JUDICIAL REVIEW THROUGH WRIT PETITIONS

CHAPTER I

ORIGIN AND DEVELOPMENT OF WRIT PROCEDURE

1. Object

In the 19th and 20th centuries the scope of the minimal duties of the state has progressively widened. New authorities with wide statutory powers have been created, giving a new emphasis to the problem of reconciling the powers of the state with the liberties of the citizen. Many of the statutes relating to the new administrative authorities contain provisions whereby the aggrieved citizen can secure redress from administrative tribunals. In France and other continental countries problems of this kind are the exclusive concern of special tribunals like the *Conseil d'Etat*, where a *droit administratif*, largely the creation of such tribunals, is applied. In England, however, it has been said:

> "no consideration of administrative convenience or executive efficiency should be allowed to weaken the control of the courts, and no obstacle should be placed by Parliament in the way of the subject's unimpeded access to them".[1]

Faced in earlier centuries with the problem of control of local and subordinate authorities, English judges had evolved the prerogative writs which are still effective in dealing with many problems created by the welfare state. They were introduced into India by the charters of the Supreme Courts in the Presidency Towns.

The value of any method of control of administrative action is measured by the extent to which it enables the administrative authorities in the state to perform their functions without sacrificing the essential liberties of the citizen.

As the Indian Founding Fathers selected the prerogative writs in preference to other possible methods of judicial control, it is proposed to consider how far this choice has been justified and after a brief outline of the history of the writs in England and in India to consider the present position in India and suggest amendments where necessary.

In constitutional theory, and to a large extent in historical fact, after the Norman conquest, legislative, executive and judicial powers in England were derived from the Crown and were subject to its control. Long after the Sovereign ceased to sit in it, he was regarded

1. Report of the Committee on Ministers' Powers, p. 114.

as in some sense present in the Court of King's Bench. Though the Stuart monarchs endeavoured to remove administration from the purview of the courts, Coke wrote:

> "The Court of King's Bench hath not only jurisdiction to correct errors in judicial proceedings but other errors and misdemeanours extra-judicial tending to the breach of the peace or oppression of subjects or raising of faction, controversy or debate or any other manner of mis-government; so that no wrong or injury either public or private can be done but this shall be reformed or punished. If any person be committed to prison this court ..... ought to to grant an *Habeas Corpus* ...... It granteth prohibition to the courts temporal and ecclesiastical to keep them within their proper jurisdiction...... If a freeman be disfranchised unjustly, this court may relieve the party ... (the king being visitor of all civil corporations) the law has appointed the place wherein he shall exercise this jurisdiction ...... the Court of King's Bench where...all behaviour of this kind of corporation is enquired into and redressed ".[2]

The abolition of the Court of Star Chamber, the transfer of its surviving powers to the common law courts, and the assimilation of the powers and jurisdiction of the three common law courts, all contributed to make the writ procedure in England the most effective method of protecting the rights of the citizen.

Though its scope was strictly limited, the writ procedure was introduced into India before the end of the 18th century.

With the inauguration of the Republic, the new Constitution set out directive principles of state policy intended to create the welfare state. This involved multiplication of the number of administrative authorities and widened the scope of executive activity. At the same time, a charter of fundamental rights was promulgated which the citizen and in some cases the non-citizen could plead not only against the acts of executive authorities but also against the legislature; the Constitution guaranteed to the person whose fundamental right was infringed an adequate procedural remedy in the Supreme Court. The same remedy could be sought in a High Court which was also given power to grant relief in appropriate cases where not only a fundamental right but also a legal right or interest was violated. The main purpose of writ petitions is to enable the superior courts to pass upon the validity of the acts of the administration.

Thus, in India after the Constitution had come into force, the High Courts could under Art. 226 issue directions, orders, or writs, including

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2. Co. Inst. IV 70.

writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari* or any of them not only for the purpose of enforcement of fundamental rights but also *for any other purpose.* Such writs could be issued throughout the territory in relation to which the High Court exercised its jurisdiction, to any person or authority including in appropriate cases any government. Writs could be issued against the state or any of its organs. Therefore, the scope of orders by the High Courts in India under Art. 226 is wider and of greater amplitude than the powers possessed by the High Courts of England.

