

“Supreme Court as a Protector and Guarantor of the Fundamental Rights”

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ABSTRACT

While doing this research, the researcher found many facts related to Article 32 and Article 226. The purpose of this research is to know, why supreme court is a protector and guarantor of fundamental rights. It is very interesting to know role of article 32 in our constitution.

During this research, the researcher followed various types of research – doctrinal and analytical research, to use facts and information which are already available. Here researcher also gathered many information from primary and secondary data like sources, book, journals, newspaper and preliminary proceeding.

This research is very helpful in enhancing my knowledge about article 32 and some facts about article 226. Here the researcher wants to discuss that article 32 is a fundamental right and it empowers supreme court to issue writs whereas article 226 empowers high court to issue writs for enforcement of fundamental rights. Fundamental rights also provided the remedy for the enforcement of the right under article 32 of the Indian Constitution.

The researcher discussed about function of the judiciary like Administration of Justice, Application of Law, Making of Law, Interpretation of Constitution, Guardian of the constitution, Protector or Individual Right and Render Advice.

It is also mentioned in research that under article 32 when supreme Court can refuse to permit remedy. And it also interesting to know Whether Article 32 of Indian Constitution be amended under Article 368. The most important point that Fundamental Right is applicable on the citizen of India.

KEYWORDS

Administration of Justice, Making of Law, Render Advice, Supreme Court as Protector and Guarantor of Fundamental Right.

“If I was asked to any particular Article in this Constitution as the most important- an Article without which this Constitution would be a nullity- I could not refer to any other Article except this one.... It is very soul of the Constitution and the very heart of it,”

¹ Dr. B.R. Ambedkar.

¹ C.A.D Vol. VII at 953.

INTRODUCTION

Bryce says that “*If the law be dishonestly administered, the salt has lost its flavor.*” It means if a lamp of justice goes out the judiciary gives a gloried about the importance, intendment and necessity of the judiciary in a government particularly in a democratic. It is legitimate said that the excellence of a country’s judiciary is a measure of the excellence of its government.

‘Justice’ is an ivory for every country and is most important rule for every government. It has to perform a very important role in the government set-up. If the judiciary is prejudice or not independent then the light of justice will fade away and the life of the people will be diminished.

The Supreme Court is basically the living outlet of the Constitution- It is basically the will of the people which is expressed in the Fundamental Law that they have resolve to retain themselves from hasty and unjust action by placing their representative under the restriction of permanent law.² It is very well said that Fundamental Rights is meaningless unless there is an operative machinery for the enforcement of the rights. It is remedy that makes rights very effective and accurate. It is well said that if there is no remedy, there is no right at all. Fundamental Rights also provided an adequate remedy under Article 32 of the Constitution. Under Article 226 it empowers all The High Court to issue the writs for the enforcement of Fundamental Rights.

Fundamental rights guaranteed to citizens, which is as incorporated in Part III of the Constitution, constitute individual rights common to most people in liberal democracies. They are enforceable in a court of law, i.e.; their violations result in punishment. These rights are not absolute, they are exercised within the framework of the provisions of the constitution. They generally help us to remove or crimination on ground of religions, race, sex, region, or place of birth etc. These rights also protect and promotes the interest of the minorities, their religious, culture, and ethnic. They also guarantee us freedom to enjoy the right to life and personal liberty.

The Fundamental rights are both natural as well as legal. They are necessary for the development of personality. And legal is for they are binding upon every government-central, provincial, district and local.

- Articles 32(1) guarantees the right to move the Supreme Court by “*appropriate proceedings*” for the enforcement of Fundamental Rights conferred by Part III of the Constitution.
- Clause (2) of Article 32 confers power on the Supreme Court to issue appropriate directions or orders or writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari for the enforcement of any of the rights.

² Bryce, James, American Commonwealth(London: The Macmillan Co.; 1960,p.68.

