Writ of Habeas Corpus

Writ of Mandamus

Srit of Quo-Warranto

Wrdit of Certiorari

Writ of Prohibition

CHAPTER

MJudicial Review of Administrative Actions: Principles and Modes
The Constitution of India assured greater protection of individuals rights and afforded larger freedom to the court to look into executive lapses. The judiciary showed a great promise in its constitutional career in preserving the liberty and freedom of the people. In India the court is an arbiter between the people and the executive. Each citizen of India has inherent right to challenge the constitutionality of any executive enactment passed by any executive authority if his interest is affected by it. By judicial interpretations the fundamental rights, distribution of executive powers and other constitutional restrictions and limitations were provided a new meaning. The fundamental object of judicial review is to infuse life in the dry and abstract postulates of the constitution enabling it to be a living organism so as to satisfy the needs of the time.

Articles 32 and 226 of the Indian Constitution makes provisions for the system of writs in the country. Under clause (2) of Article 32 the Supreme Court is empowered to issue appropriate direction, orders or writs, including
writs in the nature of habeas corpus, mandamus, prohibition quo-warranto and certiorari for the enforcement of any fundamental rights guaranted by Art III of the constitution.

By this article the Supreme Court has been constituted as a protector and guarantor of the fundamental rights and once a citizen has shown that there is infringement of his fundamental right the court cannot refuse to entertain petitions seeking enforcement of fundamental rights.\(^1\) Article 226(1) empowers every High Court, notwithstanding anything in art.32, throughout the territories in relation to which it exercises jurisdiction to issue any person or authority, including appropriate cases any government, within those territories directions, orders or writs including writs in the nature of habeas corpus, mandamus, quo warranto, prohibition and certiorari for the enforcement of Fundamental Rights or for any other purpose.

Article 32 and Article 226 are expressed in broad language. The Supreme Court, nevertheless, ruled that in reviewing administrative actions, the courts would keep to broad and fundamental principles underlying the prerogative writs in the English law without however importing all its technicalities.\(^2\) The result of this approach has been that

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by and large the scope of judicial review in India under arts. 32 and 226 is similar to what it is in England under the prerogative writs. But there are a number of cases where the Supreme Court has deviated from the English approach.¹

Under articles 32 and 226, the courts enjoy a broad discretion in the matter of giving proper relief if warranted by the circumstances or the case before them. The courts may not only issue a writ but also make any order, or give any direction, as it may consider appropriate in the circumstances, to give proper relief to the petitioner.² It can grant declaration or injunction as well if that be the proper relief.³ It would not throw out the petitioner's petition simply on the ground that the proper writ or direction has not been prayed for.⁴ In practice it has become customary not to pray for any particular writ in the petition filed before the court, but merely to make a general request to the court to issue appropriate order, direction or writ. In making the final order, the court may not mention any specific writ but merely quash⁵ or pass

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¹ For example, see Gujrat Steel Tubes V. Mazdoor Sabha, A.I.R. 1980 S.C. 1896.
³ The Kochunni as Ibid. Also see Sudarshan Kumar Kalra V. India, A.I.R. 1974 Del. 119.
⁴ Charanjit Lal V. India, A.I.R. 1951 S.C. 41.
declaratory order\textsuperscript{1} or give any other appropriate order\textsuperscript{2}. There thus exists a good deal of flexibility in the matter of choice of remedy to suit the specific circumstances of each case.

**Scope of Article 32:**

Article 32 provides a guaranteed, quick and summary remedy for the enforcement of Fundamental Rights. Any person complaining of infraction of any of his Fundamental Rights by an administrative action can go straight to the Supreme Court for vindication of his right, without being required to undergo the dilatory proceedings from the lower to a higher court as one has to do in any ordinary litigation. The Supreme Court has thus been constituted as the protector and guarantor of Fundamental Rights.

Article 32 is itself of a Fundamental Rights and cannot therefore, be diluted or whittled down by legislation, and can be invoked over when a law declares a particular administrative action as final. The implications of this positions can be appreciated by reference to one or two cases. Section 14 of the Preventive Detention Act, 1950 prevented a detenue on pain of prosecution, from disloseng to any court the grounds of his detention communicated to him by the detaining authority.

\textsuperscript{1} B.B.L. and T.Merchants' Association v Bombay \textit{A.I.R.}1962 \textit{S.C.} 486.
Though the provisions did not formally deprive the detenu of the right to move the Supreme Court for a writ of habeas corpus under art.32 to challenge his detention, still it rendered the court's power somewhat nugatory and illusory, for, unless the court could look into and examine the grounds on which the detention order was based, it could not decide whether detenu's Fundamental Rights under articles 21 and 22 were infringed or not. Therefore, the court declared §14 as unconstitutional\(^1\).

In Prem Chand v. Excise Commissioner\(^2\), the Supreme Court struck down one of its own rules, requiring furnishing of a security to move a writ petition before the court under art.32, as unconstitutional on the ground that it retarded the assertion or vindication of the Fundamental Rights under art.32. But a rule requiring deposit of security for filing a petition of review of an order made earlier by the court dismissing a petition under art.32 has been upheld as valid as it does not restrict the right to move the court under art.32.\(^3\)

A notable aspect of art.32 is that it can be invoked only when there is an administrative action in conflict with a Fundamental Right of the petitioner. It cannot be invoked if no question of enforcing a Fundamental Right arises. While dealing with a petition under art.32, the court would confine

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itself to the question of infringement of Fundamental Rights and would not go into any other question.\footnote{Khyerban Tea Co. v. I.T.O., A.I.R. 1964 S.C.925.} Article 32 cannot be invoked even if an administrative action is illegal unless petitioner's Fundamental Right is infringed. Thus a petition merely against an illegal collection of income tax is not maintainable under art.32, for the protection against imposition and collection of taxes except by authority of law falls under art.265 which is not a Fundamental Right.\footnote{Ramjilal v. I.T.O., A.I.R.1951 S.C. 97} But when an illegally levied tax infringes a Fundamental Right, then the remedy under art 32 would be available.\footnote{Bombay v. United Motors, A.I.R.1953 S.C.252.} In Tata Iron and Steel Co. v. S.R. Sarkar\footnote{A.I.R. 1961 S.C.65.}, the company paid tax under the Central Sales Tax Act to the State of Bihar. The State of West Bengal also sought to levy the tax under the same Act on the same turnover. In such a fact situation, a petition under art. 32 was entertained by the Supreme Court because the Act in question imposes only a single liability to pay tax on inter-state sales. The company having paid the tax to Bihar (on behalf of the Central Government), the threat by west Bengal to recover sales tax (again on behalf of the Central Government) in respect of the same sales primafacie infringed the Fundamental Right to carry on trade and commence guaranteed by art.19(1)(g).
The question whether a particular administrative action infringes a Fundamental Right or not and, therefore, whether a petition under art.32 to challenge it is maintainable or not, does at times raise complex issues. The classic case on the point is Ujjam Bai v. Uttar Pradesh.1 A petition was filed in the Supreme Court under art.32 on the ground that a sales tax officer by misconstruing a provision in a taxing statute had imposed sales tax on the petitioner and thereby affected his Fundamental Right under art.19(1)(g). The Supreme Court held that since the order of assessment was made by the officer concerned within his jurisdiction, a mere misconstruction of a statutory provision by him would not justify a petition under art.32, even though a Fundamental Right may be involved. The court stated under art.32, it would quash an order of a quasi-judicial body affecting a Fundamental Right if it acts under an ultra vires law or without jurisdiction, or if it wrongly assumes jurisdiction by committing an error on a collateral fact, or if it fails to follow the principles of natural justice, or to observe the mandatory procedural provisions presented in the relevant statute. But a mere error of law committed by a quasi-judicial body cannot be cured under art. 32.2 This ruling has come in for a good deal of criticism as

