The Development of the Prerogative Remedies in England and India: The Student Becomes the Master?

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This article examines the development of prerogative writs as a remedy in English law and in Indian law. While Indian law has borrowed the structure of prerogative writs from common law, the Indian Constitution has permitted a far greater development of the remedy of prerogative writs. The authors argue that the Indian approach has allowed greater flexibility and may indeed be truer to the common law vision of prerogative writs.

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I. How do the Prerogative Remedies Come to Find Themselves in the Indian Constitution?

As will be known to every lawyer in India, the power of the High Court and the Supreme Court to issue "*directions, orders or writs, including writs in the nature of* habeas corpus, mandamus, *prohibition,* quo warranto *and* certiorari"[1] forms a vital

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part of Indian Constitutional and Administrative law. And the power to invoke these remedies is exercised through the procedure of the "writ petition", that highly characteristic feature of public law litigation in India. The first question that this article addresses, then, is where do these remedies come from and how did they find themselves in the Indian Constitution?

Now, at one level, this question has an easy answer. *Habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* are the prerogative remedies of English law. They were born in the procedures adopted by the medieval English legal system to impose legal order on the administration; and were called "prerogative" since they are the Crown's remedies, sought only on the suit of the Crown (although from an early stage they were available to the person aggrieved by the decision of an inferior court or administrative body).[2] Their presence in India must be simply part of the colonial legacy, imposed by the British rulers.

But the truth is more interesting than that. Understandably the Fundamental Rights Drafting Committee was determined to see fundamental rights adequately protected. As Seervai asserts, it was *"inevitable that fundamental rights would be written into the Constitution given the nature and history of the struggle for freedom in India."*[3] Indeed, considering the historical backdrop, and in particular the fight for independence, it is unsurprising that *"the idea of providing in the Constitution effective remedies for the enforcement of the fundamental rights was present in the minds of the Constitution-makers from the very beginning."*[4] In so insisting on the protection of fundamental rights, the committee was breaking with the then tradition of British Constitutionalism which did not countenance any limitation on Parliamentary supremacy as implied by the protection of fundamental rights.[5]

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1 The cited words come from Article 226(1) of the Constitution of India which vests this power in the High Courts. The article also provides that the writs may *"issue to any person or authority, including (...) any Government"* and may lie for *"the enforcement of any of the rights conferred by Part III* [Fundamental Rights] *and for any other purpose."* Article 32 makes similar provision for the Supreme Court but the power to issue these writs is limited to the protection of Fundamental Rights.

2 *See*, WADE AND FORSYTH, ADMINISTRATIVE LAW (10th edn., 2009), Ch. 16 for an introduction.

3 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA – A CRITICAL COMMENTARY 1449 (4th edn., 1993).

4 A.C. KAPUR, CONSTITUTIONAL HISTORY OF INDIA 1765-1984 457 (3rd edn., 1985).

5 In well known words Krishna Iyer J. has said in Samsher Singh v. State of Punjab, AIR 1974 SC 2192, 2212 (Supreme Court of India) that *"Not the Potomac, but the Thames, fertilises the flow of the Yamuna"*. In context the learned judge was referring to the system of Parliamentary rather than Presidential government adopted in the Constitution of India. But here, in the adoption of the protection of fundamental rights, the Constituent Assembly was fertilised by the Potomac not the Thames.

But within the Constituent Assembly there was a strong determination not only to protect fundamental rights but to do so effectively. Thus there was a determination to incorporate into the Constitution remedies "*in the nature of the English prerogative remedies*." For instance,

> K. M. Munshi pointed out that fundamental rights in the United States[6] and civil liberties in Britain had been preserved by reason of two factors: (a) an independent judiciary; and (b) the prerogative writs of *habeas corpus, mandamus,* prohibition, *certiorari* and *quo warranto.*[7]

Part of this sensitivity to the prerogative remedies derived, it seems, from the fact that only the High Courts of the Presidency Towns (Madras, Bombay and Calcutta) were vested under their Charters with the power to issue the prerogative writs.[8] Thus other courts, including the other High Courts, lacked the power to issue *certiorari*, prohibition and *mandamus*.