- Clause (3) of Article 32 states that Parliament may by law empower any court to exercise within the local limits of the jurisdiction all or of the powers exercised by the Supreme Court under Clause (2).
- Under Clause (4), the right guaranteed by Articles 32 shall not be suspended except as otherwise provided for the Constitution. Article 32 thus provides for an expeditious and inexpensive remedy for the protection of fundamental rights from legislative and executive interference.³

It is apparent from Article 32(1) that whenever there is a violation of Fundamental Rights, any person can move the Court for an appropriate remedy.

The Supreme Court has characterized the jurisdiction conferred on it by article 32 as ‘**an important and integral part of the basic structure of the Constitution**’ because it is meaningless to confer fundamental rights without providing an effective remedy for their enforcement if and when, they are violated.

‘*A right without a remedy is a legal conundrum of a most grotesque kind.*’ Article 32 confers a highly-cherished right.⁴ The Supreme Court has given a dynamic interpretation to these constitutional provisions and has read therein the right to award compensation for breach of a fundamental rights when no other remedy was suitable in the fact situation to give redress and relief to the petitioner. The word compensation does not occur in Article 32 or 226. These articles merely speak of ‘writs’, ‘orders’ or ‘directions’ for the enforcement of fundamental rights.

Under Article 32 the Court refuse to award monetary compensation before 1983, for infringement of Fundamental Rights. A major contribution by the court towards the protection of Fundamental Rights against undue interference by administrative authorities, as situations may arise when only compensation can provide some relief to the affected person; no writs or order could fill the bill. In **KHATRI V BIHAR**⁵, the Bhagalpur police had blinded certain accused persons. In this case, the Supreme Court for the first time raised the extremely significant, constitutional question, namely, if the State deprives a person of his life or personal liberty in violation of the right guaranteed by Article 21, can the Supreme Court under Article 32 give monetary compensation to the aggrieved.

BASIC FEATURE:

Judicial review under article 32 and 226 is a basic feature of the Constitution beyond the light of amenability.

- Certiorari
 - a) This may be issued where the law under which the decision was void.
 - b) the decision itself violates a fundamental right.

³ Ibid.

⁴ Fertilizer Corporation Kamgar Union v Union of AIR 1981 SC 344.

⁵ Also see Khatri v Bihar AIR 1981 SC 928; Sheela Barse v State of Maharashtra AIR 1983 SC 378; Ranjan Dwivedi v India AIR 1983 SC 624.

- c) the decision violates the law or which is without jurisdiction.
- d) the decision is against natural justice, mala fide.

THE PERSON AGAINST WHOM THE WRIT CAN BE ISSUED

- Child prostitution- Court has promulgated directions to control the evil of child prostitution.
- Closure of industry- Supreme Court announced order for revival of a company having regard to the evidence that living had been denied to 10,000 workers for five years.
- Commissioner- Court may appoint a person to act as Commissioner to examine into allegations made in contrast to Government officers for breach of fundamental right. A request made after an objective inquiry would not be rejected unless justification is shown to exist for rejection.
- Compensation- For deprivation of right to life and personal liberty. The compensation may be awarded.
- Locus standi- Any person those who are complaining of infraction of any fundamental rights guaranteed by the Constitution is at liberty to move to the Supreme Court but the rights that could be invoked under Art.32 must ordinarily be the rights of the person who complains of the infraction of such rights and approaches the court for relief and the proper subject for investigation would however be as to the nature of the rights that is stated to have been infringed.
- Mandamus- (a) It should be issued under article 32 where fundamental right is infringed by a statute.
(b) Statutory Order
(c) Executive Order
- Natural Justice- The Court can go under article 32 or article 226 refuse to exercise its direction of striking down the order. If such striking down will result in restoration of another order passed earlier in favor of the petitioner or against the opposition party for violation of principles of natural justice which is otherwise not in accordance with law.