1. A.I.R. 1962 S.C.1621-
it dilutes the efficacy of art.32, and is rather difficult to justify. Ordinarily, as will be seen later, a 'patent' error of law by a quasi-judicial body can be quashed by a writ of certiorari which the Supreme Court can issue under art.32. It is, therefore, difficult to comprehend as to why the court should refuse to give relief in a case of misconstruction of law when a Fundamental Right is involved. The ruling becomes all the more uncomprehensible when it is remembered that while the Supreme Court would issue a writ under art.32 if a quasi-judicial body does not follow principles of natural justice, it refuses to give relief in the case of misconstruction of law by it. Further, the court probably would have quashed the order if the authority had been administrative and not quasi-judicial. This indulgence towards quasi-judicial bodies can be explained on the basis of the judicial view that an order made by the courts does not infringe Fundamental Rights\(^1\), but the analogy between a court and a quasi-judicial body is misleading for such a body, unlike the court, consists of administrators rather than judges.

Thus the main purpose of Article 32 is to protect the individual against the infringement of his fundamental rights. The threat to fundamental rights may arise from various sources.

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Judicial opinion is clear that the authorities falling under the Government and Parliament of India, Government departmental undertakings and Agencies incorporated by statutes are amenable to the writ jurisdiction of the Supreme Court and are included within the definition of state in Article 12.¹

Agencies falling under the registered statutes e.g. public or private companies, government companies registered societies may be included within the term 'State' and, therefore, are amenable to the writ jurisdiction of the Supreme Court, if such authorities are instrumentalities or agencies of the Government.²

Courts of law are not mentioned as such in Article 12 but they may pose a threat to the Fundamental Rights of the people in exercise of their administrative powers. In Prem Chand Garg v. Excise Commissioner³, the Supreme Court struck down certain rules framed by it as violative of Fundamental Rights.

Some of the Fundamental Rights given under Articles 15(2), 17, 23(1) and 24 can be claimed against private individuals also. The judicial opinion is that these rights though

2. R.D.Shetty v.International Airports Authority(1979) 3SCC 489
belong to private individuals cannot be enforced by private individual. Therefore, as the law stands today, such private individuals and bodies are not amenable to the jurisdiction of the Supreme Court, no matter they violate Fundamental Rights.\(^1\) There seems to be no valid reason for this kind of a judicial exclusion.

The approach of the court in the area of Fundamental Rights must not be whether the authority is 'State' within the meaning of Article 12. The correct approach should be that every authority or person who poses a threat to a Fundamental Right should be amenable to the jurisdiction of the court. Therefore, not the type of agency but the threat to the Fundamental Rights must be the determining factor for the issue of writs under Article 32.

**Writ Jurisdiction of High Court under Article 226:**

The writ jurisdiction conferred on the High Courts by art.226 can be invoked to enforce not only a Fundamental Right but a Non-Fundamental Right as well. The jurisdiction conferred on the High Courts under art.226 is broader in range than that conferred on the Supreme Court under art.32, for while Supreme Court acts only when there is an infraction of a

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1. Writ of Habeas corpus being the exception.
Fundamental Right, a High Court may act when a Fundamental Right or any other legal right is violated. For example, when a tax levied without authority of law infringes a Fundamental Right, action against it can be taken both under art.32 as well as under art.226; but when it does not infringe a Fundamental Right, only art.226 can be taken recourse to.\(^\text{1}\) Thus the High Courts have a wider power to issue writs against 'any person or authority' for the enforcement of Fundamental Rights and any other legal right. As regards the 'person and authority' against whom such writs can be issued, the law seems to be in a thicket of inconsistencies. There is no controversy about the writs of habeas corpus and quo warranto which can be issued against private individuals and public office respectively. Therefore, the discussion will mainly concentrate on writs of certiorari, prohibition and mandamus.

It is gratifying to note that the area for the operation of the writs has been extended, and rightly so, to cover various administrative agencies exercising multifarious functions.

There is no dispute that all constitutional and administrative authorities are amenable to the jurisdiction of the courts. Therefore a writ can be issued against public acts

of the President of India, Governors, Union and State Governments, ministers, government officers and departments, and other bodies given in the Constitution i.e. Union Public Service Commission, Election Tribunal, Finance Commission, Water Dispute Authority and Advocate General of India.\(^1\) In Election Commission of India v. Venkata Rao\(^2\), the Madras High Court had issued a writ against Election Commission having it permanently located at New Delhi. The Court held that the Madras High Court had no power to issue a writ against Election Commission which is outside its jurisdiction. The mere fact that the effect of the order of a person or authority are produced within the territory of the High Court if the cause of action arises within its jurisdiction is not sufficient to insist the High Court with jurisdiction under Art.226 to issue a writ.\(^3\) The Punjab High Court can only issue a writ to central authorities which are located in Delhi. As a result of the Supreme Court decision relief against the Central Government could only be sought in Delhi.

The Law Commission expressed the view that these limitation had reduced the utility of Art.226 and, in fact, they had defeated the very purpose of this Article. Commission,

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therefore, recommended the removal of these limitations on a person seeking relief under Art.226.\textsuperscript{1} Accordingly, the Constitution was amended by the Constitution(15th Amendment) Act, 1963. Article 226 now permits High Court within whose jurisdiction the cause of action in whole or in part arises to issue directions, orders or writs to any Government or authority notwithstanding that the authority or the Government is located in Delhi if the cause of action in whole or in part arises in its jurisdiction.

The law relating to the amenability of registered agencies i.e., companies registered under the Indian Companies Act and Societies registered under the Societies Registration Act, is still in a developing state and has not reached the state of maturity. The Government companies, no matter wholly controlled by the government, are not considered as public authorities amenable to the writ jurisdiction of the High Court.\textsuperscript{2} The law seems to rest on the ground that the remedies available under the Companies Act, labour laws and the ordinary law of the land are sufficient to meet the ends of justice.

However, some High Courts have taken the view that not only the government companies but private companies also are

\footnotesize{\textsuperscript{1} Law Commission Report XIV, p.66.  
\textsuperscript{2} Praga Tool Corpn. V.C.A. Immanual,(1969) ISCC 585.}
amenable to writ jurisdiction because their bye-laws have the force of law. Standing orders made by the companies under the Industrial Employment (standing orders) Act, 1946 were considered as having the force of law. The Kerala High Court also issue a writ against the Cashew Corporation of India, a government company, on the ground that it was performing a statutory function, under the Imports and Exports Control Act, 1947 and Import Control Order, 1955 of controlling import and export of cashewnuts. Similarly, the various High Courts have issued writs against societies registered under the Societies Registration Act on the ground that their bye-laws have statutory force. However, the view of the Supreme Court in Co-operative Central Bank Ltd. v. Addl. Industrial Tribunal does not favour this approach.