2. History of judicial review by writs in England

Though it was in the Tudor period that they assumed importance, some of the prerogative writs mentioned by name in Arts. 32 and 226 of the Indian Constitution here in the 13th century used in England for some purposes similar to those for which they are employed in England and India today. *Certiorari* was in common use, sometimes as a writ of error, sometimes to institute an appeal, on the theory that if a subject complained of injustice, the sovereign wishing to be informed, would order the record to be transmitted to King's Bench. In the seventeenth century it became a means of review of the activities then newly required of the justices of the peace. Prohibition, one of the oldest known writs, at first used to limit the jurisdiction of the ecclesiastical courts, was later used by the common law courts in the battles with the Court of Chancery, and other courts more closely associated with the Crown.[3] *Mandamus* in the 13th century was a means of ensuring performance of acts to safeguard the King's feudal dues rather than an instrument for enforcing public duties, but in the reign of Edward II it was used to direct the University of Oxford to readmit a person it had expelled.[4] In 1573 it was used to restore a franchise of which a London citizen had been illegally deprived and in *Bagg's* case,[5] it was used to restore to his office a burgess illegally deprived of it by the Mayor and Corporation of Plymouth. Thereafter its scope was expanded to compel performance of duties incumbent in administrative and judicial bodies.[6] Though it was extensively used by Edward I to prevent encroachments on his prerogatives and rights, *quo warranto* had been used previously by private suitors. In the 16th century it was replaced by an information filed by the Attorney-General, and if

3. de Smith, *Judicial Review of Administrative Action,* pp. 259-263.
4. Tapping, *Law and Practice of the High Prerogative Writ of Mandamus,* pp. 1-8.
5. (1615) 77 E.R. 1271.
6. de Smith, *op. cit.,* pp. 264-65.

brought *ex relatione* a private person, leave of the court was necessary.[7] A statute of William and Mary (4 & 5 W. & M.c. 18) forbade the exhibition of malicious informations and it was subsequently held that this applied to information in the nature of the *quo warranto*. 9 Anne c. 20 enabled an information to be brought with leave of the court at the relation of any person against anyone usurping or unlawfully holding any office in any city or borough. The association with Sec. 19 of Magna Carta attributed to *habeas corpus* is probably imaginary. By the fifteenth century, older writs intended to protect personal liberty had been replaced by the writ of *habeas corpus* which was not used against the Crown until the reign of Henry VII. The subsequent Habeas Corpus Acts, particularly the Act of 1679, merely excluded various devices resorted to by the executive with the object of denying a hearing to the person deprived of his liberty.

In the 17th and 18th centuries, the above-mentioned writs were called "prerogative" because they were then regarded as being intimately connected with the rights of the Crown, because their issue was discretionary and because they issued to parts of England where writs of right did not run.[9] Proceedings by writ, even *habeas corpus*, are civil proceedings. All writs test the legality of administrative and executive orders. The writ of *habeas corpus* does the same function in this regard as *certiorari*, *mandamus* etc. It is but a writ of remedial nature and cannot be used as an instrument of punishment.[9a] It secures the liberty of the subject both in civil and criminal cases where there has been a deprivation of personal liberty without legal justification.[9b] The writ of *habeas corpus* can therefore be deemed in essence a civil proceeding. In a criminal proceeding the enquiry is about the offence committed but in a proceeding for the writ of *habeas corpus* the legality of the deprivation of liberty is the only issue.

