CHAPTER - 5

THE ENFORCEMENT OF FUNDAMENTAL RIGHTS OF THE INDIVIDUAL AGAINST THE STATE AND PRIVATE BODY

I. Fundamental Rights Against Private bodies

The Private sector undertakings and private corporations, national and multinational should be treated as "the State" in certain situations, so as to make them subject to fundamental rights. Here it must be pointed out at the outset that the guarantee of fundamental rights is essentially a device whereby the autonomy of an individual is protected from encroachment by those who have power and capacity to do the same. Since the governing power rests with the state, possibility of the encroachment has traditionally been from the State. This is the reason that fundamental rights have bbeen sought and given against the State. Protection of an individual against another individual is mainly the concern of ordinary law to be made and enforced by the state in exercise of its governing power. But this governing power cannot be so exercised as to dictate to the individual to do or not to do certain things in certain spheres of their life. Within his proctected domain a private party has the freedom of choice, freedom to act according to his likes and dislikes and even according to his prejudices and ideosyncracies. This one may do irrespective of the fact that such a selfish or irrational act may harm or even ruin another person or party. An attitude of sympathy and cooperation towards one's fellow citizens in an ideal which is not allowed to be achieved by legal coercion beyond a certain point. This is the essence of personal liberty and nothing to be said hereinafter is meant to negate this basic postulate.

But in certain circumstances an act of a private party begins to resemble the act of a public authority and private right begins to look like public power. This may happen because of, (i) Governmental nexus and assistance to the private act; or (ii) concentration of economic power; or (iii) the simple fact

that the private party has control over something which is indispensable for the ordinary living of other individuals. The circumstances may be diverse, but, the essence of the matter is that it is possible for a private party to exercise control over the lives and fortunes of others in vital matters and here it is only reasonable to suggest that in such circumstances the party should be required to observe the same norms as a public authority. In other words, in those circumstances the private party should be treated as "the State" and subjected to the discipline of fundamental rights. The determination of exact circumstances in which a private party should be treated as a public authority may be a question of detail which may have to be worked as a public authority may be a question of detail which may have to be worked out from case to case in the context of specific facts present there. It is also possible that there may be borderline cases where opinions of the judge concerned but also by prevailing needs and philosophy of the time which are themselves changeable. But what can be said safely is that now the time has come when the meaning of the term "the State" in article 12 of the Constitution should be given broader interpretation so as to include those sections of the private sector whose governing and controlling power over the ordinary multitude in indistinguishable from that of public authorities properly so called. If this is not done, the changes contemplated to be brought about by the new economic policy would make this part of the constitutional law of India look at variance from the realities of politico - economic life of India in the 21st century.

Since the above change has been advocated with the assumption that the same can be brought about by judicial innovation, the following submissions are made with a view to help advancing the interpretation on the subject within braod parameters of existing doctrinal framework.

First, many areas of the private sector can be covered under the existing agency and instrumentality test. The six indices of this test mentioned above which have so far been adumbrated by the court, are actually relevant mainly in relation to public sector undertakings and it is in the context of these undertakings that the above guidelines were laid down. But, here the essence of the matter is that there should be evidence of governmental nexus with the

private activity. This can be in the form of governmental assistance, collaboration or interference. The governmental assistance may take the form of, (i) tax concession, (ii) grant of monopoly; (iii) financial assistance; (iv) the power of eminent domain; or (v) any other way in which meaningful assistance may be given. Joint ventures or joint ownership of an undertaking will definitely come in the category of governmental collaboration. Since some governmental regulation. This may be indicative of the special importance which the government gives to that activity. This leads us to take note of another type of governmental nexus, which may be found even without any governmental assistance or collaboration. The private sector may undertake activities which may be of such public and general importance that they are generally allowed to be undertaken only by the government, and therefore, the principle should be applied that a private party doing the same job must do it subject to the same conditions as the government. Here public utilities readily come to mind as an example. This means that many private sector units can be subjected to fundamental rights by the agency and instrumentality test itself.

Second, industrial giants, national and multinational corporations can be held to be " the State" and subjects to fundamental rights on the ground that the property and business they own enable them to control the lives and fortunes of a host of people including the employees, distributors, retailors, consumers and in a way the community itself. Renner pointed out very early that private law institutions performed public law functions and the need was to recognise the reality so that power and responsibility could be combined together.[1] Miller and Friedman have drawn our attention to the same phenomenon. Millar has said that the need was for protection against the governing power and this should be available against every entity or sector where the governing power was in fact located[2]. Similarly Friedman has pointed out that now the group power was gaining ascendancy over the state and in

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1. Karl Renner, *The Institutions of Private Law and Their Social Functions*. (1949).
2. Arthur S. Miller, *"The Constitutional Law of the Society State"* , 10 Stan. L. Rev. 620 (1958)

this category he mentions organised industry and labour.[3] He also feels the need for the rule of law to be consistent with this new reality.

Third, framers of the Indian Constitution have themselves settled the issue that the need for the guarantee of fundamental rights can be as important against private parties as against the state. It is a different matter that at the time of the framing of the Constitution this need was perceived to be limited only to some kinds of cases. Thus article 15 (2) guarantees that no citizen shall be discriminated against on the ground of religion, race, caste, sex or place of birth with regard to "(a) access to shops, public restaurants, hotels and places of public entertainment, or (b) the use of wells, tanks bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public." Article 17 declares the untouchability is abolished and its practice in any form is forbidden. Article 23 prohibits traffic in human beings and beggar and other forms of forced labour. By article 24 employment of a child below the age of 14 years in any factory or mine or his engagement in any other hazardous employment is prohibited. Article 28(3) provides that a person attending an educational institution recognised by the State or receiving aid out of state funds shall not be required to participate in any religious instruction without his consent or that of his guardian in case he happens to be a minor nor shall he be required to attend any religious worship there without such consent. Lastly, article 29(2) guarantees that a citizen shall not be denied admission to a state recognised or state aided educational institution on grounds only of religion, race, caste, language or any of them.

The above provisions can be said to have been progressive according to the standards prevailing at the time when the Constitution was framed and adopted. But our experiences during the last four decades and more have amply demonstarted that they do not go far enough and in the years to come their inadequacy will be further felt. Thus article 15(2) prohibits discrimination on

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3. W. Friedman, *"Corporate Power, Government by Private Groups, and the law"* , 57 Colum. L. Rev. 155 (1957).

certain grounds in specified matters. But what is needed is the guarantee of general right to equality against the private sector when it assumes controlling power and begins to look like " the State". To take only one example, the supreme Court in *Maruti Udyog*,[4] implicity recognised that the manufactures could not give preferential treatment to a few customers unless they satisfied the standards of reasonable classification. If so, the same principle should logically apply to Hindustan Motors and Premier Automobiles and any distinction based on public sector and private sector dichotomy would be totally irrational and illogical. Similarly, a person attending a private educational institution and living in a hostel needs to be given not only the negative right not to be forced to participate in any worship or religious instruction, a right which article 28(3) guarantees, but also needs the positive right to practise his religion in a reasonable manner in that institution without any let or hindrance. Again, the basic interests of a student are not limited merely to getting admission without any discrimination, in the institution he can also claim the right of freedom of expression and association. Indeed, both the teachers and students can claim their basic right of academic freedom. Though the existing decisions are not conclusive one way or the other on the issue,[5] it is respecfully submitted that the elements of state aid, recognition and regulation should be enough to establish governmental means so as to enable the court to hold that private educational institutions are "the State".

II. Fundamental Rights in modern democratic thinking

Since the 17th Century, if not earlier, human thinking has been veering round to the theory that man has certain essential, basic, natural and inalienable rights or freedoms and it is the function of the State, in order that human liberty may be preserved, human personality developed and an effective social

4. *Ashok Kumar Mittal* V. *Maruti Udyog* (1986) 2 SCC 293.

5. The relief was granted in *Manmohan Singh Jaitla* v. *Commr. Union Territory of Chandigarh*, (1984) Supp. S.C.C 540; *Francis John* v. *Director of Education* , (1989) Supp, (2) SCC 598; *Master Vibhu Kapoor* v. *Council of Indian School Certificate Examination*, A.I.R. 1985 Del. 142 (F.B). It was refused in *Executive Committeee of Vaish Degree College, Shamli* v. *Laxmi Narain* , (1976) 2 SCC . 58.

and democratic life promoted, to recognise these rights and freedoms and allows them a free play.