In a move recent decision of the Supreme Court in R.D. Shetty v. International Airports Authority, the court has rightly extended its reach in matters of issuing writs by

5. (1979) 3 SCC 489.
liberalizing the test which brings an administrative authority within the gravitational orbit of the term 'state' in Article 12 of the Constitution. The core question in writ jurisdiction in India has always been whether an administrative authority is included in the category of 'other authorities' as contemplated by Article 12 within the definition of the term 'state'. The Supreme Court in Son Prakash Rekhi v. Union of India¹, held that the Bharat Petroleum Corporation a government company registered under the Indian Companies Act, 1956, is 'state' within the meaning of Article 12 of the Constitution. By the Burmah Shell (Acquisition of Undertaking in India) Act, 1976, the government had acquired the undertakings in India of the Burmah Shell Oil Storage and Distribution Company and handed them over to Bharat Petroleum Corporation Ltd., a government company formed for this purpose. A writ petition was filed by an employee of the Burmah Shell Company, who had retired and was entitled to get pension from the Bharat Petroleum Corporation for the restoration of cut in his pension. A preliminary objection was taken against the writ that no writ could be against Bharat Petroleum Ltd. since it being a company registered under the Indian Companies Act, was not 'state' within the meaning of Article 12 of the Constitution. Overruling the objection the Supreme Court held that the time test for classifying a body as 'State' within the meaning of Article

12 is not whether it is created by a statute or under a statute but whether besides discharging the functions or doing business as the proxy of the state, there must be an element of ability to affect legal relations by virtue of power vested in it by the law.

**Discretionary Remedy:**

The remedy provided for in Article 226 is a discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere.¹ This remedy cannot be claimed as a matter of right. The High Court must exercise its discretion on judicial consideration and on well-established principles unless the High Court is satisfied that the normal statutory remedy is likely to be too dilatory or difficult to give reasonable, quick relief, it should be loath to act under Art. 226. The High Court should be careful to be extremely circumspect in granting these reliefs especially during the pendency of criminal investigations. The investigation of a criminal case is a very sensitive phase where the investigating authority has to collect evidence from all odd corners and anything that is likely to thwart its cause may inhibit the interests of...

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justice. But the rule that it may refuse to grant any writ where alternative remedy is available is only a rule of direction and not a rule of law\(^2\), and instances are numerous where a writ had been issued in spite of the fact that the aggrieved party had other adequate legal remedy.\(^3\)

The existence of an alternate adequate remedy is, however, no bar to the exercise of writ jurisdiction where the relief is involved in case of infringement of fundamental rights\(^4\), or where there is complete lack of jurisdiction\(^5\) or where the order has been passed in violation of natural justice by the subordinate court.\(^6\) Existence of alternative remedy is also no ground to refuse to issue writ where the action is being taken under any invalid law or arbitrarily without sanction of a law.\(^7\)

In V. Vellaswamy v. I.G. of Police, Madras\(^8\), the petitioner challenged the validity of his compulsory retirement

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The High Court dismissed his writ-petition on the ground that an alternative remedy by way of review petition against the compulsory retirement order was available to him under R.15-A of Tamil Nadu Police Subordinate Service Discipline and Appeal Rules, 1980. On the facts the Supreme Court found that the review petition was not an alternative efficacious remedy and therefore held that the High Court was wrong in dismissing his petition on the ground that an alternative remedy was available.

The High Court will not go into the disputed question of fact in exercise of its writ jurisdiction.\(^1\) It has been held that the High Court should not dispose of in summary manner important question of law raised in a petition under Article 226. The Supreme Court directed the High Court to decide the case on merits.\(^2\)

Because of its broad ambit, Article 226 serves as a big reservoir of judicial power to control administrative action and hundreds of writ petitions are moved in the High Courts every year challenging this or that action of the administration. Being a constitutional provision, the ambit of art.226 cannot be curtailed or whittled down by legislation, and even

if a statute were to declare an administrative action as final, art. 226 could still be invoked to challenge the same.¹ This is an aspect of some significance. For while in the modern administrative age, the legislature is rather easily persuaded to make the powers of the administration immune from being questioned in the courts, article 226 (and art. 32 as well) would still provide a means to restore to courts against any action of the administration. From this point of view, it may be worthwhile to point out the judicial review stands on a much firmer ground in India than Britain, for while in Indian the constitutional provisions guaranteeing judicial review are immune from any legislative action, in Britain it is not so and the jurisdiction of the courts to issue writs can always be regulated or entailed by legislation.

Under article 226, the jurisdiction of the High Court to issue writs etc., extends to the state over which it has jurisdiction, and also to territories outside that state, if the government, authority or person is within those territories and if the cause of action in relation to the government etc., wholly or in part, arises within the State. For exercising such outside jurisdiction, it is not necessary that the whole of the cause of action should arise within the

state, it is sufficient if only a part of the cause of action has arisen within the state. It depends upon the facts of each case whether part of the cause of action has arisen within the state or not.¹

Alternative Remedy:

The alternative remedy is that the Supreme Court and High Courts cannot refuse relief under Articles 32 and 226 on the ground of alternative remedy if the person complains of violation of his Fundamental Rights. But if the person invokes the jurisdiction of the High Court for any other purpose, in exercise of its discretion the High Court may refuse relief. The law was laid down with sufficient clarity by the Supreme Court in A.V. Venkateswaran V.R.S. Wadhwani.²

Where no Fundamental Right is involved, it has been ruled that, normally speaking, a High Court would not exercise its jurisdiction under art.226 when an alternate, adequate and efficacious legal remedy is available and the petitioner has not availed of the same before coming to the High Court.³

Art. 226 is silent on this point; it does not say in so many words anything about this matter, but the courts have themselves evolved this rule as a kind of self-imposed restriction on their writ jurisdiction under article 226. The rule has been justified on the ground that persons should not be encouraged to circumvent the provisions made by a statute providing for a mechanism and procedure to challenge administrative action taken thereunder. The courts have also stressed the point that the remedy under art. 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 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 Tilaghu Paper Mills Co. Ltd. v. Orissa, it was held that the petitioners were not permitted to approach the High Court, without exhaustion of the alternative remedy, to get redress for an alleged illegal order of the sales tax authority. Under the Act, there is a hierarchy of authorities before which the petitioners can get redress against the wrongful acts complained of.

But this not an absolute rule and some flexibility is practised by the courts in this matter depending upon the circumstances of the case in which the writ jurisdiction is invoked. The High Courts emphasize repeatedly that existence of an alternative legal remedy does not affect their writ jurisdiction as such, it is only a factor to be taken into consideration by them in the exercise of their discretion. The rule of exhaustion of remedy before invoking jurisdiction under article 226 has been characterised as a rule of policy, convenience and discretion rather than a rule of law. Existence of an alternative remedy is not regarded per se a bar to issuing a writ, and the court is not obligated, as a rigid norm, to always relegate the petitioner to the alternative remedy. This is more a matter of self-imposed restriction by the courts on themselves. The courts recognise that there could be circumstances justifying the issue of a writ without exhaustion of the alternative remedy. For example, if the petitioner has lost his remedy for no fault of his own, the High Court could take cognisance of the matter under article 226, but would not do so when he has lost his remedy through his own fault. If the alternative remedy is onerous and burdensome, then it could not be regarded as adequate and the High Court could take cognisance of the matter under article 226. For example, in tax

assessment proceedings, where an appeal from the assessing officer could be taken to a higher authority only after depositing the tax assessed, the assessee could approach the High Court under article 226 without exhausting the statutory remedy as it was onerous and not adequate\(^1\). Under the Sea Customs Act, 1878, an appeal from an order of the collector imposing penalty could be taken to the higher authority only after deposit of the amount of penalty imposed. This remedy is thus not adequate and, therefore, the High Court could exercise its writ jurisdiction\(^2\).

