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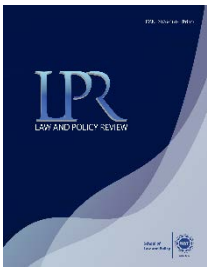

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Unlocking Prerogative Writs: Concept and Scope of Writ Jurisdiction under Article 199 of the Constitution of Pakistan

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Abstract

The concept of 'prerogative writs' is as old as common law itself. Historically, public law remedies have been granted in the name of the Crown. There are five different kinds of writs or orders, which include prohibition, mandamus, certiorari, quo warranto, and habeas corpus. Undoubtedly, writ jurisdiction is an indispensable weapon with the judiciary to check the constitutional legality of the actions and inactions of the executive arm of the government. This paper aims to provide a general account of the origin, concept, types, scope, and nature of prerogative writs in light of the principles established through case laws. It concludes that the framers of the constitution have conferred an extraordinary jurisdiction on High Court(s) under Article 199 for the enforcement of fundamental rights guaranteed under the constitution of the Islamic Republic of Pakistan, 1973.

Keywords: Article 199, common law, constitutional law remedies, High Court, prerogative writs

Introduction

The concept of constitutional law remedies is not new. One can trace the roots of prerogative writs to the common law of England. Historically, public law remedies have been granted on behalf of the Queen and in the form of writs (Stott & Felix, 1997). In 1938, the traditional word 'writ' was revised and replaced by the term 'order' (except for habeas corpus). This change in nomenclature is a result of the Administrative Justice (Miscellaneous Provisions) Act of 1938 (Khan, 2012).

In Pakistan and India, prerogative writs derive their authority from their respective constitutions. For instance, Article 32 and Article 226 of the Indian constitution empower the Supreme Court and the High Courts to exercise writ jurisdiction (Khan, 2012). In Pakistan, Article 199 of the 1973 Constitution empowers High Courts to issue such orders (Khan, 2012). However, the said article does not directly address the word writ, although

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the wording of the said provision reflects the hereinafter mentioned prerogative writs.

Indeed, a legal right has no value or sanctity unless and until accompanied by an enforceable remedy (Stott & Felix, 1997). The public law remedy is a good way to enforce legal rights. However, the discretion to issue a writ or order rests with the court as part of judicial review. The court may decide to refuse such remedies even if the complainant makes his claim, if the initiation of proceedings is unreasonably delayed, and/or when it goes against people's interests (Barnett, 2002). The Supreme Court of Pakistan has rightly ruled that Article 199 cannot be exercised where an alternative remedy is available to fully resolve the matter (PLD 2010 SC 969).

Writ jurisdiction is an indispensable weapon with courts to keep check on the actions and omissions of administrative authorities. Courts in modern democracies hold an inherent power to judicially review the acts of the executive arm and the same power is exercised to issue such writs or orders. The contemporary jurisdiction of superior courts to issue directions or orders is similar to the jurisdiction of issuing the famous prerogative writs of certiorari, habeas corpus, prohibition, quo warranto, and mandamus.

Justice Rustam Kayani, former Chief Justice of the Lahore High Court, stressed the importance of writ jurisdiction in the following words when addressing the Karachi Bar Association on December 11, 1958. His words are, no doubt, limited to mandatory and quashing orders but his statement reflects the pivotal nature of prerogative writs (PLD 2009 Lah 22).

> Mandamus and certiorari are flowers of paradise and the whole length and breadth of Pakistan is not wide enough to contain their perfume. God fulfills Himself in many ways and that we (Judges) are the humble instruments of His fulfillment. The writ jurisdiction is the modern manifestation of God's pleasure and that God's pleasure dwells in the High Court.

Types of Writs

Prerogative writs can be broadly classified into two categories based on the parties who may seek public law remedies. The writs of prohibition, certiorari, and mandamus are only available to an aggrieved party, while habeas corpus and quo warranto are available to the general public.

Prohibition

A prohibiting order (formerly known as prohibition) is a pre-emptive action by nature. It prevents a public body or authority from unlawful actions in the future (Ryan, 2014). In common parlance, the writ of prohibition is known as a 'stay order' (Basit, 2018). It prohibits a public authority from deciding if found unlawful, can be altered by the writ of certiorari (Barnett, 2002). In this kind of writ or order, directions are issued when an authority exceeds its legal limits (Basit, 2018).

The very first condition for the maintainability of the prohibiting order is that the application or petition must be filled by an aggrieved person. The said writ or order can be made only if the administrative act exceeds lawful jurisdiction, falls outside lawful jurisdiction, violates the rules of natural justice and fundamental rights, and/or is based on a statute which is, in itself, unconstitutional (Basit, 2018).