The concept of human rights can be traced to the natural law philosophers, such as, Locke and Rousseau. The natural law philosophers philosophized over such inherent human rights and sought to preserve these rights by propounding the theory of "social contract."[6]

According to Locke, man is born "with a title of perfect freedom and an uncontrolled enjoyment of all the rights, and privileges of the Law of Nature" and he has by nature a power "to preserve his property - that is, his life, liberty, and estate, against the injuries and attempts of other men."[7]

The Declaration of the French Revolution, 1789, which may be regarded as a concrete political Statement on Human Rights and which was inspired by the Lockeian philosophy declared :

"The aim of all political association is the conservation of the natural and inalienable rights of man."

The concept of human rights protects individuals against the excesses of the State. The concept of human rights represents an attempt to protect the individual from oppression and injustice. In modern times, it is widely accepted that the right to liberty is the very essence of a free society and it must be safeguarded at all times. The idea of guaranteeing certain rights is to ensure that a person may have a minimum guaranteed freedom.

The underlying idea in entrenching certain basic and Fundamental Rights is to take them out of the reach of transient political majorities.

It has, therefore, come to be regarded as essential that these rights be entrenched in such a way that they may not be violated, tampered or interfered with by an oppressive government. With this end in view, some written constitutions guarantee a few rights to the people and forbid governmental

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6. Lloyd , *Introduction to Jurisprudence*, 117-123, 159 (1985)
7. Extracts from Locke *two treaties of Government.*

organs from interfering with the same. In that case, a guaranteed right can be limited or taken away only by the elaborate and formal process of constitutional amendment rather than by ordinary legislation. These rights are characterised as Fundamental Rights.

The entrenched Fundamental Rights have a dual aspect. From one point of view, they confer justiciable rights on the people which can be enforced through the courts against the government . From another point of view, the Fundamental Rights constitute restrictions and limitations on government action, whether it is taken by the Centre, or a State or a local government. The government cannot take any action, administrative or legislative, by which a Fundamental Rights is infringed.

Entrenchment means that the guaranteed rights cannot be taken away by an ordinary law. A law curtailing or infringing an entrenched right would be declared to be unconstitutional. If ever it is deemed necessary to curtail an entrenched right, that can only be done by the elaborate and more formal procedure by way of a constitutional amendment. As the Supreme Court has observed,[8] the purpose of enumerating Fundamental Rights in the Constitution "is to safeguard the basic human rights from the vicissitudes of political controversy and to place them beyond the reach of the political parties who, by virtue of their majority, may come to form the government at the Centre or in the State".

The modern trend of guaranteeing Fundamental Rights to the people may be traced to the Constitution of the U.S.A. drafted in 1787.

The U.S. Constitution was the first modern Constitution to give concrete shape to the concept of human rights by putting them in to the Constitution and making them justiciable and enforceable through the instrumentality of the courts.

The original U.S Constitution did not contain may Fundamental Rights.

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8. *Chairman, Rly. Board* v. *Chandrima Das*, AIR 2000 SC 998, 997 .

There was trenchant criticism of the Constitution on this score. Consequently, the Bill of Rights came to be incorporated in the Constitution in 1791 in the form of ten amendments which embody the Lockeian ideas about the protection of life, liberty and property.[9]

The nature of the Fundamental Rights in the U.S.A. has been described thus: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majority and officials, to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other Fundamental Rights may not be submitted to vote; they depend on the outcome of no elections."[10]

In modern times, the concept of the people's basic rights has been given a more concrete and universal texture by the Charter of Human Rights enacted by the United Nations Organisation (U.N.O),[11] and the European Convention on Human Rights.[12] The principle ot the Universal Declaration of Human Rights inter alia declares:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

The General Assembly of the United Nations Organisations adopted the Universal Declaration of Human Rights on Dec. 10, 1948. This document has proved to be a mere declaration without any teeth. The Charter has so far remained merely a formal document without any measures having been taken to facilitate the realization of the basic freedoms and the human rights which the document contains.

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9. B. Bailyn, *Ideological Origins of the American Revolution,* (1967)
10. Justice Jackson in *West Verginia State Board of Education* v. *Barnette*, 319 U.S. 624.
11. Ian Brownlie, *Basic Documents of Human Rights* (1971)
12. For trends in the present day Africa in the area of human rights, see, D.O Ahic, *Neo-Nigerian Human Rights in Zambia : A Comparative Study with some countries in Africa and West Indies,* 12 J.I.L.I. (1970) at 609.

The concept of Fundamental Rights thus represents a trend in the modern democratic thinking. The enforcement of human rights is a matter of major significance to modern constitutional jurisprudence. The incorporation of Fundamental Rights as enforceable rights in the modern constitutional documents of natural law and natural rights.

For sometimes now a new trend is visible in India viz. to relate the Fundamental Rights in India to the International Human Rights. While interpreting the Fundamental Rights provisions in the Indian Constitution, the Supreme Court has drawn from the International Declarations on Human Rights,[13] The Supreme Court, for example, has made copious references to the Universal Declaration of Human Rights, 1948, and observed :

> The applicability of the Universal Declaration of Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence".[14] There is no formal declaration of people's Fundamental Rights in Britain. The orthodox doctrine of the Sovereignty of Parliament prevailing there does not envisage a legal check on the power of Parliament which is, as a matter of legal theory, free to make any law even though it abridges, modifies or abolishes any basic civic right and liberty of the people. The power of the

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13. The Supremen Court of India has frequently drawn from the Declaration of Human Rights to define the scope and content of the Fundamental Rights in India : for example: *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597; *M.H. Hoskot* v. *State of Maharashtra*, AIR 1978 SC 1548 ; *Randhir Singh* v. *Union of India*, AIR 1982 SC 879;*D.K. Basu* v. *Union of India*, AIR 1997 SC 610; *Vishaka* v. *State of Rajasthan* AIR 1997 SC 3011; *People's Union for Civil Liberties* v. *Union of India* (1997) 1 SCC 759; Chairman, *Rly Board* v.*Chandrima Das,* AIR 2000 SC 988; *Madhu Kishwar* v. *State of Bihar*, AIR 1996 SC at 1869 , the Supreme Court referred to the Declarations on "The Right to Development" adopted by the UN General Assembly on December 4, 1986, and also to Vienna Conventions on the Elimination of all forms of Discrimination against women (CEDAW) ratified by the UNO on Dec. 18, 1979.

    See also , People's Union for Civil Liberties v. Union of India, AIR 1997 SC 568, 575.

14. *Chairman, Railway Board* v. *Chandrima Das*, AIR 2000 SC 988 at 997.

> executive is however limited in the sense that it cannot interfere with the rights of the people without the sanction of law.[15]

There prevails in Britain the concept of Rule of Law which represents, in short, the thesis that the executive is answerable to the courts for any action which is contrary to the law of the land. Rule of law constitutes no legal restraint on the legislative power of Parliament and thus, cannot be equated to the concept of Fundamental Rights.

Until 1998, the protection of individual freedom in Britain, therefore, rested not on any constitutional favouring individual liberty and the Parliament form of government. British lawyers often questioned the very basis of the theory of declaring basic civil rights in a constitutional document.

The British Model could not be duplicated elsewhere. The fact remains that Britain is a small and homogenous nation, having deep-rooted democratic traditions. But these conditions do not prevail in other countries which are composed of diverse elements, having no deep-rooted traditions of individual liberty, and which, therefore, face very different problems from those of Britain.

Even in Britain, there was an ever growing realisation that guaranteed civil rights do serve a useful purpose and that Britain should also have a written Bill of Rights.[16] Britain had accepted the European Charter on Human Rights.[17]

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15. *Lord Atkin in Eshugbayi* v. *Govt. of Nigeria*, 1931 A.C. 662.

16. Hood Philips, *Const. and Adm. Law* , 40 438 (1978); also, *Reform of the Constitution* (1970); De Smith, *Const. And Adm. Law,* 439 (1977); Scarman, *English Law- The New Dimension*; Anderson, *On Liberty Law and Justice* (1978).