Normally when the petitioner has availed of the alternate legal remedy and the matter is pending before the authority, the court will not entertain a writ petition. But if a question arises in the course of those proceedings which the authority has no jurisdiction to decide, e.g. vires of the statute, the alternative remedy will not be a bar to the writ petition\(^3\). In such a case the alternative remedy is not an affective and efficacious remedy.

The High Court will not go into the disputed question of fact in exercise of its writ-jurisdiction\(^4\). The power

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1. Ibid
conferred on the High Court by Art. 226 cannot be taken away or abridged by any law except by an amendment of the Constitution\(^1\).

The words writs, orders or directions in article 32 as well as 226 is in the process of evolution. The judicial opinion has been undergoing some shifts. The over-all picture is that the judiciary has expanded over time the range of persons or bodies to whom writs can be issued. The reason underlying this judicial approach is that centres of power should be restrained from arbitrary application of power against individuals. The eternal principle of modern democratic government is: "The governing power wherever located must be subject to the fundamental constitutional limitations".\(^2\)

Writs are public law remedies and are generally designed to redress grievances against public officials or bodies. In the modern welfare state, the administration has assumed a sprawling and varied character. The state functions not only through the traditional government departments, officials, boards, administrative bodies and local governmental bodies but also through diversified various other agencies called public corporations, government companies, commissions, etc., which discharge various types of functions. The state at times utilises such structures as companies registered under the

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Companies Act, or Co-operative Societies registered under the Co-operative Societies Act and some of these bodies may be sponsored by the government itself and some may even be set up by private persons. The modern administration has assumed such a multifarious character that the question against whom a writ may be issued bristles with difficulties. This state of affairs is recognised by the Indian Constitution in article 12, which falls in Part III of the Constitution. This part contains Fundamental Rights of the people. Since writs can be issued for the enforcement of Fundamental Rights under articles 32 and 226, it follows that they can be issued for that purpose to all the bodies covered by article 12. As regards writs "for any other purpose" under article 226, they can certainly be issued to the various bodies covered by art.12, but it is a moot point whether this part of the jurisdiction of a High Court covers a broader area than that covered by article 12.

The writs of habeas corpus, mandamus, quo-warrants, Certiorari and Prohibition have been borrowed in India from England where they have had a long and chequered history of development and, consequently, have gathered a number of technicalities. The Supreme Court and the High Court have power to issue writs in the nature of habeas corpus, mandamus etc., under articles 32 and 226 respectively. The words "in the

nature of" in the Indian Constitutional provisions are significant as they indicate that the courts are not bound to follow all the technicalities of the English law surrounding these writs, or the changes of judicial opinion there from case to case and time to time. What the Indian courts have to do, therefore, is to keep to the broad and fundamental principles underlying these writs in the English law; the courts do not have to feel completely circumscribed by those principles. Although the Supreme Court has itself emphasised this front, in practice, however, the attitude of the Indian courts is by and large conditioned by the English approach and it is not often that the courts show a tendency to depart from the technicalities of the English law. The courts have generally been prone to follow the principles developed in English with some deviations here and there, except that in recent years some bold departures have been made from the English position. While the administration expands and perfects new techniques to interfere with individual freedom under the impulse of the concept of a socialist society, the tools of the disposal of courts to control the same remain somewhat antiquated. Quite a few aspects of administrative functioning fall outside judicial scrutiny. The result is the anomalous position that an individual aggrieved by administrative action may not always get relief through court action. This point will become clear after the discussion on the nature of the writs and the grounds on which they can be issued.
Writ of Habeas Corpus:

Habeas Corpus is a Latin term, which may be rendered into English in some such form as 'you must have the body'. This writ is used primarily to secure the release of a person who has been detained unlawfully or without any legal justification. The great value of the writ is that it enables immediate determination of the right of a person as to his freedom. The writ is issued in form of an order calling upon a person by whom another person is detained to bring that person before the court and to let the court know by what authority he has detained that person. If the cause shown discloses that there is no legal justification for detention the court will order immediate release of the detained person. Thus the main object of the writ is to give quick and immediate remedy to a person who is unlawfully detained by the person whether in prison or private custody.

The writ of habeas corpus can be traced thirteenth century, the words 'habeas corpus' were a familiar formula in the language of civil procedure and it is likely that the phrase first appeared much earlier. The words simply represented a command, issued as a means or interlocutory process to have the defendant to an action brought physically before the court. The idea of producing the body with the cause of his

detention was not present. In fact, there usually had been no detention at all and the purpose of the process was to order an officer to bring in the defendant, and not at all to subject the cause of a detention to the courts' scrutiny. It has, even, been said that the early use of habeas corpus was to put people in goal rather than to get them out, but this seems to have been a mistaken impression. Habeas corpus was used not to arrest and imprison, but to ensure the physical presence of a person in court on a certain day. There is some indication that 'habeas corpus' was also used to signify a command to the Sheriff to bring a person accused of crime before the court. Again, this seems to have been merely one way to have the party physically brought into face the charges against him where other methods had failed. The words 'habeas corpus' at this early stage were not connected with the idea of liberty, and the process involved an element of the concept of due process of law only in so far as it mirrored the refusal of the courts to decide a matter without having the defendant present.

Many of the purposes for which the writ has been utilized in the past are now matters of historical importance. Aliens who had been brought to England as slaves had attained freedom by means of habeas corpus\(^2\). In Hottentot Venus\(^3\), a

3. (1810) 13 East.195
rule for a writ of habeas corpus was granted upon the allegation that an ignorant and helpless foreigner has been brought to this country and exhibited against her consent by those who held her in their custody. The writ was at one time also used as a means of securing freedom in cases of illegal imprisonment though within certain limits legal as a means of recruiting in the case of the navy and based on the royal prerogative, is no longer resorted to. During the first world war attempts were made to use the writ as a means of escaping from the compulsory military service under the provisions of the Military Service Acts\(^1\).

In modern times the writ is most frequently invoked to test the validity of detention in public or private custody. A person who is in custody under a warrant or order of commitment may test the validity of the warrant or order under which he is detained by means of the writ of habeas corpus irrespective of the fact whether he is imprisoned under the sentence of a naval, military or ecclesiastical court or interned under the authority of some emergency state. The High Court is competent to issue a writ of habeas corpus for the production of a person illegally or improperly detained in public custody under executive orders\(^2\).

\(^{1}\) R.V. Mornhill Camp (1917) K.B. 176.
In India, detention may be unlawful if, *inter alia*, it is not in accordance with law, or the procedure established by law has not been strictly followed in detaining a person, or there is no valid authority of law to detain a person, or the law is invalid because it infringes a Fundamental Right, or the legislature in enacting the law exceeds its limits. Under article 22, a person arrested is required to be produced before a magistrate within 24 hours of his arrest, and failure to do so would entitled the arrested person to be released.