Section 34 of the Judicature Act, 1875, assigned to the Queen's Bench Division of the High Court all causes and matters, civil and criminal previously within the exclusive cognizance of the Court of Queen's Bench. Its effect was to vest the power of issuing the prerogative writs above named in the Queen's Bench Division. The Administration of Justice (Miscellaneous Provisions) Act, 1938, abolished the writs of

7. de Smith, *op. cit.*, p. 154.
8. A. S. Chaudhari, *High Prerogative Writs*, p. 609.
9. de Smith, *Judicial Review of Administrative Action*, pp. 267–268.
9a. See Title Crown Proceedings s. 2 Habeas Corpus, in *Halsbury's Laws of England* Simonds Ed., Vol. II, p. 27
9b. *Ibid.*, p. 31.

mandamus, prohibition and *certiorari*, substituting for them orders in the nature of these writs. This did not affect the conditions in which they would issue or their scope; it only simplified the relevant procedure, by assimilating it to the procedure governing all applications in that division, which are made in writing, setting out the parties, the relief sought and the grounds. The same statute abolished informations in the nature of *quo warranto* but provided for the issue of an injunction restraining any person against whom *quo warranto* could have been issued and declaring the office vacant. Only the writ of *habeas corpus* has been left intact, presumably under the apprehension that in the mind of the average man abolition of the writ might be confused with abolition of the right to personal liberty.

The conditions requisite for the issue of the writs and their scope will be considered later. Each writ was directed towards a particular evil and the courts who issued them worked out and laid down the rules governing them which were, in effect, self-imposed restrictions on their jurisdiction, based on the assumption that the court should not interfere in purely executive matters. Though still of primary importance, as means of control of activities of local government and other statutory bodies, and for ensuring adequate fulfilment of the tasks of government, the restrictions on their exercise are now regarded in some quarters as detracting from their usefulness, and it has been suggested that more effective judicial control can be exercised by the use of more flexible remedies such as injunctions and declaratory actions.

3. History of writ procedure in India

In India, the first court empowered to issue prerogative writs was the Supreme Court at Calcutta established by Royal Charter issued on 26th March, 1774, under powers in the Regulating Act, 1773 (Geo. III c. 63). The statute gave the Supreme Court authority over British subjects in Bengal and power to hear suits and complaints against persons in the East India Company's service. The charter subjected subordinate courts to the control of the Supreme Court in the same manner as inferior courts in England were subject to the control of the Court of King's Bench, and empowered it to issue prerogative writs for that purpose. As the Supreme Court claimed power to entertain proceeding arising out of the official acts of the Company's officers, the Governor-General's Council resisted and complained to the authorities in England with the result that a statute of 1781 (21 Geo. III c. 70) considerably restricted the powers and jurisdiction of the Supreme Court. The original jurisdiction of the court was confined to Calcutta;

it was deprived of jurisdiction in revenue matters; the official acts of the Governor-General's Council were exempted from its jurisdiction.

Though the charter of the Supreme Court of Madras issued in 1800 under powers in 39 and 40 Geo. III c. 79, like the charter of the Supreme Court in Calcutta, gave the judges the same jurisdiction and authority as the Court of King's Bench, its territorial jurisdiction was similarly limited, so that, while it could issue a prerogative writ in the exercise of its local jurisdiction, that would not extend to the issue of a writ to an individual or authority exercising governmental functions in the Madras mofussil.[10] A similar situation was created in Bombay when the charter of the Supreme Court was issued in 1823.

The three Supreme Courts amalgamated with the Sadar Adalats to form the present High Courts in the Presidency Towns under the provisions of the Indian High Courts Act, 1861 (24 & 25 Vic. c. 104), sec. 9 of which provided that each of these High Courts should exercise such jurisdiction, powers and authority as would be granted by their Letters Patent subject however to such directions and limitations as to the exercise of original and criminal jurisdiction to the field defined by the competent Indian legislature and until such limits were prescribed, within the Presidency Towns. The effect was that the former Jurisdiction of the Supreme Court over "British Subjects" (which in 1774 meant Europeans but, when the Crown assumed the governance of British India, included Indians) outside the Presidency Towns was not transferred to the High Courts, so that it was held that the Calcutta High Court had no power to grant an information in the nature of *quo warranto* against a person residing outside and exercising the powers of an office outside the town of Calcutta.[11]