Function of The Judiciary:-

- **Administration of Justice**
It is one of the most important functions of the judiciary is to administration of justice. In fact, the existence of judiciary is justified for its function of administration of justice. While the judiciary hear and decide on the basis of different cases on civil, criminal, constitutional and other matters, the dedication remains for the administration of justice.
- **Application of Law**
Basically, Judiciary has also the task of application of law. It has, to apply the law in specific cases like civil and criminal. Judiciary has a very significant role in the

application of law because in many cases, law does not and may not provide clear hint and in such a situation the judiciary has to play a very delicate and supreme role.

- **Making of Law**

Making of law or task of legislation is fundamentally the business of the legislature, but the judiciary or the courts also make laws in various ways. While deciding the cases where there are clear laws, the judiciary has not to make a law. But in many of the cases, law may be ambiguous or vague, in such cases, the judiciary or the judges judge them in a different way within the existing framework. Hence, they provide a new dimension to the law. In fact, it is known as judge made law.

- **Interpretation of Constitution**

The judiciary is also assigned with the task of interpretation of the constitution of the country. In a democratic political set-up the judiciary is generally made the accredited interpreter of the constitution. There are many words and expressions in the constitution that might require interpretation in different situations and the judiciary perform the task in such cases. In a federal form of government, this task is of special significance because it involves the relationship of the center and the states concerning their allocation of jurisdiction.

- **Guardian of the Constitution**

The judiciary or the Court also act as the guardian of the constitution, especially in a federal set-up. While performing the role as guardian of the constitution, the judiciary keeps a close eye over the activities of the legislature and that any part of legislation violates the constitution, the judiciary can declare the law as ultra vires or unconstitutional.

- **Protector or Individual Rights**

In a democratic political set-up, the judiciary is one who performs the important function of the protection of the individual rights. The judiciary, through its power of judicial review, work as a watch dog for the protection of individual rights and in case of any violation, it takes immediate action for the infringement of any such fundamental rights.

- **Render Advice**

The courts or the judiciary also maintain the function of rendering advice whenever it sought for. In case, some of the constitutional provisions seems to be vague on the part of the government of a country; In a particular situation the executive branch may seek advice from the judicial branch; And in such cases, the judiciary performs a very important task.

HISTORICAL BACKGROUND

Part III of the Indian Constitution constitute the Charter of Freedom of The Citizens of the India. It is what The Magna Carta is the essential freedoms of the Indian people. The framers of the Indian Constitution did not leave their task only by laying down Fundamental Rights, because a right without adequate measure of protection would be a heap of sands. They also arranged certain measures to protect them, because they knew that all power corrupts, and absolute power corrupts absolutely.⁶ Again, basic human rights of the citizens be arbitrarily curtailed by the executive or by the legislature. Hence, it is necessary to provide an effective machinery of their protection.⁷

The Supreme Court acts as a laboratory where the validity of the laws and executive actions are tested in the light of the relevant constitutional provisions.⁸ In other way, this court acts as perpetual watch dog and keeps an unceasing vigil to protect the Fundamental Rights of the citizens. Right to constitutional remedies constitute the anchor of democracy of India.⁹

Dr. B.R. Ambedkar, while commenting on the provisions of Articles- 32, opined. **“If I wish to make a particular article as the most important without which this Constitution would be a nullity, I would not refer to another article except this.”**

Therefore, Article 32 declares all laws contravening Fundamental Rights void, and Art. 32 makes this declaration effective by giving the aggrieved person a Fundamental Right to obtain from the Supreme Court appropriate directions, orders or writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo Warrant, and Certiorari, restraining the violation of his Fundamental Rights.

It is by virtue of the powers conferred by these two articles that the Supreme Court and High Courts have been functioning as the custodian of the Fundamental Rights. In course of its functioning for the last Thirty years, the Supreme Court of India had many opportunities to elucidated the scope, amplitude and mode of operation of its judicial review; specially under Art.32 of the Constitution which makes the **Court the protector and guarantor of the Fundamental Rights enshrined in the Constitution.** The Court can apply several writs. They are as follows;

- Habeas Corpus- It literally means bring the body. In legal terms, habeas corpus is simply the name for the procedure by which the court inquire into the legality of a citizen's detention.