    On July, 7, 75, a resolution was moved in the House of Commons demanding that En gland should have a Bill of Rights. There is some opposition as well in academic circles to having a Bill of Rights; See Yardley, *Modern Constitutional Developments : some reflections.* 1975 Pub. Law 197 : Lloyd, *Do we need A bill of Rights*? M.L.R. 121 (1976) : H.W.R. Wade, Constitutional , Fundamentals, 24-40 (1980).

    See also, Report of Select Committee on a Bill of Rights (House of Lords , 1978).

17. There have been some cases in Britain in this area: *Waddington* v. *Miah*, (1974) 1 W.L.R. 613 ; *R* v. *Secretary of State for Home Affairs exp. Bhajan Singh,* (1975) 2 All ER 1081;*Bulmer Ltd* v. *Bollinger, S.A.* (1974) 2 All ER 1226.

But this was not good enough because the Charter did not bind Parliament but could be used only to interpret the local law. The feeling was that law made by Parliament was in essence law made by the House of Commons. This in practice, meant that a government having support of a majority in the House (though it had the support only of a minority of electorate), could often force through whatever legislation it desired. What was, therefore necessary was a Bill of Rights which could curb parliamentary legislative power.

The Australian Constitution, following the traditions of Britain, does not have a Bill of Rights but guarantees only a few rights, e.g., freedom of religion.[18]

In a federal country, the problem becomes more complicated as there may be attacks on individual liberty and freedom not only at the Central level, but even at the State level.

In the modern era, it has become almost a matter of course to prescribe formally the rights and liberties of the people which are deemed worthy of protection from government interference. The wide acceptance of the notice that a formal Bill of Rights is a near necessity in the effective constitutional government arises, to some extent, from a feeling that mere custom or tradition alone cannot provide to the Fundamental Rights the same protection as their importance deserves. "The unique English situation is not simply exportable, and other nations have generally felt that their governments need the constant reminder which a Bill of Rights provides, while their people need the reassurance which it can supply."[19].

An outstanding example of this trend in Canada can be reffered in this context To begin with, the Canadian Constitution had only a few guaranteed Rights.[20] Then, the Canadian Parliament enacted a law laying down basic Rights of the People.[21]

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18. S. 116 of the Australian Constitution.
19. Bowie, *Studies in Federalism,* 567, 601.
20. Ss. 93 and 133 of the British North America Act.
21. See The various articles on the subject in 37 Can. B.R. 1-217 (1959). Also Auburn, *Canadian Bill of Rights and Discriminatory Statutes,* 86 LQR 306 (1970); Walter S. Tranopolsky, *The Canadian Bill of Rights* (1975).

III. Protection of Fundamental Rights in India

In India, a few good reasons made the enunciation of the Fundamental Rights in the Constitution rather inevitable. For one thing, the main political party, the Congress, had for long been demanding these Rights against the British rule. During the British rule in India, human rights were violated by the rulers on a very wide scale. Therefore, the farmers of the Constitution, many of whom had suffered long incarceration during the British regime, had a very positive attitude towards these rights.

Secondly, the Indian society is fragmented into many religious, cultural and linguistic groups, and it was necessary to declare Fundamental Rights to give to the people a sense of security and confidence. Then, it was thought necessary that people should have some Rights which may be enforced against the government which may become arbitary at times. Though democracy was being introduced in India, yet democratic traditions were lacking, and there was a danger that the majority in the legislature may enact laws which may be oppressive to individuals or minority groups, and such a danger could be minimised by having a Bill of Rights in the Constitution.

The need to have the Fundamental Rights was so very well accepted on all hands that in the Constituent Assembly, the point was not even considered whether or not to incorporate such Rights in the Constitution. In fact, the fight all along was against the restrictions being imposed on them and the effort all along was to have the Fundamental Rights on as broad and pervasive a basis as possible.[22]

Articles 12 to 35 of the Constitution pertain to Fundamental Rights of the people. These Rights are reminiscent of some of the provisions of the Bills of Rights in the U.S Constitution declares the Fundamental Rights in broad and general terms. But as no rights is absolute, the courts have, in course of time, spelled out some restrictions and limitations on these Rights. The Indian Constitution, however, adopts a different approach in so far as some

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22. Granville Austin, *The Indian Constitution : Cornerstone of a Nation*, 50-113 (1966).

Rights are worded generally; in respect of some Fundamental Rights, the exceptions and qualifications have been formulated and expressed in a compendious form in the Constitution itself, while in respect of some other Rights, the Constitution confers power on the Legislature to impose limitations. The result of this strategy has been that the constitutional provisions pertaining to Fundamental Rights have become rather detailed and complex.

The framers of the Indian Constitution, learning from the experiences of the U.S.A., visualized a great many difficulties in enunciating the Fundamental Rights in general terms and in leaving it to the courts to enforce them, viz, the Legislature not being in a position to know what view the courts would take of a particular enactment, the process of legislation become difficult; there arises a vast mass of litigation about the validity of the laws and the judicial opinion is often changing so that law becomes uncertain; the judges are irremovable and are not elected; they are, therefore, not so sensitive to public needs in the social or economic sphere as the elected legislators and so a complete and unqualified veto over legislation could not be left in judicial hands.[23]

IV. The Supreme Court as protector and guarantor of Fundamental Rights

Supreme Court is the guardian of our Constitution. For the enforcement of fundamental rights it is most important to discuss about articles 32 and 226.

(i) Article 32

A right without a remedy does not have much substance. The fundamental Rights guarenteed by the Constitution would have been worth nothing had the constitution not provided an effective mechanism for their enforcement.

Art 32 (1) guarantees the right to move the Supreme Court, by

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23. B.N. Rau, *India's Constitution in the Making* 245.

appropriate proceedings, for the enforcement of the Fundamental Rights enumerated in the Constitution. Art 32(2) empowers the Supreme Court to issue appropriate orders ordirections, or writs including writs in the nature of hebeas corpus, mandamus, prohibition, quo warranto, and certiorari, which ever may be appropriate, for the enforcement of the petitioner's Fundamental Rights.

Under Clause (2) of Article 32 the Supreme Court is empowered to issue appropriate directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari for the enforcement of any fundamental rights guaranteed by Part III of the Constitution. By this Article the Supreme Court has been constituted as a protector and guarantor of fundamental rights conferred by Part III. 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.[24] In discharging the duties assigned to protect fundamental rights the Supreme Court in the words of Patanjali Sastri, J. has to play a role of a sentinel on the *qui vive*.[25] Again, in *Daryo v. State of U.P.*,[26] the Supreme Court took it as its solemn duty to protect the fundamental right zealously and vigilantly.

Scope of Clause (2) of Art. 32.- The language used in Art. 32 (2) is very wide. The power of the Supreme Court is not confined to issuing only writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari, [27] but any direction or order or writ whichever is appropriate to enforce the fundamental rights, nor it is bound to follow all the procedural technicalities, attached to it is English law. These rights are all of English origin. The Supreme Court of India may only issue the above writs but also directions, order or writs, similar to the above so far as to fit in with any circumstances peculier to India. The Supreme Court is not bound to follow the procedural techinicalities of English law. However, it has been held that in

24. *Romesh Thapper* v. *State of Madras*, AIR 1950 SC 124 at p. 126.
25. *State of Madras* v. *V.G. Row*, AIR 1952 SC 196.
26. AIR 1961 SC 1457 at p. 1461.
27. *Rashid Ahmad* v. *Municipal Board, Kairana*, AIR 1950 SC 163.

granting these writs it will follow the broad and fundamental principles that regulate its exercise in English law. In *T.C. Basappa* v. *T. Nagappa*, [28] the Supreme Court said:

> In view of the express provisions in our Constitution we need not now look back to the early history of the procedural technicalities of these writs in English law, not feel oppressed by the difference of change of opinion expressed in particular cases of Judges, we can make an order or issue a writ in the nature of certiorari, in all appropriate cases and in appropriate manner. So long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English Law.