However, recent developments of law indicate that in a writ of habeas corpus the production of the body of the person alleged to be unlawfully detained is not essential. In Kanu Sanjal v. District Magistrate, Darjeeling, the Supreme Court however, held that while dealing with the application of writ of habeas corpus production of the body of the person alleged to be unlawfully detained was not essential. In that case the top-ranking Naxalite leader Kanu Sanyal was arrested in 1971 and was detained without trial in the Visakhapatnam Jail. He moved the Supreme Court for a writ under Art.32 of the Constitution challenging the legality of his detention and praying

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for the Courts' order for his production before the court. The
court issued the rule *misi* but not the production of the
detenu. Counsel appearing for the detenu, contended the
production of the body of person alleged to be illegally
detained was an essential feature of writ of habeas corpus
under Art.32 of the Constitution and that the court can dispose
of the petition only after the petitioner was produced in
person before it. Bhagwati, J., held that in writ of habeas
corpus under Art.32 the production of body of the person
detained before the court was not necessary for hearing and
disposing of the writ-petition by the court. The production of
body of a person illegally detained is not an essential feature
of the writ of habeas corpus. "Why should we hold ourselves in
fetters by a practice which originated in England about 300
years ago on account of certain historical circumstances which
have ceased to be valid even in that country and which have
certainly no relevance in ours", his Lordship said.

Though the traditional function of the writ of habeas
corpus has been to get the release of a person unlawfully
detained or arrested, the Supreme Court has widened its scope
by giving relief through the writ against inhuman cruel treat-
ment meted out to prisoners in jail. In Sunil Batra II the

court stated that;

the dynamic role of judicial remedies ... imparts to the habeas corpus writ a versatile vitality and operational utility that makes the heating presence of the law line up to its reputation as bastion of liberty even within the secrecy of the hidden cell".

The court has thus permitted the use of the writ for protecting the various personal liberties to which the arrested persons or prisoners are entitled to under the law and the Constitution. The general rule is that an application can be made by a person who is illegally detained. But in certain cases, an application for habeas corpus can be made by any person on behalf of the prisoner, i.e. a friend or a relation. In an application for a writ of habeas corpus the Supreme Court will not follow strict rules of pleading nor place undue emphasis as to question as to on whom the burden of proof lies.

Even a postcard written by a detenue from jail would be sufficient to activise the court into examining the legality of detention. The Supreme Court has shown great anxiety for personal liberty and refused to throw out a petition merely on the ground that it does not disclose a prima facie case. This practice marks a departure from that obtaining in England where

observance of the strict rules of pleading is insisted upon in a writ of habeas corpus. But, in view of peculiar socio-economic conditions prevailing in this country the court has adopted liberal approach where large masses of people are poor, illiterate and ignorant and the access to the courts is not easy on account of lack of financial resources it would be most unreasonable to insist that the petitioner should set out clearly and specifically the grounds on which he challenges the order of detention. The burden of proof to justify detention has always been placed on the detaining authority.¹

Three views have been expressed as to date with reference to which the legality of detention of a person may be examined on a habeas corpus petition. In Gopalan v. Government of India², the Supreme Court ruled that the earliest date with reference to which the legality of detention may be examined is the date on which the application for the same is made to the court. In a few earlier cases,³ the view was taken that the legality was to be determined at the time of the return and not with reference to the institution of the proceedings. In another case, the Supreme Court has stated that the legality of detention is to be considered as on the date of

hearing\(^1\). In Kanu Sanyal v. Distt. Magistrare\(^2\)(II), the Supreme Court has taken note of these three views and pointed out that the second view is more in accordance with the law and practice in England and largely accepted in India. The third view also has some relevance for if the detention at the hearing is legal, the court cannot order release of the person detained by issuing habeas corpus. In Kanu Sanyal, the court did not express any definitive view as to which of the three views is correct. In any case, the court has ruled that the earliest date with reference to which the legality of detention could be examined is the date of filing of the petition for habeas corpus and the court is not concerned with a date prior to that. In the instant case, the court refused to go into the validity of detention before the date of petition.

Writ of habeas corpus provides security against administrative and private lawlessness but not against judicial 'foolishness'. Therefore if a person has been imprisoned under the order of conviction passed by a court, writ would not lie. The normal procedure in such case is appeal. In exercise of its discretion, the court may refuse the petition if there is special alternative remedy available. But it is not a rule of the limitation of jurisdiction. The court may still grant relief in appropriate cases.\(^3\)

The writ of habeas corpus will lie if the power of detention vested in an authority was exercised *mala fide* and is made in collateral or ulterior purposes. In habeas corpus writ proceeding not only the fact of detention but the constitutionality of the law can also be challenged. In A.K. Gopalan v. State of Madras¹, the court examined the constitutionality of the Preventive Detention Act. The legislature which deprives a person of his personal liberty by law must be competent to make that law. If the law is unlawful the detention will be unlawful. An appeal lies against an order of the High Court granting or rejecting the application for issue of the habeas corpus under Arts. 132, 134 or 136.

¹ A.I.R. 1950 S.C. 27.
The Writ of Mandamus:

The word "mandamus" means "the order". The writ of mandamus is thus an order by a superior court commanding a person or a public authority (including the Government and public corporation) to do or forbear to do something in the nature of public duty or in certain cases of a statutory duty.

For instance, a licensing officer is under a duty to issue a licence to an applicant who fulfils all the conditions laid down for the issue of such licence. But despite the fulfilment of such conditions if the officer or the authority concerned refuses or fails to issue the licence the aggrieved person has a right to seek the remedy through a writ of mandamus. Mandamus is thus a command issued by a court to an authority directing it to perform a public duty imposed by law. The writ can be issued when the government denies to itself a jurisdiction which it undoubtedly has under the law\(^1\), or where an authority vested with a power improperly refuses to exercise it\(^2\). The function of mandamus is to keep the

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public authorities within the limits of their jurisdiction while exercising public functions. Mandamus can be issued to any kind of authority in respect of any type of function—administrative, legislative, quasi-judicial, judicial. Thus, when the telephone of the applicant was wrongfully disconnected in spite of his paying his dues regularly, the High Court directed the telephone authorities to restore the connection within a week.

In India, mandamus can be issued to undo what has already been done in contravention of a statute, or to enforce a duty to abstain from acting unlawfully. For example, Mandamus can be issued to restrain the government from superseding a reference made by it earlier of an industrial dispute for adjudication to a labour tribunal because under the law the government has no authority to do so.

It is considered as a residuary remedy of the public law. It is a general remedy whenever justice has been denied to any person. English writers trace the development of the writ from the Norman conquest, however it was only in the early part of the eighteenth century that the writ came to be frequently used in the public law to compel the performance of the public duties.

Conditions for the grant of Mandamus:

(i) There must be public or private duty:

Untill recently the law was that mandamus would be only to enforce a duty which is public in nature. Therefore a duty private in nature and arising out of a contract was not enforceable through this writ. It was on this basis that in I.T. Commr v. State of Madras\(^1\), the court refused to issue mandamus where the petitioners wanted the government to fulfil its obligation arising out of a contract. However, recently in Gujrat State Financial Corporation v. Lotus Hotel\(^2\), the Supreme Court issued writ of mandamus for the specific performance of a contract to advance money. In this case the Gujrat Financial Corporation a government instrumentality, had sanctioned a loan of Rs.30 lakhs to Lotus Hotel for the construction but later on refuse to pay the amount.