The reason is very straight forward. The availability of habeas corpus means that if an individual is found to have been imprisonment unlawfully the court can release him or her, thus enforcing the law and frustrating governmental oppression.

The writ of habeas corpus will be issued if the confinement is prima facie illegal.

⁶ AIR1965 SC395.

⁷ Seervai, H.M.; The position of the Judiciary under the Constitution of India(Bombay: University of Bombay, 1970);p.2.

⁸ Reddy, Sarojini P., Judicial Review of Fundamental Rights (Delhi: National Publishing House, 1976),p.30.

⁹ Gajendragadkar, P.B., Law, Liberty and Social Changes (Bombay: Asia Publishing House, 1965),p.30.

1. Kanu Sanyal v. District Magistrate- In the case, the court may examine the legality of the detention without requiring the person detained to produce before it.
 2. In Sheela Barse v. State of Maharashtra- If the detained person is unable to pray for the writ of habeas corpus, someone else may pray for such writ on his behalf.
- Mandamus- This writ is usually in the form of a command which is issued by Supreme Court to the Government, inferior court, tribunal, public authority, corporation or any other person having public duty to perform asking such Government, inferior, public authority, corporation or to refrain from doing illegal act.

A mandamus is available against any public authority having administrative and local bodies and it would be relied to any person who is under a duty imposed by statute or the common law to do a particular act. The writ can be granted against a public authority if;

1. Acted against the law.
 2. Exceeded his limits of power.
 3. Acted with mala fides.
 4. Abused his discretionary powers.
 5. Has taken into account irrelevant consideration.
- Certiorari- It is a writ which is issued by Supreme Court (i.e., the High Court or the Supreme Court) to the inferior Court or Tribunal or body exercising judicial or quasi-judicial functions to remove the proceedings from such Court, Tribunal or body for examining the legality of the proceedings. It means “To be Certified”
These writs are issued by the superior court in the exercise of its supervisory function and not in the exercise of its appellate function.¹⁰
 - In Hari Vishnu Kamath v. Ahmad Ishaque 1955-I S 1104: (s) AIR 1955 SC 233); the proposition laid in issuing this writ by the High Court is issued to correct the errors of Jurisdiction.
 1. When court or tribunal acts illegal in its jurisdiction.
 2. Order against principles of natural justice.
 3. Court acts in exercise of its supervisory and not appellate Jurisdiction.
 4. An error in the decision or determination itself may also be amended to a writ of Certiorari.
 - Prohibition- Prohibition is a writ and that is issued by a superior Court to inferior Court or tribunal or body exercising judicial functions preventing such inferior Court or Tribunal or body from usurping jurisdiction which is not legally vested therein or from acting in violation of the principles of natural justice or from acting under unconstitutional law. It is an order directed to an inferior Court which forbids the

¹⁰ Hari Vishnu v. Sayed Ahmed, (1950) 1 SCR 1104.

Court to continue proceedings therein in excess of its jurisdiction or in contravention of the law of the land.¹¹

- Quo-Warranto- Basically meaning of ‘Quo-Warranto’ is ‘by what authority’. According to Halsbury “An information in the nature of quo-warranto took the place of the obsolete writ of quo-warrento which lay against a person who claimed or usurped an office, franchise or liberty, to enquire by what authority he supported his claim, in order that the right to the office or franchise might be determined.”

The procedure of quo-warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of appointment to public office against the relevant statutory provision.¹²

Difference between Article 32 and Article 226.

There are many differences which are discussed here. It assembled clearly in Article 226, that the High Court effectiveness throughout the territories in alliance 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 for enforcement of the Fundamental Right.