Thus, the wording of Article 32 (2) is so elastic that it permits all necessary adaptation without legislative sanction from time to time so as to enable effective enforcement of the fundamental rights. Even if a proper writ has not been prayed for by the petitioner in a case his application cannot be thrown out. Article 32 permits large discretion to the Supreme Court to give the appropriate relief. The court can frame such writs as the exigencies of a particular case demand.

Art 13 is the key provision as it makes fundamental rights justiciable. Art 13 confers a power and impose a duty and an obligation on the course to declare a law void if it is inconsistent with a fundamental rights. This is a power of great consequence for the courts. The supreme court has figuratively characterised this role of the judiciary as that of a "sentinel on the qui vive"[29]. Art 32 confers power on the Supreme Court to enforce the Fundamental Rights.

Art 32 (3) empowers Parliament by law ot empower any other court to exercise within the limits of its territorial jurisdiciton all or any of the powers

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28. AIR 1954 SC 440.

29. *State of Madras* v. *V.G. Row*, AIR 1952 SC 196

exercisable by the Supreme Court under Art 32(2). This can however be done without prejudice to the Supreme Court's powers under Arts. 32 (1) and (2).

According the Art 32(4) the right guaranteed by Art 32 "shall not be suspended except as otherwise provided for by the Constitution."

Right of access to the Supreme Court under Art. 32 is a fundamental Rights itself.[30] Art 32 (1) provides a very important safeguard for the protection of the fundamental Rights of the citizens of India. Article 32 provides a guaranteed, quick and summary remedy for enforcing the Fundamental Rights because a person can go straight to the Supreme Court without having to undergo the dilatory process of proceeding from the lower to the higher court as he has to do in other ordinary litigation.

The Supreme Court has thus been consituted into the protector and guarantor of the Fundamental Rights. Commenting on the solemn role entrusted to itself by Art. 32, the Supreme Court has observed in *Daryao v. State of Uttar Pradesh*:[31]

> The Fundamental Rights are intended not only to protect individuals's right but they are based on the high public policy. Liberty of the individual and the protection of the Fundamental Rights are the very essence of the democratic way of life adotped by the Constitution, and it is the privilege and the duty of this court to uphold those rights. This court would naturally refuse to circum scribe them or to curtail them except as provided by the Constitution itself.

The court has emphasized in *Romesh Thappar* [32] that "this Court is thus constituted the protector and guarantor of the Fundamental Rights and it cannot consistently with the responsible so laid upon it, refuse to entertain

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30. *Bodhisattwa* v. *Subhra Chakraborty* AIR 1996 SC 922, 926 ; *Common Cause, a Registered Society* v. *Union of India*, AIR 1999 SC at 3020 .
31. AIR 1961 SC 1457 at 1461.
32. *Romesh Thappar* v. *State of Madras*, AIR 1950 SC 124.

applications seeking protection against infringement of such rights."

Under Article 32, the Supreme Court enjoys a broad discretion in the matter of framing the writs to suit the exigencies of the particular case and it would not throw out the application of the petitioner simply on the ground that the proper writ or direction has not been prayed for.[33] The Court's power is not confined to issuing writs only, it can make any order including even a declaratory order, or give any direction, as may appear to it to be necessary to give proper relief to the petitioner. [34]

It is meaningless to confer fundamental rights without providing and effective remedy for their enforcement, if and when they are violated. "A right without a remedy is a legal conundrum of most grotesque Kind." Art 32 confers one of the 'highly cherished rights.'[35]

The purpose for which Art. 32 can be invoked is to enforce Fundamental Rights. Violation of a Fundamental Right is a *sine qua non* of the exercise of the right conferred by Art. 32.[36]

The Supreme Court has described the significance of Art 32 in the following words in *Prem Chand Garg* v. *Excise Commissioner, U.P.*[37] (Per Gajendragadkar, J.):

> The Fundamental Right to move this Court can therefore be appropriately described as the cornerstone of the democratic edifice raised by the Constitution. That is why it is natural that this court should regard itself 'as the protector and guarantor of Fund mental Rights' and should declare that "it cannot, consistently with the responsibility laid upon it, refuse to entertain applications seeking protection against infringements of such rights ..... In discharging the duties

33. *Chiranjit Lal* v. *union of India*, AIR 1951 SC 41.
34 *Kochunni* v. *State of Madras*, AIR 1959 SC 725, 733 .
35. *The Fertilizer Corporation* case, AIR 1981 SC 344, 347.
36. *Federation of Bar Association in Karnataka* v. *Union of India*, AIR 2000 SC 2544.
37. AIR 1963 SC 996.

> assigned to it, this court has to play the role of a 'sentinel of the qui vive' and it must always regard it as its solemn duty to protect the said Fundamental Rights 'zealously and vigilantly'.[38]

(ii) Article 32 Enforces Fundamental Rights

As stated above, Art 32 can be invoked only when there is a infringement of a Fundamental Rights. The Supreme Court has laid emphasis on this aspect of Art 32 as follows:

> It is well-settled that, the jurisdiciton conferred on the Supreme Courtunder Art 32 is an important and integral part of the Indian Constitution but violation of a Fundamental Right is the *sine qua non* for seeking enforcement of those rights by the Supreme Court. In order to establish the violation of a fundamental Right the court has to consider the direct and inevitable consequences of the action which is sought to be enforced.[39]

In order to enforce a Fundamental right, judicial review of administrative, legislative and governmental action or non-action is permissible. But, Art 32 cannot be invoked simply to adjudge the validity of any legislation or an administrative action unless it adversely affects petitioner's Fundamental Rights.[40]

The Supreme Court under Art. 32 (1) can, while considering a petition for the enforcement of a Fundamental Rights, declare an Act to the ultra vires, or beyond the competence of the enacting legislature, if it adversely affects a Fundamental Right.

Where an enactment, as soon as it comes into force, affects the

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38.. *Ibid*, at 999.

39. *Hindi Hitrashak Samiti* v. *Union of India,* AIR 1990 SC 851 .

40. *Shantabai* v. *State of Maharashtra*, AIR 1958 SC 532.

Fundamental Rights of a person by its very terms and without any further over act being done, the person prejudicially affected is entitled immediately to invoke Art. 32 and get a declaration as to the invalidity of the impugned Act.[41]

(iii) Alternative Remedy

Article 32 is in itself a Fundamental Right and, therefore, the existence of an alternative remedy is no bar to the Supreme Court entertaning a petition under Article 32 for the enforcement of a Fundamental Right.

When once the Court is satisfied that the petitioner's Fundamental Right has been infringed it is not only its right but also its duty to afford relief to the petitioner, and he need not establish either that he has no other adequate remedy, or that he has exhausted all remedies provided by law, but has not obtained proper redress. When the petitioner establishes infringement of his Fundamental Right, the Court has no discretion but to issue an appropriate writ in his favour.[42]

In *K.K. Kochuni* v. *State of Madras*,[43] the Court held that Article 32 itself being a fundamental right the Court will give relief notwithstanding the existence of an alternative remedy. The Court's power under Article 32 (2) is wide enough to order the taking of evidence, if necessary on disputed questions of fact, and to give appropriate relief to the petitioner by issuing the writ or order so as to suit the exigencies of the case.

(iv) Article 32 v. Article 226

No action lies in the Supreme Court under Art. 32 unless there is an infringement of a Fundamental Right.[44] As the Supreme Court has emphasized : "The violation of a Fundamental Right is the *sine qua non* of the exercise of the right conferred by Art. 32"[45]

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41. *Kochunni, K.K.* v. *State of Madras*, AIR 1959 SC 725.
42. *Daryad v. State of Uttar Pradesh,* AIR 1961 SC 1457.
43. AIR 1959 SC 725.
44. *Andhra Industrial Works* v. *Chief Controller of Imports*, AIR 1974 SC 1539
45. *The Fertilizer Corp.* case.

Art. 32 differs from Art. 226 in that whereas Art. 32 can be invoked only for the enforcement of Fundamental Rights, Art 226 can be invoked not only for the enforcement of Fundamental Rights but for 'any other purpose' as well. This means that the Supreme Court's power under art. 32 is restricted as compared with the power of a High Court under Art. 226 for if an administrative action does not affect a Fundamental Right, then it can be challenged only in the High Court under Art. 226, and not in the Supreme Court under Art. 32

The words "for any other purpose" found in Art 226 (but not in Art. 32), enable a High Court to take cognizance of any matter even if no Fundamental Right is involved.