Purpose

The principle behind prohibition is that if a timely relief is not granted, the damage or loss would be irreversible. The aim and purpose of the writ of prohibition is to prohibit a person from doing anything he is not allowed or supposed to do by law. Following case laws would further clarify the importance and utility of the writ of prohibition.

R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association

In this case, the respondent increased the number of taxi licenses in violation of a written agreement inked by the respondent with the taxi association. By virtue of the said agreement, the respondent was supposed not to increase the number of licenses until a private bill was passed from the legislature. The petitioners sought relief on the ground that the decision was made without the provision of an opportunity of fair hearing.

The court allowed petition and the council was directed not to increase the number of taxi licenses by issuing a writ of prohibition. The court found that Liverpool Corporation acted wrongly in that its decision was taken without giving the petitioners an opportunity to be heard.

Tariq Transport Co. versus Sargodha Bhera Bus Services (PLD 1958 SC 437)

In this case, it was held that where jurisdiction is unlawfully presumed against an abusive and erroneous exercise of jurisdiction, a prohibition order is justified. It was further held that prohibition is a right when excess of jurisdiction is established and the authority (tribunal) is duty bound to act judicially.

Certiorari

A quashing order (formerly known as certiorari) overturns an unlawful or illegal decision by a public body or authority (Ryan, 2014). The term 'certiorari' literally means 'to be certified' (Basit, 2018). This type of writ deprives a decision of its legal effect retrospectively or prospectively, although it depends on the type of error detected. In such cases, if it is determined that there is an error of jurisdiction then the court reverses the decision, retrospectively. However, if an error allegedly falls within jurisdiction, then the court would set aside the decision with prospective effect (Cane et al., 2018).

Complementary Nature

The writ of prohibition and certiorari are inherently complementary. A writ of certiorari is issued to demand the record of proceedings in matters pending before a lower court for correcting an order or proceeding. It is granted when an order has been issued by an authority that has no jurisdiction to issue such an order. On the contrary, a writ of prohibition is issued to prevent an authority from further continuing proceedings, pending therein on the ground that it has no jurisdiction. Hence, certiorari is remedial, while prohibition is preventive (AIR 1951 Bombay 158).

Scope and Purpose

Originally, the prerogative writ of certiorari constituted a royal demand for information. If the Crown wanted to be authenticated or informed of something, instructions were given to provide the necessary information. Initially, quashing orders were never issued to demand for the details of the proceedings of an act for quashing it. Mandamus and declaration were considered as appropriate remedies in this regard. However, the scope of certiorari has evolved with the seeping of time.

Now, certiorari may be issued against all constitutional authorities, both judiciary and executive, as well as their officials and statutory bodies. This type of writ can now be issued to reverse the measures of an administrative nature (Massey, 2017). The main purpose of the writ of certiorari is to quash the order made by a court, tribunal, or body without lawful authority. The following case laws would further clarify the importance and utility of the writ of certiorari.

Town Committee, Gakhar Mandi Versus Authority under the Payment of Wages Act Gujranwala and 57 Others (PLD 2002 SC 452)

In this case, the appellant was a local council established under the Punjab Local Government Ordinance, 1979 and the respondents No 2 to 57 were the employees of the said committee. Basically, an application was submitted by the respondents No 2 to 57 before the court, seeking an additional amount from the appellant committee for overtime or extra labour done by them during the years 1981-1989. The said authority decided the matter in favor of the respondents No 2 to 57 via an order dated 24th August, 1994.

The appellant challenged the said order in the Lahore High Court, which was dismissed on the ground that the applicant failed to exhaust the remedy under Section 17 of the said act. Therefore, a petition under Article 199 of the Constitution is not competent. On appeal, the apex court held that, despite the availability of an alternative remedy, a writ of certiorari may be issued if an impugned order is unlawful or in excess of jurisdiction.

Rehan Khalid Versus Mst. Uzma Nawaz and 3 Others (2022 M L D 272)

In this case, the respondents No 1 and 2 filed a suit for the recovery of maintenance, dowry articles, and gold ornaments in the court of the learned judge of Family Court, West-Islamabad against the petitioner. The suit was decreed though impugned judgment and the respondent No 2 was found entitled for the recovery of maintenance. Being aggrieved by the impugned judgment and decree, the petitioner filed an appeal which was dismissed by the learned Additional District Judge, West-Islamabad, hence the instant writ petition.