\(^1\) A.I.R. 1954 Mad.54.
A public duty is one which is created either by a statute, the constitution or by some rule of common law. The public duty enforceable through mandamus must also be an absolute duty. Absolute is one which is mandatory and not discretionary. Therefore in Manjula Manjari v. Director of Public Instruction\(^1\), the court refused to issue mandamus against the Director of Public Instruction compelling him to include the petitioner's textbook in the list of approved books because it was a matter in the complete direction of the authority. Mandamus would not lie where the duty is ministerial in nature. A ministerial duty is one where the authority has to act on the instructions of his superior\(^2\). In the same manner mandamus can not be issued to enforce administrative directions which do not have the force of law, hence it is discretionary with the authority to accept it or to reject it\(^3\). But where the administrative instructions are binding, mandamus would lie to enforce it\(^4\). Mandamus would also lie to compel the authority to refund the amount of fee it has collected under law which has been declared ultra vires by the competent court.\(^5\)

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1. A.I.R. 1952 Ori 344.
(ii) **There must be a specific demand and refusal:**

Before mandamus can be granted there must be a specific demand for the fulfilment of duty and there must be specific refusal by the authority. Therefore in Naubat Rai v. Union of India¹, the court refused mandamus because the petitioner who was illegally dismissed from the military form never applied to the authority for reinstatement.

To maintain a petition for mandamus, the petitioner must show that he has a right to compel the government to act in a particular manner. In the absence of any such right, mandamus cannot be granted. The existence of such a right is the sine qua non for the issuance of the writ². When the governing body of a college appointed a new principal after interviewing the candidates and considering their applications, mandamus would not be issued on the petition of a unsuccessful candidate as he has no legal right to be appointed³.

Formerly, the rule was that only a person having a specific legal right to the performance of the duty by the concerned public authority had a right to seek mandamus. This meant a very strict legal standing rule and laid emphasis on individual right rather than public interest. The standing rule has now been very much relaxed and emphasis has come to be

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1. A.I.R. 1953 Puni 137.
shifted from vindication of "individual right" to "public interest". The principal has come to be that public authorities should be made "to perform their duties, as a matter of public interest, at the instance of any person genuinely interested; subject always to the discretion of the count.

For the issue of mandamus against an administrative authority the, affected individual must demand justice and only on refusal he has a right to approach the court.¹

Thus, a party seeking mandamus must show that he demand justice from the authority concerned by performing his duty and the demand was refused. In S.I. syndicate, the court refused to grant mandamus as there was no such demand or refusal where a civil servant approached the court for mandamus against wrongful denial of promotion, he was denied the relief because of his failure to make representation to the government against injustice.² The demand for justice is not a matter of form but a matter of substance, and it is necessary that a "proper and sufficient demand has to be made".³ The demand must be made to the proper authority and not to an authority which is not in a position to perform its duty in the manner demanded. It is suggested that the court should not fossilize this rule into

something rigid and inflexible but keep it as flexible. Demand may also not be necessary "where it is obvious that the respondent would not comply with it and therefore it would be but idle formality."^1

However, express demand and refusal is not necessary. Demand and refusal can be inferred from the circumstances also. Therefore, in Venugopalan v. Commr. Vijayawada Municipality^2, the court inferred demand and refusal from the situation in which the petitioner filed a suit for injunction restraining the municipality from holding elections and the suit was contested by the municipality.

(iii) **There must be a clear right to enforce the duty:**

Mandamus will not be issued unless there is, in the applicant, a right to compel the performance of some duty cast on the authority. Therefore, in S.P. Manocha v. State of M.P.^3 the court refused to issue mandamus to the college to about the petitioner because the petitioner could not establish a clear right to admission in the college. The right to enforce a duty must subsist till the date of the petition. If the right has been lawfully terminated before filing the petition, mandamus cannot be issued^4.

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Mandamus is employed to enforce a duty the performance of which is imperative and not optional or discretionary with the authority concerned\(^1\). Mandamus is used to enforce the performance of public duties by public authorities. Mandamus is not issued when government is under no duty under the law\(^2\).

A state government made a rule taking power to grant dearness allowance to its employees. The rule neither conferred any right on the government employees to get the dearness allowance nor imposed any duty on the government to grant the same. The government had merely taken power to grant the allowance in its discretion. Accordingly, mandamus could not be issued directing the government to grant the allowance to its employees\(^3\).

Mandamus cannot be issued directing the state government to appoint a commission to inquire into changes in climatic cycle, floods in the state etc. The reason being that under the commission of Inquiry Act, the power of the government to appoint a commission is discretionary except when the legislative passes a resolution to appoint an enquiry commission\(^4\).

Mandamus can be issued on all those courts on which certiorari and prohibition can be issued. Therefore, mandamus


can be issued for lack of jurisdiction, excess of jurisdiction, abuse of jurisdiction, for violation of the principles of natural justice and error of law apparent on the face of record. Mandamus may be issued not only to compel the authority to do something but also to restrain it from doing something. It provides a general remedy in administrative law.

Like any other extraordinary remedy, the grant of mandamus is discretionary. The court may refuse it if there is unreasonable delay in filing the petition, or if there is adequate alternative remedy, or if it is premature, or if its issuance would be infructuous and futile. Mandamus would also not be against the President or Governor of any state for the exercise and performance of powers and duties of his office.\(^1\) In hearing the petition for mandamus, the court does not sit as a court of appeal. The court will not examine the correctness or otherwise of the decision on merits.\(^2\) It cannot substitute its own wisdom for the discretion vested in the authority unless the exercise of discretion is illegal.\(^3\) This is true for other writs also.

There being no Fundamental Rights in England, there cannot be any question of the writ of mandamus being used for the enforcement of Fundamental Rights. It is used for the enforcement of the ordinary legal rights relating to public

1. Article 361.
3. Ibid.
matters. In India, the writ is available under Article 226 not only for the purposes for which it is available in England but also for the enforcement of Fundamental Rights. It is obvious, therefore, that in the matter of enforcement of Fundamental Rights, Indian Courts may have to evolve principles which are different from those which govern the issue of the writ in England. For instance, the remedy by means of the writ being guaranted by the Constitution for the enforcement of the Fundamental Rights, it becomes the duty of the court to issue the writ of mandamus where a Fundamental Right has been infringed, in case where the writ might not be available in England.
The Writ of Quo Warranto

The term quo warranto means what is your authority. The writ quo warranto is used to judicially control executive actions in the matter of making appointments to public offices under relevant statutory provisions. The writ is also used to protect a citizen from the holder of a public office to which he has no right. The writ calls upon the holder of a public office to show to the court under what authority he is holding the office in question. If he is not entitled to the office, the court may restrain him from acting in the office and may also declare the office to be vacant\(^1\). The writ lies in respect of a public office of a substantive character and not a private office such as membership of a school managing committee\(^2\). An appointment to the office of a public prosecutor can be quashed through quo warranto if in contravention of relevant statutory rules as it is a substantive public office involving duties of public nature of vital interest to public\(^3\). The Andhra Pradesh High Court quashed the appointment of a government pleader as the procedure prescribed in

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the relevant rules for this purpose had not been followed\textsuperscript{1}. Nomination by the Governor of members to the state legislative council, appointment of a Chief Minister in a state, nominations or elections to municipal bodies, \textit{inter alia} have been challenged by way of petitions for \textit{quo warranto}\textsuperscript{2}. \textit{Quo warranto} will not be issued if there is an alternative legal remedy provided by the statute. Thus it will not be a proper remedy to challenge the election of a Chief Minister to the House, as the statutes provides for the remedy of an election petition. The office of the Principal of a private college has been held to be not a public office\textsuperscript{3}.