It may, however, be pointed out that there have been a few exceptional cases where the Supreme Court has entertained writ petitions under Art. 32 although no question of Fundamental Right was involved. This approach of the Court is justifiable on the ground that in these cases questions of great constitutional significance were raised ; there was no forum except the Supreme Court where these questions could be authoritatively decided, and there was no other mechanism, except Art.32 to bring such matters within the cognizance of the Supreme Court. This matters *inter alia* are:

(i) misuse of the ordinance - making power by the State of Bihar; [46]

(ii) appointment of the Judges of the High Court and the Supreme Court;[47]

(iii) issues related with the procedure to remove a Supreme Court Judge. [48]

Reference may be made here to *Tamil Nadu Couvery NVV NU P Sangam* v. *Union of India.*[49] The society moved a writ petition under Art. 32 in the Supreme Court for a direction to the Government of India to refer the cauvery water dispute to a tribunal. The petition remained pending in the Court for

46. *D.C. Wadhwa* v. *State of Bihar*, AIR 1987 SC 579.
47. *Supreme Court Advocates - on - Record Ass.* v. *Union of India,* AIR 1994 SC 268.
48. *Sarojii Ramaswami* v. *Union of India*, AIR 1992 SC 2219.
49. AIR 1990 SC 316.

more than seven years. An objection was raised against the maintainability of the petition. Rejecting the objection,the Court ruled that to throw out the petition after seven years by accepting the objection against its maintainability "would be ignoring the actual state of affairs, would be too technical an approach and in our view would be wholly unfair and unjust".

(v) Inter-Relationship between Articles 32 and 226

In the matter of enforcement of Fundamental Rights, the High Courts under Art. 226, and the Supreme Court under Art. 32, enjoy concurrent jurisdiction.

A question has been raised whether a petitioner seeking to enforce his Fundamental Rights can go straight to the Supreme Court under Art. 32, or should be first go to a High Court under Art. 226. As early as 1950, in *Romesh Thapper*, [50] the Supreme Court ruled that such a petitioner can come straight to the Supreme Court without going ot the High Court first. The Court stated that unlike Art. 226, Art. 32 confers a Fundamental Right on the individual and imposes an obligation on the Supreme Court which it must discharge when a person complains of infringement of a Fundamental Right. Art. 32 provides a guaranteed remedy for the enforcement of the Fundamental Rights and constitutes the Supreme Court as the "guarantor and protector of Fundamental Rights." This proposition has been reiterated by the Supreme Court in a number of cases. [51]

This is continued to be the position till 1987 when a two judge Bench of the Supreme Court ruled in *Kanubhai*,[52] that a petitioner complaining of infraction of his fundamental Right should approach the High Court first rather than the Supreme Court in the first instance, the reason given for this view was that there was a huge backlog of cases pending before the Supreme Court.

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50. *Ramesh Thappar* v. *State of Madras,* AIR 1950 SC 124 .
51. *State of Madras* v *V.G. Row*, AIR 1952 SC 196; *K.K. Kochunni* v. *State of Madras,* AIR 1959 SC 725; *Kharak Singh* v. *State of Uttar Pradesh*, AIR 1963 SC 1295
52. *Kanubhai Brahmbhatt* v. *State of Gujarat*, AIR 1987 SC 1159.

In the case of *Andi Mukta Sadguru Shree Muktajee vandas Swami Suvarna Jayanti Mahotsav Smarak Trust & Ors v. V. R. Rudani & Ors.*[53] the Court held:

> Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article 226, writs can be issud to "any persons or authority", the term "authority" used in the context, must receive a liberal meaning unlike the term in Article 12 which is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers powers on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevnt is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owned by the person or authority to the affected party, no matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied[54].

Thus, it is clear that when a private body exercises its public functions even if it is not a State, the aggrived person has a remedy not only under the ordinary law but also under the Constitution, by way of a writ petition under Article 226. Therefore merely because a non-governmental body exercises some public duty that by itself would not suffice to make such a State for the purpose of Article 12.

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53. AIR 1989 SC 1607.
54. *Andi Mukta Sadguru Shree Muktajee vandas Swami Suvarna Jayanti Mahotsav Smarak Trust & Ors v. V.R.Rudani & Ors.*, AIR 1989 SC 1607, quoted in *Zee Tele Films Ltd. v. Union of India,* AIR 2005 SC 2677 at 2691.

It should be noted that there can be no two views about the fact that the Constitution of this country is a living organism and it is the duty of Courts to interpret the same to fulfil the needs and aspirations of the people depending on the needs of the time. In Article 12 the term "other authorities" was introduced at the time of framing of the Constitution with a limited objective of granting judicial review of actions of such authorities which are created under the Statute and which discharge State functions. However, because of the need of the day this Court in *Rajasthan State Electricity Board*[55] and *Skhdev Singh*[56] noticing the socio-econimic policy of the country thought it fit to expend the definition of the term "other authorities" to include bodies other then statutory bodies. This development of law by judicial interpretation culminated in the judgment of the 7-Judge Bench in the case of *Pradeep Kumar Biswas*[57]. It is to be noted that in the meantime the socio-economic policy of the Government of India has changed[58] and the State is today distancing itself from commercial acticities and concentrating on governance rather than on business. Therefore, the situation prevailling at the time of *Sukhdev Singh*[59] is not in existance at least for the time being, hence there seems to be no need to further expand the scope of "other authorities" in Article 12 by judicial interpretation at least for the time being. It should also be borne in mind that. in a democracy there is a dividing line between a State enterprise and a non-State enterprise, which is distinct and the judiciary should not be an instrument to erase the said dividing line unless, of course, the circumstances of the day require it to do so.

Since it is the view expressed by a two Judge Bench, it can not be regarded as an authoritative pronouncement on an important constitutional issue, viz., inter relationship between Arts. 32 and 226. Such a vital pronouncement could be made only by the Constitution Bench consisting at

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55. AIR 1967 SC 1857.
56. AIR 1975 SC 1331.
57. (2002) 5 SCC 111.
58. *See Balco Employees' Union (Regd) v. Union of India & Ors.* (2002) 2 SCC 333.
59. AIR 1975 SC 1331.

least of five Judges, especially, when the long established position is sought to be overturned.

The ruling in *Kanubhai* seeks to negate what the Supreme Court has itself said in a number of cases during the last four decades emphasizing upon the significance of Art. 32, and the role assigned to it thereunder.[60]

Even otherwise, on merit, this view will make Art. 32 redundant for after having gone to the High Court first under Art. 226, the petitioner would then come to the Supreme Court by way of appeal and not under Art. 32, because of the principle of *res judicata,* when a litigant approaches the Supreme Court, the matter is decided by the Court finally. But if he approaches the High Court, the petition is first decided by a single judge, an appeal then lies to the division bench, and, thereafter, an appeal may be taken to the Supreme Court. In fact, this may cause more delay and prove costier to the petitioner than a writ petition directly under Art. 32. In effect, the *Kanubhai* ruling devalues the significance not only of the Fundamental Rights but of the Supreme Court itself. This could never have been the intention of the framers of the Constitution.

In practice, it seems that the *Kanubhai pronouncement* has had no effect on the existing practice and the writ petitions continue to be filed in the Supreme Court under Art. 32 without first going to the High Court under Art. 226.