The broader use of the prerogative remedies was also stopped because "*the jurisdiction of the High Courts in the Presidency towns was confined to the limits of their Original Jurisdiction, as a result of which they could not issue the writs to persons or tribunals residing or situated outside the Presidency towns*".[9] As such, "*these limitations seriously impaired the supervisory jurisdiction which the High Court's exercised through these writs*".[10]

This did not mean that public authorities could not be called to account to the law outside the Presidency Towns. It meant simply that they had to be sued by an ordinary action with pleadings and oral evidence. This meant, as K. M. Munshi explained to the Fundamental Rights Drafting Committee, the protection of rights would be ineffective since outside the three cities "*the machinery for enforcing civil rights was a slow process and consequently the public conscience was not keenly alive to the assertion of rights against the executive*".[11] As such, with the value of the prerogative

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6 Notwithstanding this reference to the prerogative remedies in the US it is plain that it is the English version not the American that as been incorporated into the Indian constitution.

7 KAPUR, *supra, n.* 4, at 457, citing Munshi's note on Fundamental Rights (which was supported by Dr. Ambedkar).

8 DURGA BAS BASU & A.K. NANDI, CONSTITUTIONAL REMEDIES AND WRITS 15 (2nd edn., 1999), referring to the decision in Ryots of Garabandhu v. Parlakimendi, (1943) 48 C.W.N. 18 (Privy Council).

9 *Ibid.*, at 15.

10 SEERVAI, *supra, n.* 3, at 1450.

11 *Munshi's Note on Fundamental Rights, in* B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION, SELECT DOCUMENTS VOL. II, 71–73.

style remedies noted from their application in the Presidency towns, the drafters were able to craft a wider template for use in the new judicial system.

It was thus that the predecessor of what became Art. 32 was referred to in the Constituent Assembly Debates as the "copingstone of the structure of fundamental rights".[12] And this is the context in which Dr. Ambedkar referred to Art. 32 as the article without which *"the Constitution would be a nullity...it is the very soul of the Constitution and the very heart of it"*.[13] It was the reasoning that *"the existence of a legal right in the Constitution must imply a right in the individual to intervene in order to make the legal right effect"*[14] that truly proved the driving force behind the introduction of the prerogative remedies.

The acceptance of the reasoning for prerogative remedies ultimately resulted in Art. 32 giving the right to petition the Supreme Court directly, ensuring further the protection of fundamental rights. Furthermore, Art. 226 extended the right to grant prerogative relief to all High Courts and allowing them jurisdiction to grant prerogative relief even in non-fundamental rights cases. But it is important to note that it *"is the common law of England relating to the 'Prerogative writs' which had been adopted in India, subject to modification, if any, made by the Rules framed by the Supreme Court and the High Courts."*[15]

II. The Prerogative Remedies in England at About the Time of Indian Independence

The prerogative remedies were, however, facing an altogether different fate in the country of their birth. While Dr. Ambedkar and his fellow drafters grasped the true value of the remedies and debated how best to incorporate them into the Indian Constitution, the remedies in England continued to stagnate. Professor Wade confirmed that *"during and after the Second World War a deep gloom settled upon administrative law, which reduced it to the lowest ebb at which it had stood for centuries"*.[16] With this decline in general administrative law, came the very real threat that the prerogative remedies would be extinguished.

This stagnation, however, was not just a product of a general trend, but was hastened by the inherent issues that plagued the use of the remedies. Lord

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12 Constituent Assembly Debates Vol. III.

13 Constituent Assembly Debates Vol. III, 953 (c.f. Kapur, *supra, n.* 4, at 459).

14 Rao, *supra, n.* 11, at 71–73.

15 Basu & Nandi, *supra, n.* 8, at 14.

Denning, giving the inaugural Hamlyn lecture on "Freedom under Law" in 1949, argued that:

> Our procedure for securing our personal freedom is efficient; our procedure for preventing the abuse of power is not. Just as the pick and shovel are no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up-to-date machinery by declarations, injunctions for negligence...[17]

Lord Denning confirmed that *habeas corpus* was sufficient to protect personal freedom but that the other remedies could not cope with new developments in the law and in society. Outdated and beset with technical difficulties in their application, the decline of the remedies was accurately predicted. Lord Denning's assessment of the remedies stands in stark contrast to that of Dr. Ambedkar! Who was right?