The court ruled that it is an accepted principle of law that certiorari is only available to set aside a decision based on an error of law. It can also be used to correct an error of jurisdiction when a lower court or tribunal acts

without jurisdiction, exceeds its jurisdiction, fails to exercise its jurisdiction, or when it acts unlawfully in the exercise of its undoubted jurisdiction and decides a matter in violation of the principle of natural right. It was also held that the High Court, exercising its writ jurisdiction, cannot review the findings of fact made by the lower court or tribunal.

Difference between Certiorari and Prohibition

The effect of quashing and prohibition orders is very similar. However, the timing of issuing such orders is the only significant difference between them (Stott & Felix, 1997). The former is used to undo a decision already made by the authorities. The latter prohibits the commission of an illegal act in the future. These remedies are fundamentally complementary in nature. Certiorari overturns a decision made in the past, while prohibition checks the validity and legality of future decisions (Stott & Felix, 1997).

A quashing order is routinely accompanied by a prohibition order, since both serve to control the excessive jurisdiction exercised by authorities. The rationale behind the prohibiting order is that prevention is better than cure. Therefore, it comes into play at a prior stage than a quashing order (Khan, 2012).

Mandamus

A mandatory order (formerly known as a mandamus) compels a body to act or perform its statutory function (Ryan, 2014). In contrast, prohibition and certiorari serve to control illegal actions of public authorities (Stott & Felix, 1997). The writ of mandamus cannot be used against the actions of an authority that has full discretionary powers (Barnett, 2002). It compels an authority to act according to a particular pattern and the failure to comply with such instructions amounts to the contempt of court (Barnett, 2002). Briefly, a specific legal responsibility must be fulfilled within a specified period of time and mandamus is issued to require the fulfillment of that duty.

Scope

The writ of mandamus is issued when a tribunal refuses to exercise its discretion and is required by law to do so. However, a mandatory order to enforce the exercise of discretion cannot be issued. Therefore, fulfilling a specific function of a public nature is a positive command and has no

negative aspects, since it is the domain of certiorari and prohibitions (Khan, 2012).

The writ of mandamus can also be issued to administrative authorities, if orders are passed in excess of the statutory authority (PLD 1961 SC 178). It is an equally effective remedy against the decision of a university syndicate, a registrar of a high court, a tax commissioner, and a presiding officer in elections.

Purpose

The main purpose of the mandamus, or a mandatory order, is to require a person to perform his or her legal duty, failure to do so constitutes a violation of the aggrieved person's fundamental rights. Briefly, this type of writ is issued to protect people's fundamental rights. Following case laws will further clarify the significance and utility of the writ of mandamus.

R v Secretary of State for the Home Department ex parte Phansopkar and Begum, 1976

In this case, Phansopkar and Begum were commonwealth citizens. Their countries of origin were India and Bangladesh, respectively. Both stated that they were the wife of a resident of England who was a registered UK citizen. They were entitled to reside in England under the Immigration Act, 1971. However, they had to provide a certificate from the British government agencies in their home countries. This process was time-consuming. Hence, to avoid delays, both went directly to the Home Office upon arrival in England to obtain the said certificate.

It was denied by the said body and the petitioners turned to the Court of Appeal. In appeal, the court ruled that the issuance of certificates would have enabled the Indian and Bangladeshi applicant wives to exercise their right to spousal reunification in England. So, it could not be delayed without a good reason. Since the applications were significantly delayed, the Home Office could not refuse to consider the applications and a mandatory order was issued, accordingly.

Anjum Badar versus Province of Sindh through Chief Secretary and 2 Others (PLD 2021 Sindh 328)

In this case, the petitioner requested the regularization of appointments made on a contractual basis through a writ of mandamus. The court held that writs are not allowed as a matter of right and for the writ of mandamus,

there must be a legal right and a corresponding legal duty. Contractual employees have no legal right to be appointed on a regular basis. Hence, the petition was dismissed.

Quo Warranto

The word quo warranto means 'by which authority' or 'under which authority'. Historically, the writ of quo warranto was a powerful weapon used by the king against usurping the prerogatives of the Crown. However, the scope of this writ has been extended and it is now used by private petitioners (Mateen, 2018). The quo warranto process is a judicial remedy that requires any person who holds public office to prove by what right he or she holds the office. If the incumbent is not found to be eligible or entitled, they are removed from the office by the court order (Basit, 2018).

The writ of quo warranto gives the court jurisdiction and authority to review any action of the executive branch related to an unlawful appointment to public office. The petitioner must prove to the court that the office in question is a public office and is being held by a person without lawful authority before claiming relief (AIR 2011 SC 1267). The writ of quo warranto is a public interest litigation in which the redress of a wrong is sought by a person not for himself but *pro bono public*.