Article 32 is itself a Fundamental Right and guarantees the right to move the Supreme Court by appropriate proceeding for the enforcement of Fundamental Right. There is some difference between Article 32 and Article 226 and they are following;

- Under Article 32, the remedy is indulged only for enforcement of the Fundamental Right which are guaranteed in Part III of the constitution whereas Article 226 permits the High Court to issue directions, orders and writs for the enforcement of the Fundamental Rights and also for the enforcement of any other purpose.
- In under Article 32, if petition filed is removed by Supreme Court on the merit, a subsequent petition under Article 226 would be barred.¹³
- The territorial jurisdiction of the High Court is not as wide as that of the Supreme Court. The jurisdiction of the Supreme Court prolongs to the whole territory of India, but High Court does not enjoy such jurisdiction.
- During the period of emergency article 32 can be suspended whereas President of India cannot suspend articles 226.
- Article 32 empowers the Supreme Court to issue writs whereas Article 226 empowers every High Court to issue the writs.
- When the Fundamental Rights are infringed or threatened, Articles 32 empowers the Supreme Court to issue the writs but only article 226 enables the High Court to issue orders to writs in the nature of habeas corpus, mandamus, prohibition, certiorari, quo-warranto and to protect aggrieved.

¹¹ East India Commercial Co. v. Collector of Customs, AIR 1962 SC 1893.

¹² University of Maysore v. Govind Rao, AIR 1965 SC 491.

¹³ See Workmen v. Board of Trustees, AIR 1978 SC 1283.

Under Article 32 When the Supreme Court can refuse to permit remedy.

There are right to move on to the Supreme Court is itself a Fundamental Right while having infringement of the rights and Supreme Court has itself duty to prosecute the fundamental rights guaranteed by the Constitution. Normally, the Supreme Court cannot refuse to grant this remedy. Anyhow, here is same condition in which Supreme Court refuse to grant the remedy under Article 32. These are mentioned below;

- Res judicata- The principle of res judicata put on even in the case of petition under Article 32. However, a petition under Article 32 for Habeas Corpus is an exception to this general rule.¹⁴ The Supreme Court cannot be moved more than once on the same facts.¹⁵
It has been held by the Supreme Court that in the unavailability of new circumstances arising because the dismissal of the petition filed in Supreme Court under Article 32, a fresh petition under Article 32 on the same matter cannot be filed in the Supreme Court.¹⁶ It is to be notable that a petition filed in the Supreme Court under Article 32 and dismissed by it on suit by a speaking order will also be operative as res judicata, even though order has been made ex parte.
- Delay- The Court may refuse to grant relief where there is no reasonable explanation for the delay. However, this is not a rule of law but a rule of practice based on the Court's discretion and this discretion is to be exercised in the light of the circumstances of each case.¹⁷
- Malicious petition- Under Article 32, if the petition filed in the Supreme Court is found to be malicious or ill-motivated, it may be dismissed by the Supreme Court.¹⁸
- Misrepresentation or Suppression of Material facts- The Supreme Court may dismiss the petition at any stage, where the petitioner is found to have made it clear misrepresentation as to the material facts.¹⁹
- Existence of adequate alternative remedy- It does not bar the Supreme Court to entertain a petition under Article 32.²⁰ That's why the Supreme Court has held that in the case of adequate alternative remedy it may exercise its discretion deny to entertain a petition filed under Article 32.

Article 32 of Indian Constitution be amended under Article 368

Firstly, Article 32 is a part of the basic structure of the constitution and that cannot be restricted or seized away even by way of modification of the constitution, that had ruled by Supreme Court. So, Article 32 cannot be amended by Parliament under Article 368.

¹⁴ Ghulam Sarwar v. Union of India, AIR 1967 SC 1335.

¹⁵ Niranjana v. State of M.P.; (1972) 2 SCC 542.

¹⁶ Lakhanpal v. Union of India, AIR 1967 SC 908.

¹⁷ Ram Chandra v. State of Maharashtra, AIR 1974 SC 259.

¹⁸ Kini v. Union of India, AIR 1985 SC 893.

¹⁹ Welcome Hotel v. State of A.P., AIR 1983 SC 2237.