It is a method of judicial control in the sense that the proceedings practically review the actions of the administrative authority which appointed the person. It tunes the administration by removing inefficient and unqualified perso-

\begin{itemize}
\item[1.] K. Bheema Raju v. Gcvt. of A.P., \textit{A.I.R.} 1981 A.P.
\end{itemize}
nnel and impostors from public offices. Thus the writ of quo warranto gives judiciary the weapon to control the executive, the legislative, statutory and non-statutory bodies in matters of appointment in the public offices. A.N. Ray, J. (who was fourth in order of seniority) was appointed as Chief Justice of India superseding his three senior colleagues who immediately resigned from the Supreme Court. A petition for the writ of quo warranto was moved in the Delhi High Court challenging the appointment of Ray, J., as the Chief Justice but the court dismissed the petition¹. In the first place, the court stated that quo warranto was a writ of technical nature and it is discretionary for the court to grant it or refuse it according to the facts and circumstances of the case². Secondly, the court argued that the writ would not be issued if it is futile to do so, or where a mere irregularity in the appointment can be cured. Thus, even if it were assumed that the appointment of the Chief Justice should be on the basis of the rule of seniority, Ray J., could immediately be reappointed, if quo-warranto were issued, for he was by then the senior-most judge of the court. It follows from this that if a holder of a public office is not qualified to hold the office initially but subsequently acquires the necessary qualifications during the pendency of the writ petition, the writ quo warranto will not be

². In Jogendra Nath v. Assam A.I.R.1982 Gau.25, the court rejected a quo warranto petition challenging the appointment of the Chief Minister saying that this question was best left to the Assembly as to who should have been appointed to this office by the Governor.
issued. Thirdly, the court ruled that malafides of the appointing authority is not relevant to the question of issuing quo-warranto as the writ is issued against the usurper of the office and not against the appointing authority. quo warranto would not be issued even if the appointment was made for a collateral purpose if the appointment did not violate any mandatory rule.

An appointment to a public office cannot be challenged in a collateral proceeding. However, in Haryana v. Haryana Co-op. Transport, the Supreme Court held that a person can challenge an award of a labour court under article 226 by challenging the appointment of the presiding officer thereof on the ground that he was not qualified under the law to hold the office. The court rules that the appointment was not being challenged collaterally in proceedings taken to challenge the award, but directly in substantive proceedings. This is artificial logic. The petitioner had not asked specifically in so many words that quo warranto be issued, but the court ignored the defect by saying that there was no magic in the use of a formula. In this case the court not only quashed the appointment of the presiding officer but also set aside the award.

Originally, quo warranto was a high prerogative writ. The essence of the procedure was calling a subject to account

for an invasion or unsurpation of the royal prerogative or the right of franchise or liberty of the Crown. At that period of time it was the king's weapon, and the subjects were not allowed to use it. The statute of 710 extended this remedy to the public.

**Conditions for the issue of Quo warranto:**

A writ of Quo warranto will issue in respect of an office only if the office is public\(^1\). It will not lie in respect of office of a private charitable institution or of a private association. Thus, the managing Committee of a private school even though a small section of the public, viz. the students and guardians are interested in the school, is not an office of a public nature for the purpose of Quo-Warranto\(^2\). The test of a public office is whether the duties of the office are public in nature, in which the public are interested whether it is or is not remunerated. But payment of remuneration out of public funds will be a specific test\(^3\). In Anand Behari v. Ram Sahai\(^4\), the court held that a public office is one which is created by the constitution or a statute and the duties of which must be such in which public is interested. In this case it was held that the office of speaker of Legislative Assembly is a public office.

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A substantive office is one which is permanent in character and is not terminable at will. In R.V. Speyer\(^1\), the word 'substantive' was interpreted to mean an 'office independent of title'. Therefore, quo warranto would be granted even when the office is held at the pleasure of the state provided it is permanent in character. In other words, the official must be an independent official and not merely one discharging the functions of a deputy or servant at the pleasure of another officer.

Mere declaration that a person is elected to an office or mere appointment to a particular office is not sufficient for the issue of quo warranto unless such person actually accepts such office\(^2\). There must be a clear violation of law in the appointment of a person to the public office. If there is a mere irregularity, quo warranto will not lie. In State of Assam v. Ranga Muhammad\(^3\), the court found the transfer and posting of two district judges contrary to law, but did not issue quo warranto as it was a case of mere irregularity that did not make the occupation of office wrongful.

In short, Quo warrant will not issue unless there is a clear infringement of provisions having the force of law\(^4\) as

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1. (1916) IKB 595.
distinguished from mere administrative instructions or some provision of the constitution itself\(^1\). The question to be determined before issuing quo-warranto is whether the impugned appointment has contravened the binding rule of law and not whether it has involved a 'manifest error' which is relevant in a proceeding for certiorari.

**When Quo-Warranto may be refused:**

Quo-warranto is a discretionary remedy which the court may grant or refuse according to the facts and circumstances of each case.\(^2\) The proposition that a writ can be issued on the petition of a person whose rights are adversely affected has no application to the writ of quo warranto. A petition for the writ is maintainable at the instance of any person, although he is not personally aggrieved or interested in the matter\(^3\). However, he must not be a man of straw set up by anyone. For example, in order to challenge a municipal office, the person must at least be the resident of the area where municipality governs.

Like any other extraordinary remedy, quo-warranto is also a discretionary remedy. It can be refused on the ground of unreasonable delay. Therefore, when a person has held

office for a long time without challenge the writ may be refused. However, in K. Bheema Raju v. Govt. of Andhra Pradesh\(^1\), the court remarked that in a matter which involves a Fundamental Right to public office and violation of legal procedure to be adopted in the matter of public appointment to public office the delay should not deter the court in granting the relief and rendering justice.

Normally, acquiescence is no ground for refusing the remedy in cases of public office appointments but it may be a relevant factor in cases of election\(^2\). The writ may also be refused if there is an adequate alternative remedy. Therefore in V.D. Deshpande v. State of Hyderabad\(^3\), the court refused the writ against members of legislatures who had become disqualified since they held offices of profit as Article 192 of the Constitution provided an adequate remedy.

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The Writ of Certiorari:

Certiorari may be defined as a judicial order operating in personam and made in the original legal proceedings, directed by the Supreme Court or High Court to any constitutional statutory or non-statutory body or person, requiring the records of any action to be certified by the court and dealt with according to law. It is a remedy operating in personam, therefore writ can be issued even where the authority has become functus officio, to the keeper of the records.

Our Supreme Court has the power to issue certiorari only for the purpose of enforcement of Fundamental Rights, under Art.32, while our High Courts have this power under Art. 226, not only for this purpose but also for other purposes where, according to the general principles governing certiorari, it would lie. It is to be noted, however, that though we have an additional ground in India, namely, the enforcement of Fundamental Rights, the use of the writ has so far been confused to the purpose of quashing a decision and not to remove a case from an inferior tribunal to be tried by the Supreme Court or a High Court itself, for which there are statutory provisions.

'Certiorari' comes from 'certify' (to inform). It was the writ by which" the king commanded the judges of any inferior court of record to certify the record of any matter
in that court with all things touching the same and to send it to the kings court to be examined\(^1\).

The object of the writ was thus to remove the record of the inferior tribunal to the superior court so that the latter may "inform itself upon every subject essential to decide upon the propriety of the proceedings below"\(^2\).