The list of the remedies' deficiencies was primarily procedural. The remedies were not available in the alternative, there was no discovery or service of interrogatories, the time limits were very short (six or three months) and there were never ending arguments about exactly which bodies they would lie against. Furthermore, there was no oral evidence or cross examination in any case, let alone one in which the tenets of natural justice demanded such a specific inspection of the issues.[18]

And it seemed for a while as if Lord Denning was right. Litigants frustrated by the deficiencies of the then unreformed Order 53 of the Rules of the Supreme Court turned to the ordinary writ action as a way of vindicating their rights against the relevant bodies. And it was this approach that proved most successful, leading to the sidelining of the prerogative remedies. Indeed most of the leading cases that mark the renaissance of English administrative law in the 1960s and 1970s are not applications for prerogative relief but writ actions seeking a declaration or an injunction.[19] Prerogative remedies seemed to be withering away

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16 H.W.R. WADE, ADMINISTRATIVE LAW 18 (5th edn., 1982).

17 DENNING, THE DISCIPLINE OF LAW 61-62 (1979).

18 *See*, WADE AND FORSYTH, *supra, n.* 2, at 549–550.

19 *See*, for instance, Anisminic Ltd. v. Foreign Compensation Commission, [1969] 2 AC 147 (House of Lords); Padfield v. Minister of Agriculture, Fisheries and Food, [1969] AC 997 (House of Lords) and Congreve v. Home Office, [1976] QB 629 (Court of Appeal).

in the jurisdiction in which they had first become valuable, falling to the sidelines in deference to a new method of vindicating rights.

III. The Re-birth of the Prerogative Remedies in England

But when Order 53 was reformed in 1977 to create what we know as the application for judicial review, the prerogative remedies were once again reborn.[20] Rising up out of the deep gloom, the remedies, now available in the alternative, were once again pushed to the forefront of administrative law. The creation of the judicial review process, which was flexible enough to allow necessary factual disputes to be resolved whilst protecting public authorities with the clarification of both the short time limits for application and permission requirements, brought back the spirit of the prerogative remedies and revolutionised the process of securing fundamental rights.

O'Reilly[21] laid down that it would in general be an abuse of the process of the court to bring a writ action (which was a private law procedure) to challenge a decision of a public law decision. If the challenge was to the decision of a public authority then the challenge had to be brought by way of the application for judicial review. Since *O'Reilly*, the application for judicial review has come into its own and the prerogative remedies obtainable now through the application for judicial review have flourished.[22]

IV. The Development of the Remedies in India

Although the Indian prerogative remedies take their fundamentals from the age old English tradition, it is interesting to note how the remedies have developed in parallel. Although it must be remembered that the Indian Constitutional arrangement allows for a more radical development of the remedies, the activism of the Indian judges must not be underestimated.

The true strength of the remedies in India is that they take their foundations from English law but are not constrained by any historical issues that may have

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20 For the details *see*, Wade and Forsyth, *supra, n.* 2, at 552.

21 O'Reilly v. Mackman, [1983] 2 AC 237 (House of Lords).

22 Though it is important to note that the more than the prerogative remedies can be obtained through the application.

arisen in their development. The true genius of Dr. Ambedkar and his colleagues in the drafting committee was to isolate the salient points of the prerogative remedies and simplify their application. Indeed, *"it was observed in* Dwarkanath *v.* ITO,[23] *that this Article being couched in comprehensive phraseology, ex facie it confers wide powers on the High Court to reach injustice wherever it is found"*.[24]

It is this simplicity of the wording that has really allowed the development of the prerogative remedies in India. Such a point is recognised by both commentators and judges, with the judgment of Mukherjea J. in *Basappa*[25] confirming that:

> In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English 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.[26]

Furthermore,

> [It] was observed in *P.J. Irani* v. *State of Madras*,[27] that the power of the High Court under this Article is not limited to the issue of the writs falling under particular grouping, such as certiorari, mandamus etc, as those writs have been understood in England, but the power in general to issue any order, direction or writ for the purposes mentioned in the Article.[28]

V. The Importance of Their Constitutional Status

With the doctrine of Parliamentary Sovereignty in England, in general terms, no executive action sanctioned by an Act of Parliament can be questioned or held

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23 Dwarkanath v. I.T.O., AIR 1966 SC 81, (Supreme Court of India).

24 B.L. Hansara, Writ jurisdiction under the Constitution 45 (1st edn., 1984).

25 T.C. Basappa v. T. Nagappa, (1955) 1 SCR 250 (Supreme Court of India).

26 T.C Basappa v. T. Nagappa, (1955) 1 SCR 250, 256 (Supreme Court of India) *per* Mukherjea, J.

27 P.J. Irani v. State of Madras, AIR 1961 SC 1731 (Supreme Court of India).

28 Hansara, *supra, n.* 23, at 45.

void by a Court. In addition, Parliament may also be able to remove the jurisdiction of the Courts over certain matters. In India, however, the Constitution itself enshrines in Articles 32 and 226 the jurisdiction to issue writs in the nature of the prerogative remedies in the Supreme Court and the High Courts.