(vi) Broad Canvas of Article 32

Art. 32 being a Fundamental Right itself, it cannot be diluted or whittled down by any law. Art. 32 can be invoked even when a law declares a particular administrative action as final.[61]

The powers of the Supreme Court under Art. 32 are plenary and not

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60. *State of Madras* v. *V.G. Rao*, AIR 1952 SC 196; *K. Kochunni* v. *State of Madras*, AIR 1959 SC 725.
61. *Gopalan* v. *State of Madras*, AIR 1950 SC 27; *Prem Chand* v. *Excise Commisioner*. AIR 1963 SC 996.

fettered by any legal constraints. If in exercise of those powers, the court commits a mistake, the court has plenary power to correct the mistake.[62]

That Art. 32 bestows the Supreme Court with great powers is illustrated by the following case. In *Khatri* v. *State of Bihar*,[63] several petitioners filed writ petitions under Art. 21 on the allegation that they were blinded by the police while they were in its custody. The question arose whether the Court could order production of certain reports submitted by the CID to the State Government claimed that this material was protected by Ss. 162 and 172 of the Cr. P.C. Rejecting the contention, the Court said that the proceedings under Art. 32 are neither an 'inquiry' nor a 'trial' for an offence. Neither the Supreme Court is a criminal Court while hearing a writ petition nor are the petitioners accused persons and so these sections of the Cr. P.C. are not applicable to the Court's writ jurisdiction under Art. 32.

(vii) Procedure Under Article 32

In *Bandhua Mukti Morcha*,[64] the Apex Court has clarified that procedurally, under Art. 32, it is not bound to follow the ordinary adversary procedure and may adopt such procedures may be effective for the enforcement of the Fundamental Rights. When a writ petition was moved on behalf of some workmen that they were being held in bondage, the court appointed two persons as commissioners to make report on the petitioners' condition. It was argued that their report had no evidentiary value since what was stated therein was based only *exparte* evidence which had not been tested by cross-examination. The court held the argument not well-founded and rejected it, as it was based upon a total misconception of the true nature of a preceeding under Art. 32.

Art 32(2) confers power on the Court is its widest terms. "It is not

62. *S. Nagaraj* v. *State of Karnataka*, (1993) Supp. (4) SCC 595 ; Common Cause, *a Regd. Society* v. *Union of India* , AIR 1995 SC 2979, 3025.
63. AIR 1981 SC 1068
64. AIR 1984 SC 802

confined to issuing the high prerogative writs", but "it is much wider and includes within its matrix power of issue any directions, order or writs which may be appropriate for enforcement of the Fundamental Rights in question".[65]

The Constitution is silent as to the procedure to be followed by the Court in exercising its power under Art. 32(2) because the Constitution - makers were anxious not to allow any procedural technicalities to stand in the way of enforcement of Fundamental Rights and they never intended to fetter the Court's discretion to evolve a procedure appropriate in the circumstances of a given case to enable it to exercise its power to enforce a Fundamental Right.

Whatever procedure is necessary to fulfil that purpose is permissible to the Court. It is not at all obligatory for the Court to follow adversarial procedure. No such restriction ought to be imposed on the Court. In such a system a poor person is always at a disadvantage against a rich person. When the poor come to the Court for enforcement of their Fundamental Rights, it is necessary to depart from the adversarial procedure and evolve a new procedure so as to enable such people to bring the necessary material before the Court so as to secure enforcement of their rights. In the words of Bhagwati, J. :

> We have therefore to abandon the *laissez faire* approach in the judicial process particularly where it involves a question of enforcement of Fundamental Rights meaningful for the large masses of people .... If we want the Fundamental Rights to become a living reality and the Supreme Court to become a real sentinel on the *qui vive*, we must free ourselves from the shackle of out dated and outmoded assumptions and bring to bear on the subject fresh outlook and original unconventional thinking.[66]

Accordingly, the Court has accepted even a letter addressed to the Court

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65. AIR 1984 SC 814.
66. AIR 1984 SC at 815-16

as an "appropriate" proceeding and has taken congnizance of the matter raised therein. The letter need not be in any particular form.[67]

The poor cannot produce relevant material before the Court in support of their case. Even when a case is brought on their behalf by a citizen acting *pro bono publico*, it would be almost impossible for him to gather the relevant material and place it before the court. If the court adopts a passive attitude and declines to intervene in the absence of relevent materials, "the Fundamental Rights would remain merely a teasing illusion so far as the poor and disadvantaged sections of the community are concerned."[68]

That is why the court appoints commissioners to gather facts and data in regard to a complaint of branch of a Fundamental Right made on behalf of the weaker sections of the society. The commissioners' report furnishes prima facie evidence of the facts and data. The court appoints as commissioners such persons as would carry out the assignment objectively and impartially without any predilection or prejudice. Any party can dispute the facts or data stated in the commissioner's report. It is entirely for the court to consider what weight ought to be attached to the facts mentioned in the report. The High Courts can also follow a similar procedure in exercise of their jurisdiction under Art. 226.

(viii) Article 32 cannot be Restricted by Legislation

Art. 32 being a Fundamental Right cannot be diluted by any legislation. Section 14 of the Preventive Detention Act, 1950, prevented the detenu, on pain of presecution, from disclosing to any court the grounds of his detention communicated to him by the detainig authority. The provision was held unconstitutional as it rendered negatory the exercise of the Supreme Court's power under Art. 32 for unless the court could examine the grounds on which

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67. *Bandhua Mukti Morcha* v. *Union of India*, AIR 1984 SC 802, 813-14 ; *M.C. Mehta* v. *Union of India*, AIR SC 1086, 1090; *Pratul Kumar Singh* v. *State of Orrissa*, AIR 1989 SC 1783.
68. AIR 1984 SC at 516.

the detention order had been based, it could not decide whether detenu's Fundamental Rights under Arts. 21 and 22 had been infringed or not.[69]

A similar point was raised in *Express Newspapers* v. *Union of India* in another way.[70] The Working Journalists Act, 1955, constituted a wage board for fixing the rates of wages of working journalists. The Act was challenged on the ground that it made no provision requiring the wage board to give reasons for its decision. It was argued that this rendered the petitioner's right to approach the Supreme Court for enforcement of his Fundamental Rights negatory because, in the absence of reasons, the Court would not be able to investigate the valid prohibited the wage board from giving reasons for its decision, as that would have rendered Art. 32 negatory. But as there was no such provision and it was left to the board's discretion to give reasons for its decision or not, Art. 32 was not infringed in any manner whatsoever.

In *Prem Chand* v. *Excise Commr.*,[71] the Supreme Court struck down one of its own rules, (O.35, R.12) which required furnishig of security to move the court under Art. 32, as it retarded the assertion or vindication of the Fundamental Right under Art. 32. The rule imposed a financial obligation on the petitioner, and if he did not comply with it, his petition would fail.

The Court also took the positin in *Prem Chand* that furnishing of security discriminated against the poor sections of the society, and that Art. 32 cannot be encumbered by rules which favoured the rich with access to justice. But a rule aiding and facilitating the orderly presentation of petitions under Art. 32 cannot be regarded as unconstitutional as contravening Art. 32. A rule requiring security for filing a petition for review of an order made earlier by the court dismissing an Art. 32 petition is valid as it does not restrict Art. 32 in any way.[72]

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69. *Gopalan* v. *State of Madras*, AIR 1950 SC 27 ; *Lachhman Das* v. *State of Punjab*, AIR 1963 SC 222.
70. AIR 1958 SC 578.
71. AIR 1963 SC 996.
72. *Lala Ram* v. *Supreme Court of India*, AIR 1967 C 847.

The Supreme Court has again asserted recently that its power and jurisdiction under Art. 32 cannot be curtailed by any law. In exercising its power under Art. 32, the Court can direct anybody to make any inquiry. All authorities in the country are bound by the directions of the Court and have to act in aid of the Court.

In *Paramjit,*[73] the Supreme Court directed the National Human Rights Commission to make an inquiry into a specific matter. Under the Act establishing the Commission, it cannot inquire into any matter which is more than one year old. But the Supreme Court ruled that the Commission could inquire into the referred matter even though it was older than one year because the Commission would be functioning sui generis under the direction issued by the Court under Art. 32 and not under its own constituent statute.

By and large the Supreme Court has used its jurisdiction under Art. 32 in a creative manner.

(ix) Quasi - Judicial Bodies

The Supreme Court has diluted the efficacy of Art. 32 as a technique to challenge a dicision by a quasi-judicial body. In *Ujjam Bai* v. *State of Uttar Pradesh,*[74] the court has held that an assessment of sales tax by a quasi-judicial authority, acting within its jurisdiction and under an intra vires law, could not be challenged under Art. 32 on the ground that it has misconstrued or misinterpreted the law, because no breach of any Fundamental Right was involved in such a situation. Such an error can be corrected by way of appeal to the Supreme Court.

