the origin of this tendency was primarily due to a vacuum created by the inaction or under action of the two wings, but still the balance of powers as envisaged in the constitution has to be preserved and protected and the judiciary would have to keep a self imposed restraint. It is more important due to the fact that there is no appeal against the law laid down by the Apex Court of the country. Pathak J has rightly cautioned in the following observation,

"The history of human experience shows that when a revolution in ideas and in action enters the life of a nation, the nascent powers so released possesses the potential of throwing the prevailing social order in disarray. In a changing society, wisdom dictates that reform should emerge in the existing polity as an ordered change produced through
its institutions. Moreover, the pace of change needs to be handled with care lest the institutions themselves be endangered.\textsuperscript{22}

Therefore, the writ jurisdiction has to be exercised with a self-imposed restraint and discipline. Notwithstanding the enormity of powers and wide discretion available with the court, it should not allow these powers to behave like a 'bull in the china shop' to tread the forbidden path of recklessness. All factors attached to a particular matter have to be duly considered before exercising this jurisdiction.

The grant of interim relief is one of the salient reliefs available there. But interim relief is ancillary to the final relief. Once the interim relief is granted the matter has to be necessarily decided on merits. The interim order finally merges and sinks into the final order. If interim order is allowed to be sustained without deciding the matter finally on merits, it is the misuse of jurisdiction under the law of writs.

It may be seen that in the field of writ jurisdiction the High Court has been given wider discretion in exercising the powers under Art. 226 than the Supreme Court has got under Art. 32. In fact the right to move the High Court under Art. 226 is a constitutional right and there is no constitutional guarantee attached to it like Art. 32. Therefore, as far as the entertainability of writs under article 226 is concerned the High Court in its discretion may refuse the writ on various grounds as already discussed. But it is not that open to the High Court so as to allow the court to use this discretion without any justification. This discretion has an attached responsibility under the provisions of the constitution. Art.226 has not been provided in isolation but it stands fitted in a wholesome scheme of the constitution. This scheme mandates the court to impart justice in a speedy and effective manner. Thus while exercising the discretion under Art. 226 the court has to see all the facts and circumstances of the case. As the highest judicial body of the state the High Court may always be conscious of the responsibility attached to such open discretion confided in it by the framers of the constitution. Therefore such discretion, irrespective of its open ends, has to be exercised in a most

\textsuperscript{22} Bandhua Mukti Morcha v. Union of India (1984) 3 SCC 161 at page 225
judicious manner. GajendergadkarJ had rightly observed in Makhan Singh’s case (infra) that such discretion had to be judicially exercised. The hon’ble Judge held that under the Scheme of Art. 226(1) it could not be said that citizen has no right to move High Court for invoking jurisdiction under Art. 226(1).

Again Pasayat (acting CJ) observed in this context:

“"The language of Art 226 does not admit of any limitation on the powers of the High Court for exercise of jurisdiction, hereunder, though by various decisions of the Apex court with varying and divergent views it has been held that jurisdiction under Article 226 can be exercised only when body or authority, decision of which is complained was exercising its powers in discharge or public duty and that writ is a public law remedy."23

Thus the discretion of the High Court under Art. 226 is subject to many factors.

Mere breach of contract cannot be remedied in writ. It is because of the fact that when a breach of contract is complained of, it involves normally a disputed question of fact, which may be decided after detailed appreciation of facts. Secondly, the private contract between the parties does not create any fundamental right, which may be remedied, if breached, by way of a writ petition under Art. 226 of the Constitution. If the state or its agents have entered into the field of ordinary contract, the relations between the parties are not governed by the constitutional provisions like article 226, but by the terms of the contract and the obligations of the parties are decided by such terms.. However, if the action complained of was the purported exercise of statutory power, relief could be claimed under Art. 226. Beg. CJ made the following observation in this context,

""If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Art. 226 of the constitution. Such proceedings are summary proceedings reserved for extraordinary cases where the exceptional and what

are described as perhaps not quite accurately, "prerogative" powers of the court are invoked."24

Thus no writ or order can be issued under Art. 226 of the constitution in such cases to compel the authorities to remedy a breach of contract pure and simple. Mere breach of contract cannot be remedied by court in exercise of its powers under Art. 226 of the constitution.

The writ jurisdiction of the High Court cannot be used to give a direction to the legislature to enact a particular law. It is primarily due to the doctrine of separation of powers among the various organs of the Govt. The basic role of judicial review is to ensure the rule of law envisaged in the constitution of India. Any law ultra vires of the constitution is likely to be set aside by the Supreme Court or the High Court in judicial review. But the courts have no corresponding power to direct the legislature to enact a law so desired by the court. It is also due to the fact that the writ jurisdiction basically exists in the realm of law and it cannot conceive a law, which is nowhere in existence. Similarly, the court cannot direct the executive also to implement the policies of the Govt. in the manner prohibited under the law. Every law draws its validity from the constitution and every action draws its strength and validity from the law enacted under the provisions of the constitution, which is 'superior law' or 'paramount law' of the land. This is the crux of the doctrine of rule of law. On the same analogy the Supreme Court and the High Courts are also the creatures of the constitution. When constitution does not allow them the power to get law enacted, as per their directions, it would be ultra-viress of the constitution if they so desire or direct. Of course the courts have got powers to lay down law by means of interpretation or construction of law including that of the constitution. But that is based on interpretation of an already existing law and not an enactment of new law. Bhagwati J observed in this regard,

"It is entirely a matter for the executive branch of the Government to decide whether or not to introduce any particular legislation. Of course, any member of the legislature can also introduce legislation but the Court certainly cannot mandate the executive or any member of the legislature to initiate legislation, howsoever necessary or desirable the Court may consider it to be.

24 Radhakrishana Aggarwal v. State of Bihar, AIR 1977 SC 1496 page 1500
That is not a matter which is within the sphere of the functions and duties allocated to the judiciary under the Constitution. If the executive is not carrying out any duty laid upon it by the Constitution or the law, the Court can certainly require the executive to carry out such duty and this is precisely what the Court does when it entertains public interest litigation."25