The strength of the prerogative remedies thus lies in the fact that *"in India, the jurisdiction being provided for by the Constitution cannot be taken away or modified in any manner short of amendment of the Constitution"*.[29] The enshrined status of these writs allows for an altogether more complete protection of fundamental rights as the remedies are able to resist any immediate change or abrogation by an overzealous government.

Although there was much disagreement as to when rights could be suspended, it became clear that *"Art. 32 being guaranteed as a fundamental right, it cannot be taken away or curtailed by anything short of amendment of the Constitution"*.[30] Such a status afforded to the remedies ensures that they are protected. Indeed, *"any law which seeks to take away, or restrict the jurisdiction of the High Court under Art. 226 must so far be held to be void and that the High Court shall be entitled to exercise the powers under Art.226, free from the fetters imposed, directly or indirectly"*.[31]

VI. The Flexibility of the Writs

The Indian drafters appreciated the inherent problems with the prerogative remedies when drafting and so allowed the application of the Articles to be flexible in nature. It is clear from the observations of Mukherjea J. in *Basappa*[32] *"that it was open to* [the] *Courts to issue any appropriate writ to an aggrieved party, and his application for a writ would not fail because he had applied for the wrong kind of writ"*.[33] In England, this had not been the case, until the reforms of Order 53 were introduced, highlighting the ability of the drafters to take the English idea and mould it to the Indian constitution. The writs were grouped under the general head of 'judicial review' and *"as a result of this change, an application would not fail on any of the technical preliminary grounds available under the common law prerogative writs"*.[34]

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29 Basu & Nandi, *supra, n.* 8, at 8.

30 Basu & Nandi, *supra, n.* 8, at 39, referencing Minerva Mills v. Union of India, AIR 1980 SC 1789 [¶¶ 26,78, 91, 93] (Supreme Court of India).

31 Basu & Nandi, *supra, n.* 8, at 90.

32 T.C. Basappa v. T. Nagappa, (1955) 1 SCR 250 (Supreme Court of India).

33 Seervai, *supra, n.* 3, at 1453.

34 Basu & Nandi, *supra, n.* 8, at 14.

Furthermore, the drafters introduced a permission requirement so that the Court must consider that the applicant has 'sufficient interest'. Although seemingly restrictive, a liberal interpretation of this idea has allowed the Courts to widen rules relating to *locus standi* and therefore increase the scope of protection of fundamental rights. Developing the notion of flexibility *"the superior Courts in England had no power to modify the prerogative writs, but under Art. 226,* [the Indian] *High Courts are entitled to modify the form and incidents of the prerogative writs in order to give appropriate relief to the parties"*.[35]

VII. Concluding Appraisal

Thus in both England and India the prerogative remedies have in the end flourished. They have been recognised as a vital component in the vindication of the rule of law. The insight of the Indian jurists in 1947 proved truer to the mission of the common law. It was the triumph of Dr. Ambedkar and his fellow drafters to introduce a flexible system of remedies, far ahead of the reforms of Order 54.

Indeed, it could well be argued that *"the writ jurisdiction in India today is in a better position than in England"*.[36] With the ability to enforce fundamental rights and not just legal ones, the Indian system is more flexible that the English counterpart. For example, *"in India, a writ or order in the nature of* mandamus *is available to restrain the State or a public official from enforcing an Act*[37] *on the ground that it is unconstitutional, crucial protection afforded only occur due to the interpretation of Art. 13"*.[38]

Even more so, the activism of the Indian judges in relation to the interpretation and application of the Articles has meant an even wider protection of rights than maybe even the drafters conceived.[39]

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35 Basu & Nandi, *supra, n.* 8, at 18.

36 Basu & Nandi, *supra, n.* 8, at 17.

37 Himmatlal v. State of M.P., (1954) SCR 1122 (Supreme Court of India).

38 Basu & Nandi, *supra, n.* 8, at 17.

39 *See,* commentary at M.R. Mallick, Writs Law and Practice 85 (1st edn., 2000) and cases such as Baga Ram v. State of Bihar, AIR 1950 Pat. 397 (Patna High Court).