Art. 32 is , however, available when a Fundamental Right is violated -

(1) by a *quasi-judicial* authority acting under an *ultra vires* law; or

(2) when the assessing authority seeks to impose a tax against a constitutional prohibition;[75] or demands to tax not leviable under any valid law; or

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73. *Paramjit Kaur* v. *State of Punjab*, AIR 1999 SC 34.

74. AIR 1962 SC 1621.

75. *Firm Mehtab Majid* v. *State of Madras*, AIR 1963 SC 928.

(3) where the stature is *intra vires* but the authority acts under it without jurisdiction, or wrongly assumes jurisdiction:[76] or

(4) where the action taken is procedurally *ultra vires,* for example, when principles of natural justice are infringed.[77]

The Government of India, by a statutory order, applied the Sea Customs and other relevant Act of Pondicherry, saving "all things done or omitted to be done November 1, 1954" from the mischief of the Acts being applied. The petitioner had placed orders for impose before, but received the consignments after, the said date, and the Customs Collector seized them and imposed a heavy penalty on him. The petitioner challenged the Collector's order under Art. 32 alleging infringment of Art. 19(1) (*g*) on the ground that the Collector was acting without jurisdiction. Rejecting the petition, the Supreme Court held by a majority that in seizing the consignments, the Collector was acting within jurisdiction and was discharging a *quasi-judicial* function. Although he might either be taking a wrong view of the facts, or misconstruing the statutory order in question, yet in none of these situtations could the Court interfere under Art. 32, in the latter event because of the ruling in the *Ujjam Bai* case.[78]

In STC v. Mysore,[79] the *Ujjam Bai* case were held inapplicable and an assessment of sales tax on inter-State sale of cement was quashed under Art. 32. Under the Constitution, a State can not tax an interstate sale. It was argued that the taxing officer was acting in a *quasi - judicial* capacity; he had jurisdiction to decide whether a particular sale was inter-State or not, and any error committed by him in deciding that question falling within his jurisdiction would not offend any Fundamental Right as had been held in the *Ujjam Bai* case.

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76. S.T.C. v. Mysore, AIR 1963 SC 558.
77. *Coffee Board* v. *Jt. Commercial Tax Officer*, AIR 1971 SC 870.
78. *Pioneer Traders* v. *Chief Controller of Imports and Exports*, AIR 1963 SC 734
79. AIR 1963 SC 548.

A writ petition was moved in the Supreme Court under Art. 32 on the ground that the licensing authority misapplied the Imports and Exports Control Act. The Court dismissed the same on the ground that a petition under Art. 32 is not competent to challenge any erroneous decision of an authority. Invoking the authority of *Ujjam Bai*, the court ruled that a wrong application of the law would not amount to a violation of Fundamental Rights. If the provisions of the law would not amount to a violation of Fundamental Rights whether the authority was right or wrong on facts. An erroneous decision does not violate Fundamental Rights.[80]

The above mentioned cases bring out the difficulties of challenging quasi-judicial decisions on the ground of infringement of Fundamental Rights through Art. 32 petitions. The law has become rather technical. It is always a difficult question to decide whether an authority is acting without jurisdiction, or within jurisdiction but taking a wrong view of facts or law. Art. 32 is available in the first case but not in the second. Similarly, if a quasi-judicial authority acting within jurisdiction, misinterprets a constitutional provision, rather than an ordinary law, Art. 32 may be available in the first case but not in the second. Similarly if a quasi-judicial authority acting within jurisdiction, misinterprets a constitutional provision, rather than an ordinary law, Art. 32 may be available . On the whole, therefore, it is hazardous task to challenge a quasi-judicial decision under Article 226 which is broader in scope than Article 32. This position, in a way, appears to be anomalous for, while Article 32 is a guaranteed right, Article 226 is not so.

(x) Questions of Fact

The Court has power to decide disputed questions of fact arising in a writ petition if it so desires. This was very clearly stated by the Court in *Kochunni,* [81] where the Court observed:

But we do to countenance the proposition that, on an

80. *J. Fernandez & Company* v. *Dy. Chief Controller Imports and Exports*, AIR 1975 SC 1208.

81. *K.K. Kochunni Moopil Nayar* v. *State of Madras*, AIR 1959 SC 725.

> application under Art. 32, this Court may decline to entertain the same on the simple ground that it involves the determination of disputed questions of fact or on any other ground. If we were to accede to the aforesaid contention of learned counsel; we would be failing in our duty as the custodian and protector of the Fundamental Rights .....Further, questions of fact can and very often are dealt with on affidavits.

This statement was made in 1959. Since then the attitude of the Court has stiffened on this question and, ordinarily, the Court does not now go into disputed questions of fact.[82] in a writ petition. The reason for this judicial stance is that disputed questions of fact can be decided properly by examining the pleadings raised by the parties and by taking evidence and such a course is not possible in a summary proceeding like that of a writ petition under Art.32.

(xi) Against whom a writ can be issued ?

By and large Fundamental Rights are enforceable against the state. The term 'State' has been defined in Art. 12 which has already been discussed earlier. There are a few fundamental Rights, such as, under Arts. 17, 21, 23 or 24 which are also available against private persons. In case of violation of any such right, the court can make appropriate orders against violation of such rights by private persons.[83]

The protection available under Article 21 is available against 'the state'. In *Ajay Hasia*[84], the Court held that the expression 'Other Authorities included an "instrumentality" or 'agency" of the government. Now the term "state" included even a company registered under the Indian Companies Act or a

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82. *Major Sodhi* v. *Union of India*, AIR 1991 SC 1617 ; *Daljit Singh Dalal* v. *Union of India*, AIR 1997 SC 1367.

83. *People's Union for Democratic Rights* v. *Union of India*, AIR 1982 SC 1473, 1490-91, *Vishaka* v. *State of Rajasthan*, AIR 1997 SC 3011.

84. *Ajay Hasia v. Khalid Mujib*, AIR 1981 SC 487.

society registered under the Societies Registration Act[85]. The above development will be applicable to Article 21[86].

The basic question which arises arises in this regard is : against whom the protection of Article 21 is available? This question was considered by the Court in *Gopalan's*[87] case, where the Court held that the protection was available only against the State. Justice Patanjali Sastri opined that the constitutional safeguards were directed against the State and its organs[88]. The Court preferred the English doctrine of immunity against unlawful executive interference. Article 21, according to Justice Mahajan, "gives complete immunity against the exercise of despotic power by the executive". It further gives immunity against invalid laws which contravene the Constitution[89]. However, in the opinion of Das, J., Article 21 puts a check on the legislature as well[90].

Bhagwati, J., followed the expansive approach of *Gopalan,* in the *Habeas Corpus*[91]. The learned judge opined:

> Article 21 operates not merely as restriction on executive action against deprivation of personal liberty without authority of law, but also enacts a check on the legislature[92].

A similar view was followed by the learned judge in *Bachan Singh*[93]. In this case the learned judge, following *Maneka,* observe:

> Article 21 affords protection not only against executive action but also against legislation[94].

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85. *Ibid.*
86. Dwivedi, B.P. *The Changing Dimension of Personal Liberty in India,* Wadhwa & Company, Allahabad, 1998 at 72.
87. *Gopalan v. State of Madras,* AIR 1950 SC 27.
88. *Ibid* at 74.
89. *Ibid* at 84, *Per* Mahajan, J.
90. *Ibid* at 109, *Per* Das, J.
91. *A.D.M. Jabalpur v. S. Kant Sukla,* AIR 1976 SC 1207.
92. *Ibid* at 1363.
93. *Bachan Singh v. State of Punjab,* AIR 1982 SC 1325.
94. *Ibid* at 1340.

Now it is well settled that the protection of Article 21 is available against the executive and the legislature as well. Is the protection of Article 21 available against the judiciary? It may be noted that the 'judiciary' is not expressly mentioned within the definition of the 'State' under Article 12. However, there are a few fundamental rights in part III which afford protection against the *Judiciary as well*[95]. In *Bachan Singh*[96]. Bhagwati, J., dissenting, opined that a law vesting 'uncontrolled and unregulated discretion in the court whether to award death sentence or life imprisonment' would fall foul of Article 21[97]. Thus, a judgment of the court awarding death sentence was treated as violative of Article 21.