The power to issue the writs was given to the judges not merely in their individual capacity, but as constituting the Supreme Court.[12]

The powers vested in the High Courts by the Indian High Courts Act were preserved by subsequent legislation of the Parliament of the United Kingdom, and though the ban imposed in 1781 on interference in revenue matters was retained throughout the British period, sec. 226 of the Government of India Act, 1935 (26 Geo. V, c. 2) provided for its removal by an Act of the appropriate legislature, though the previous sanction of the Governor-General or Governor was necessary before a Bill for this purpose could be introduced.

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10. *Ryots of Garabandho* v. *Zamindar of Parlakimedi,* A.I.R. 1943 P.C. 164.
11. *Hamid Hassan* v. *Banwarilal Roy,* A.I.R. 1947 P.C. 90.
12. *Ryots of Garabandho* v. *Zamindar* (supra).

The High Courts, other than those mentioned above, created under the Indian High Courts Act and subsequent legislation were not given the powers of the Presidency High Courts to issue prerogative writs.

On an application for an order in the nature of mandamus, it was held that, as the High Courts, other than those established in Calcutta, Madras and Bombay under the Indian High Courts Act, 1861, had no original jurisdiction, any right to issue mandamus which might have existed in a Supreme Court could not have been inherited by them, and it was for this reason that only the Presidency Towns High Courts were empowered to issue orders in the nature of mandamus by sec. 45 of the Specific Relief Act, 1877.[13]

The Code of Criminal Procedure of 1872 gave European British Subjects detained in custody, whether within or outside the limits of the territorial jurisdiction of a Presidency High Court, a right to apply for an order in the nature of *habeas corpus* but provided that : (s 82)

> " neither the High Courts nor any Judge of such High Courts shall issue any WRIT of *habeas corpus* mainprise *de homine replegiando* nor any other writ of the like nature beyond the Presidency towns ".

Section 148 of the High Courts Criminal Procedure Act, 1875, set out various purposes for which an order in the nature of *habeas corpus* might be made, empowered the Presidency Towns High Courts to make such orders in the cases of person within their original jurisdiction, and forbade the issue of the common law writ of *habeas corpus* for any of the specified purposes. The above-mentioned statutes of 1872, and 1875 were repealed by the Code of Criminal Procedure of 1882, but not so as to restore any jurisdiction or form of procedure not existing or followed, when the Act of 1882 came into force. Under the Act of 1882 as under sec. 492 of the Code of Criminal Procedure, 1898, as originally enacted, a Presidency High Court could direct :

(a) that a person within the limits of its ordinary original jurisdiction be brought up before the court to be dealt with according to law ;

(b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty ;

(c) that a prisoner detained in any jail situate within such limits be brought before the court to be there examined as a witness in any matter pending or to be enquired into in such court ;

13. *Krishnaballabh* v. *Governor of Bihar*, A.I.R. 1926 Pat. 305.

(d) that a prisoner detained as aforesaid be brought before a court-martial or any Commissioners for trial or to be examined touching any matter pending before such court-martial or Commissioners respectively;

(e) that a prisoner within such limits be removed from one custody to another for the purpose of trial; and

(f) that the body of a defendant within such limits be brought in on the sheriff's return of cepi corpus to a writ of attachment.

The High Courts could frame procedural rules but the section did not apply to certain named preventive detention statutes.

The effect of this legislation was that for any of the purposes mentioned in sec. 491 of the Code of Criminal Procedure 1898, it was no longer possible to apply for the common law writ of *habeas corpus*.[14]

Section 491 of the Code of 1898 was amended in 1923 so that all High Courts were empowered to make orders under it, and in relation to persons within the limits of their appellate criminal jurisdiction.