"The ancient writ of certiorari in England is an original writ which may issue out of a superior court requiring that the record of the proceedings in some cause or matter pending before an inferior court should be transmitted into the superior court to be there dealt with. The writ is so named because in its original Latin form it required that the king should be certified of the proceedings to be investigated and the object is to secure by the exercise of the authority of a superior court, that the jurisdiction of the inferior tribunal to be properly exercised"\(^3\).

The Supreme Court while speaking of the scope of the writ of certiorari in the Province of Bombay v. Khushaldas\(^4\) case held that whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, acts in excess of their legal authority, a writ of certiorari lies.

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1. R.V.Northumberland Tribunal(1952) 1 AII E.R.122(128) C.A.
3. R.V.Northumberland Tribunal(1952) 1 All E.R.122(128) C.A.
It does not lie to remove merely ministerial acts or to remove or cancel executive administrative acts. For this purpose the term "judicial" does not necessarily mean act of a judge or a legal tribunal sitting for determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances imposing liability affecting the right of others.

Conditions precedent to the issue of Certiorari:

The writ of certiorari is issued to a judicial or quasi-judicial body where there is want or excess of jurisdiction and where there is violation of procedure or disregards of principles of natural justice. The writ can also be issued where there is error of law apparent on the face of the record but not error of a fact.

It is a basic principle of administrative law that no body can act beyond its powers. This lies at the basis of judicial review on the ground of lack of jurisdiction. No authority can exceed the power given to it, and any action taken by it in excess of its power is invalid. Thus, when an authority is empowered to grant a stage carriage permit for a maximum period of three years, it cannot grant the same for the five years. The writ of certiorari is issued to a body

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performing judicial or quasi-judicial functions for correcting errors of jurisdiction as when an inferior court or tribunal acts without jurisdiction or in excess of it or fails to exercise it\(^1\). The want of jurisdiction may arise from the nature of subject-matter, so that the inferior court had no authority to enter on the enquiry or upon some part of it. Want of jurisdiction may also arise from the absence of some preliminary proceeding or upon the existence of some particular facts which are necessary to the exercise of court's power and the court wrongly assumes that, that particular condition exists.

A writ of *critiorari* also lies against a court or tribunal when it acts in violation of the principles of natural justice are generally accepted are the court or tribunal should be free from bias and interest and *audi alteram Partem*, i.e.; the parties must be heard before the decision is given. The principle that the adjudicator should not have an interest or bias in the case is that no man shall be a judge in his own cause, justice should not be done but manifestly and undoubtedly seen to be done. The reason for this rule is to enable the tribunal to act independently and impartially without any bias towards one side or the other\(^2\).

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The writ is also issued for correcting an error of law apparent on the face of record. It cannot be issued to correct an error of fact. What is an error of law apparent on the face record is to be decided by the Courts on each case. In Hari Vishnu v. Ahmad Ishaque the Supreme Court held that no error could be said to be error on the face of the record if it was not self-evident and if it required an examination, argument to establish it. An error of law which is apparent on the face of the record can be corrected by a writ of certiorari but not an error of fact, howsoever grave it may appear to be. The reason for the rule is that the court issuing a writ of certiorari acts in a supervisory jurisdiction and not appellate jurisdiction. Accordingly, it cannot substitute its own decision on the merits of the case or give direction to be complied with by the inferior court or tribunal.

The writ of certiorari cannot be issued against a private body. Co-operative Electricity Supply Society Limited incorporated under the Co-operative Societies Act, is a private body and not a public body discharging public function and the writ petition is, therefore, not maintainable against such a private society.

The Writ of Prohibition:

A writ of Prohibition is issued primarily to prevent an inferior court or tribunal from exceeding its jurisdiction or acting contrary to the rules of natural justice. It is issued by a superior court to inferior courts for the purpose of preventing inferior courts from usurping a jurisdiction with which it was not legally vested or in other words to compel inferior courts to keep within the limits of their jurisdiction\(^1\). It is a writ of right and court cannot refuse it in cases of excess of jurisdiction or where jurisdiction is being exercised in violation of the law of the land\(^2\).

The writ of Prohibition is designed to prevent the excess of power by public authorities. Formerly, the writ is issued only to judicial and quasi-judicial bodies. For example, in Brij Khandelwal v. India\(^3\), the Delhi High Court refused to issue prohibition to the Central Government to prevent it from entering into an agreement with Sri Lanka regarding a boundary dispute. The decision was based on the principle that prohibition does not lie against government discharging executive functions and that prohibition is intended to control quasi-judicial and not executive, functions. But this view is no longer tenable with the

expansion of the concept of natural justice, and the emergence of the concept of fairness even in administrative functions, the rigidity about prohibition has also been relaxed. The writ can now be issued to anybody, irrespective of the nature of the function discharged by it, if any of the grounds on which the writ is issued is present. Prohibition is now regarded as general remedies for the judicial control of both quasi-judicial and administrative decisions affecting rights. Thus, in England the writ has been issued to a local council preventing it from licensing indecent films\(^1\) or preventing it from discharging its administrative functions unfairly\(^2\).

Both Certiorari and Prohibition are issued on similar grounds; only the stage at which each writ is issued differs. The function of Certiorari is to quash a decision already made and so it is issued when the body in question has disposed of the matter and rendered a decision. Prohibition is issued when the matter has not been disposed of but is being considered by the body concerned. The function of prohibition is to prohibit the body concerned from proceeding with the matter further. A court-martial constituted under the Army Act has been held subject to prohibition\(^3\).

Grounds for the issue of Prohibition:

Prohibition can be issued on the grounds on which certiorari can be issued except in case of error of law apparent on the face of record.

In India, Prohibition is issued to protect the individual from arbitrary administrative actions. In Mannusamappa & Sons v. Custodian Evacuee Property, the custodian, after accepting the petitioners as tenants of the evacuee property and after accepting rent for five months, purported to proceed against them as if they were in permissive possession. Prohibition was issued to forbid him from proceeding further.

Generally it is an efficacious and speedy remedy where a person does not desire any other relief except to stop the administrative agency. After nature remedy does not bar the issue of this writ. The fact that something must be left to be done is necessary for the issue of the writ is not a rule of disability. It can be issued even when the agency has reached a decision to stop the authority from enforcing its decision. It can be issued even in cases where the authority has not kept any record.

Generally speaking, the conditions for the issue of prohibition are the same as those for the issue of certiorari, except as to the stage when the relief is available. It follows that the grounds on which prohibition will issue are the same on which certiorari will issue (if the Petitioner comes to court after the tribunal has already pronounced its decision). Thus, prohibition will issue to prevent the tribunal from proceeding further, when the inferior court or tribunal proceeds to act without or in excess of jurisdiction and also when the inferior court or tribunal proceeds to act in violation of the rules of natural justice. In India we also find that the writ will issue to prevent the tribunal from proceeding further, when the inferior court or tribunal proceeds to act under a law which is itself ultra vires or unconstitutional.

Thus, we saw that judicial review of administrative actions through writ is vital to safeguard the civil liberties of the people. The progress of a nation, its unity and integrity, rule of law and social equality depend on the judiciary to a great extent, and the Supreme Court and High Courts performance has to be judged on the basis of the degree of their success in fulfilling these tasks. In India, these goals have not been fully achieved, but it is undependable the Courts have done its job judiciously, despite its limitations.