²⁰ S.H. Kachuni v. State of Madras, 1959 SCR 725.

If we noticed that it can be amended but here the point is that it will be subject to judicial review by Supreme Court of India. If Court disclose out that is contradict with the basic structure of our constitution at that time it will be stated null and void by the Supreme Court.

- In ***Kesavananda Bharti v. State of Kerala*** once again there are amendable of fundamental rights came before the court, is that the court will now rule by majority and that Parliament is competent to amend under Article 368 fundamental rights just as any other part of the Constitution, subject to the doctrine that the ‘basic’ or ‘fundamental’ features of the Constitution which cannot be amended.
 - The majority ruled that while Parliament can amend any constitutional provision by virtue of article 368, such power is not unrestricted and unlimited. And the Court can still arise question that whether or not an amendment violates a ‘fundamental’ or ‘basic’ features of the constitution. An amendment which does so will be constitutionally worthless.
 - Article 368 account the expression ‘amend’ and which has a restrictive essence and cannot comprises a fundamental transition in the Constitution.
 - So, that article 368 the amendment of the constitution could not have the effect of wrecking or abrogating the basic structure of the constitution.
- In ***Minreva Mills v. Union of India***; The Supreme Court by 4:1 majority struck down clause 4 and clause 5 of Article 368 as these clauses destroyed the basic structure of the constitution and held that there are four basic structure of the Constitution and are as follows;
 - Limited power of Parliament to amend and the constitution.
 - Harmony and balance between the Fundamental Right and Directive Principle of State Policy.
 - Fundamental Right in certain cases.
 - Power of judicial review in certain cases.
 - In ***Golakhnath v. State of Punjab***; The Supreme Court over ruled its earlier decision. The Apex Court held that no authority including the parliament can amend the Fundamental Rights.

Conclusion

As we know that India has lengthiest written constitution. There must be fundamental rights which is applicable on the citizen of India. But after doing research the researcher found that there is also provided same remedy for the protection of fundamental rights. Supreme Court of India act as protector and guarantor of fundamental right. Supreme Court has given supreme power to control and protect the infringement of fundamental rights.

Article 32 is a right guaranteed by the constitution to move in the Supreme Court by appropriate proceedings for the enforcement of the fundamental rights. It is to be noted that an application under article 32 cannot lie where no fundamental right has been violated. That is why the supreme court has duty to enforce the fundamental rights and also it is known as the protector and guarantor of the fundamental right.

It is also mentioned that while the infringement of the fundamental right is in the condition precedent for presenting a petition to move supreme court under article 32 but here there is no need to justify actual violation of fundamental right. At a moment a petition will lie if there is imminent danger of the infringement of fundamental right.

It is very interesting to know about the fact that article 32 gives power to the supreme court to issue writ in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari for the enforcement of the fundamental rights. It is also noticed while doing this research article 266 makes it clear that the High Court has power throughout the territories in relation to which it exercises jurisdiction which is issued on any person or authority including in appropriate cases by any Government within those territories directions, orders or writs for the enforcement of the fundamental right. It is also clearly expressed that the Supreme Court has been constituted as the defender and guarantor of the fundamental rights of the citizens.

It is mentioned under article 226 of constitution, High Court has power to issue such writs and order which are necessary for administrative action and judicial or quasi-judicial action. Power of High Courts to issue any person or authority, including in appropriate case any Government, orders and writs, for the enforcement of any of the rights conferred by Part III. It is a constitutional right.

“Justice consist not in being neutral between right and wrong,

But in finding out the right and upholding it wherever found, against the wrong.”

THEODORE ROOSEVELT.

By enlarging the scope of Article 32 and Article 226, judiciary has brought justice and revolutionized constitutional jurisprudence. Judiciary should act as a lighthouse, not a destination in itself. It should also work in a self- reliant and self- restrained manner. It makes the Constitution a living, dynamic document. Judicial review in constitution interpretation is a healthy trend. Also Check and balances is also applicable to Judiciary for a healthy democracy.