Section 45 of the Specific Relief Act, 1877, empowered the three Presidency High Courts to make orders requiring any specific act to be done or forborne, within the local limits of their ordinary original civil jurisdiction, by any person holding a public office whether of a permanent or temporary nature or by any corporation or inferior court of judicature. This was subject to certain conditions; central and state governments were exempt from being directed by such order; an order under this section was not to be used to enforce satisfaction of a claim against government, and the power to make any other order might be excluded by statute. At the same time sec. 50 deprived the High Courts of the power to issue common law writs of *mandamus*. This provision was repealed in 1950, and there has been substituted in its place a declaration that nothing in Ch. VHI (which includes sec. 45) shall affect the power of a High Court under clause (1) of Art. 226 of the Constitution. The scope of the power under Ch. VIII of the Specific Relief Act though in some ways wider, is generally narrower than that under the common law writ, and though, in case of repugnancy, Art. 226 of the Constitution would prevail, it was presumably thought desirable *ex abundanti cautela* to make the amendment. There was no obvious necessity for such an amendment in relation to *habeas corpus* as there does not appear to be any possibility of repugnancy between the Constitution and sec. 491 of the Code of Criminal Procedure.

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14. *Girindra Nath Banerjee* v. *Birendra Nath Pal*, A.I.R. 1927 Cal. 496; *Mathen* v. *District Magistrate*, A.I.R. 1939 P.C. 213.

It has been held that sec. 45 of the Specific Relief Act has not abolished the writ of prohibition, and that sec. 115 of the Civil Procedure Code, 1908, which provides that a High Court may call for the record of an inferior court and if there has been absence of jurisdiction, failure of jurisdiction or material irregularity in the exercise of jurisdiction, make such order as it thinks fit, has not abolished the writ of certiorari. Jurisdiction to issue a prerogative writ is not affected by an enactment providing for the issue of orders similar to what would be made on a writ petition in some of the circumstances in which a writ would issue. Writ jurisdiction can only be taken away by express words.[15]

Apart from the belated extension in 1923 of the territorial jurisdiction of the High Courts when making orders in the nature of *habeas corpus*, the policy of the British Indian Government seems to have been to restrict the operation of the writs to those small areas of India in which European opposition to their abolition could have been most effective.

Article 32 of the Constitution, after guaranteeing the right to move the Supreme Court for appropriate remedies to enforce the fundamental rights, proceeds to empower the Supreme Court to issue directions and orders, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever is appropriate for the enforcement of the fundamental rights. Under Art. 139, Parliament may empower the Supreme Court to employ the same process for any other purpose but has not yet done so.

Article 226 empowers every High Court throughout the territories in relation to which it exercises jurisdiction to issue the same directions and orders to any person, including, in appropriate cases, any Government within those territories not only for the enforcement of the fundamental rights but for any other purpose; this power is not in derogation of the power of the Supreme Court under Art. 32. Under clause (3) of Art. 32, Parliament may empower any other court to exercise within its territorial jurisdiction the powers of the Supreme Court.

The Supreme Court has said that it is not necessary to look back upon the early history and peculiar technicalities of the writs in English law, nor to feel oppressed by differences and changes in opinion among English judges, that it is only necessary to have regard to the broad fundamental principles regulating the exercise of writ jurisdiction in English law.[16]

15. *Firm Juggilal* v. *Collector,* A.I.R. 1946 Bom. 280.
16. *T. C. Basappa* v. *T. Nagappa,* A.I.R. 1954 S.C. 440.

In view of the limited sphere occupied by the writs during the British period, one might ask whether it would not have been better to have created a new broad-based jurisdiction particularly in regard to the procedural safeguards for the fundamental rights.[17]

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17. cf. the following provision in the *Report by the Resumed Nigeria Constitutional Conference* (Cmnd. 569, (1958)),p. 9 :

" Any person may apply to the High Courts for the protection or enforcement of any of the fundamental rights provisions contained in the Constitution and the High Courts shall have power to make all such orders as may be necessary and appropriate to secure to the applicant the enjoyment of any of these rights. There shall be a right of appeal from a High Court to the Federal Supreme Court."