In *Antulay* v. *R.S. Nayak*[98]. The basic question framed by Sabyasachi Mukharji, J., was whether the earlier directions given by the Supreme Court transferring the case of the appellant for trial from the Court of special Judge to the High Court was violative.

Fundamental rights are generally available against State. However, some of the socio-economic rights guaranteed under part III of the Indian Constitution are available against private individuals also[99]. The question whether Article 21 is available against private acts, for the *first* time, reached before the Supreme Court in *Gopalan's*[100] case where the court was of the opinion that it was a

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95. For example, Articles 20 (2) and (3), 22 (I); *See* also, *Naresh Sridhar Mirajkar* v. *State of Maharashtra,* AIR 1967 SC 1, 28-29 *per* Hidayatullah J.

96. *Bachan Singh v. State of Punjab,* AIR 1982 SC 1325.

97. *Ibid* at 1384.

98. AIR 1988 SC 1531.

99. For example, Articles 15(2), 17, 23 and 24.

100. *Gopalan v. State of Madras,* AIR 1950 SC 27, *See* also, *P.D. Shamdasani v. Central Bank of India Ltd,* AIR 1952 SC 59, 60, which was a case under Articles 19(1) (f) and 31(1), Patanjali Sastri, C.J., Speaking for the Bench of five Judges, observed; There is no express reference to the State in Article 21. But could it be suggested on that account that Article was intened to afford protection to life and personal liberty against violation by private individuals? The words "except by procedure established by law" plainly exclude such a suggestion.

misconception to think that the constitutional safeguards are directed against individuals. Justice Patanjali Sastri held that the protection against violation of the rights by individuals must be sought in the ordinary law[101]. The question of violation of Article 21 by private action pointedly came up before the Supreme Court in *Vidya Vermas*[102] case.

A significant development took place in India by the enactment of the Protection of Human Rights Act, 1993, by Parliament. The Act defines the 'human rights' to mean the 'the rights relating to *life, liberty,* equality and *dignity* of the individual[103]. Further, it includes the above rights guaranteed by the Constitution as well as embodied in the International Covenant on Economic, Social and Cultural Rights.

In *M.C. Mehta's*[104], case a significant question came up; whether a private corporation could come within the ambit of Article 12 and thus be subjected to the limitations of fundamental rights. The Court did not make a definite pronouncement on the issue of the State but it subjected the private corporation to the limitations of Article 21. Thus in view of the humanist approach to personal liberty the question as to who is the violator whether the 'State' or 'Private individual' itself loses its relevance. In *Sheela Barse* v. *Secretary, Children Aid Society*[105] the children Aid society, Bombay, a registered society was treated as the 'state' within the meaning of Article 12 and required to satisfy the requirement of Article 21. A large mass of private educational institutions have cropped up to provide for many disciplines including scientific, technical and medical education. The question arose in *Mohini Jain's*[106] case was whether a private educational institution by state recognition would be

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101. *Ibid* at 74.

102. *Vidya Verma v. Shiv Narain,* AIR 1956 SC 108.

103. Sec. 2 (d), the Protection of Human Rights Act, 1993, (emphasis added)

104. *M.C. Mehta v. Union of India,* AIR 1987 SC 1086.

105. AIR 1987 SC 656

106. *Mohini Jain v. State of Karnataka,* AIR 1992 SC 1858.

included under Article 12. Justice Kuldip Singh upheld the right to education and then observed:

> The State is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The state may discharge its obligation through State owned or sate recognized educational institutions. When the *State government grants recognition to the private educational institutions it crates an agency to fulfil its constitutional obligation* under the constitution[107].

In *Unni Krishnan*[108], the court following *Ajay Hasia*[109], found it impossible to hold that a private educational institution either by recognition or affiliation to the University could ever be called an instrumentality of state. It is submitted that the view expressed in *Mohini Jain's* case is more in consonance with the criteria laid down in *Ajay Hasia* case. Thus the prime concern of the court, it is submitted, has been to protect the right to personal liberty of the individual either extending the scope of Article 12 to include a private body into the definition of the State or to extend the protection even to the private acts[110].

(xii) Who can apply ?

Art. 32 does not prescribe the persons or classes of persons who can invoke the Supreme Court's jurisdiction for the redressal of their grievances. The matter of 'standing' this lies within the realm of the Supreme Court.

The general principle is that a person whose Fundamental Right has been infringed has *locus standi* to move the Supreme Court under Art. 32 for

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107. *Ibid* at 1866 (emphasis added).

108. *Unni Krishnan v. State of A.P.*, AIR 1993 SC 2178, at 2206, *per* Mohan, J.

109. *Ajay Hasia v. Khalid Mujib,* AIR 1981 SC 487.

110. *Air India Statutory Corporation v. United Labour Union,* AIR 1997 SC 645, 674.

the enforcement of his right. A person where Fundamental Right is affected has standing to file a petition under Art. 32

The legal right to be enforced under Art. 32 must ordinarily be the right of the petitioner himself. As rights are different and inherent in different legal entities, it is not competent to a person to seek to enforce the rights of another except when the law permits him to do so.[111] This principle emanates from the theory that the remedies and rights are correlative and, therefore, only a person whose own right is in jeopardy is entitled to seek a remedy.

Since a corporation has a distinct legal personality of its own, with rights and duties separate from those of its individual members, a shareholder cannot complain against a law which affects the Fundamental Right of the corporation except to the extent that it infringes his own Fundamental Right as well[112].

A well-known exception to this principle, however, is a petition for a writ of habeas corpus which can be made not only by the person who is mprisoned or detained but by any person provided he is not a complete stranger, for liberating a person from an illegal imprisonment.[113]

(xiii) Relief under Article 32

The phraseology of Art. 32 (2) is very broad. Thereunder the Supreme Court is authorized to issue orders, directions, or writs, "including" writs, " in the nature of" *mandamus*, *certiorari*, prohibition, *quo warranto* and h*abeas corpus*.

Under Art. 32, the Supreme Court may issue not only the specified writs but also make any order, or given any directions as it may consider appropriate in the circumstances of the case to give proper relief to the

111. *G. C. College, Silchar* v. *Gauhati University*, AIR 1973 SC 761 ; *S. Sinha* v. *S. Lal & Co.*, AIR 1973 SC 2720.

112. *Chiranjit Lal* v. *Union of India*, AIR 1951 SC 41.

113. *Sunil Batra* v. *Delhi Administration* (II), AIR 1980 SC 1579 .

petitioner. The Court can grant declaration or injunction as well if that be the proper relief. [114]

The Court can mould relief to meet the exigencies of the specific circumstances.[115]

What is the appropriate remedy to be given to the petitioner for the enforcement of his Fundamental Rights in a matter for the Court to decide. In the words of the Court:[116]

> The jurisdiction enjoyed by this Court under Art. 32 is very wide as this court, while conceding a petition for the enforcement of any of the Fundamental Rights ...., can declare an Act to be ultra vires or beyound the competence of the legislature.

The power of the Supreme Court is not restricted to the five writs specifically mentioned in Art. 32 (2). This is because of two reasons, viz :

(1) The power of the Court is 'inclusive';

(2) The Court has power to issue writs "in the nature of" the specified five writs.

This means that the Court has flexibility in the matter of issuing writs. The Court has explained the position in *M.C. Mehta* v. *Union of India*[117].

> ... This Court under Art. 32 (1) is free to devise any procedure appropriate for the particular purpose of the proceedings namely, enforcement of a Fundamental Right and under Art. 32 (1) the Court has the implicit power to issue whatever direction, order or writ is necessary in a given case, including all incidental or ancillary power necessary to secure enforcement of the Fundamental Right.

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114. *K. K Kochunni* v. *State of Punjab*, AIR 1959 SC 725; *P.J. Irani* v. *State of Madras*, AIR 1961 SC 1731
115. *Golaknath* v. *State of Punjab*, AIR 1967 SC 1643.
116. *Bodhisattwa* v. *Subha Chakraborty,* AIR 1996 SC 922, 926
117. AIR 1987 SC 1086, 1091.