Purpose

The primary purpose of this constitutional remedy is to protect the sacredness of the public office by guarding against illegal appointments. The writ of quo warranto is a weapon of the judiciary utilized to prevent the executive branch from making unlawful appointments to public offices or performing acts outside the scope of the respective public office (AIR 2006 SC 3106). Following case laws further clarify the importance and utility of the writ of quo warranto.

Messrs Sahib Din Logistics and Others Versus Federation of Pakistan Through Chairman and Others (2021 P T D 1245)

The crux of the case is that the officer issuing the impugned notices was not appointed in accordance with the Sales Tax Act, 1990. Therefore, it was prayed by the petitioner that the impugned notices may be overturned. Objections to the officer's authority in the present case were raised only to refuse the information requested by impugned notices and no reason was put forward to suggest that failure to intervene would lead to injustice.

The court held that for issuing a writ of quo warranto, it is imperative to consider the intent and motive of the petitioner(s). If it is manifest that the petitioner has invoked a constitutional jurisdiction with an ulterior motive, then the exercise of such jurisdiction ought to be declined. A writ of quo warranto is an extraordinary discretionary jurisdiction and the High Court is not bound to exercise the same in each and every case, especially in matters of minor discrepancies, sheer curable technicalities, and where the approach is doctrinaire, unless it is shown that non-interference would result in grave injustice or would amount to endorsing the retention of illegal gains.

Atta Ullah khan versus Ali Azam Afridi and Others (2021 SCMR1979)

The petitioner was thrice upgraded. Against the said upgradation, the respondent filed a petition of quo warranto, which was allowed. The provincial assembly of Khyber Pakhtunkhwa promulgated the upgradation policy through a notification dated August 29, 2011 for its employees. Section 2 of the said policy specifically states, "Personal up-gradation shall be made once during the whole service period" whereas section 4 of the said Policy mandates that "no such up-gradation shall be made in favor of such employees or individual whose posts have once personally upgraded either before or after the promulgation of this policy."

The court ruled that the three consecutive upgrades granted to the petitioners clearly breached the policy in question. The popular legal principle states that if a statute or law describes or requires a certain way for things to be done, it should be done that way or not at all. The writ of warranto is issued by the courts to review such a situation against a person when that person holds an office to which they are not entitled. For the above, the petition had no merit and accordingly, it was dismissed and the leave to appeal denied.

Habeas Corpus

Habeas corpus is a Latin term which means 'you may have the body' or 'show the body' (Basit, 2018). The High Court may, upon the application of any person, issue the writ of habeas corpus to require the presentation of a person in detention or custody and to release him if the imprisonment is unlawful (Basit, 2018). The writ of habeas corpus is a fundamental right in the Constitution of Pakistan, 1973 that protects against unlawful detention.

Historically, habeas corpus has been an indispensable weapon to protect the freedom of individuals against the arbitrary power of the executive. This kind of writ is issued to secure the subject's liberty through a speedy determination of the legality of a person's detention. It is irrelevant whether the applicant is in public or private detention. The injunction is always available when there has been an unlawful and improper deprivation of the subject's liberty (Brohi, 1958).

In a nutshell, the writ of habeas corpus requires legal justification and reasoning for the detention or imprisonment of an individual (Stott & Felix, 1997). In Pakistan, a habeas corpus petition can be filed under Article 199 of the Constitution and Section 491 of the 1898 Code of Criminal Procedure (Mateen, 2018). Under the said section, the power to issue such orders is further delegated to the district and sessions judges.

Scope and Nature

The writ of habeas corpus offers security against administrative and private lawlessness but not against a court conviction. It can be issued against both public and private detention. However, where a person has been detained based on a court conviction, this does not preclude such detention. Unlike other constitutional law remedies, the writ of habeas corpus requires the court to release the prisoner once it is determined that his or her detention is illegal (PLD 1977 Lahore 1279).

Purpose

This kind of writ is issued to produce the detainee and if the detention is found unlawful, the court can release the detainee. This remedy is a protection against the unlawful imprisonment and violation of liberty, which is a fundamental right of every individual under Article 9 of the said constitution. Following case laws would further clarify the importance and utility of the writ of habeas corpus.

Ameer Hussain versus Government of Punjab and Others (PLD 2022 Lah. 61)

In this case, the petitioner had been detained previously under Section 3 of the Punjab Maintenance of Public Order Ordinance, 1960 and his release was ordered by the Provincial Board of Review. However, the petitioner was rearrested and imprisoned under Section 11 (EEE) of the Anti-Terrorism Act, 1997. The High Court ruled that preventive detention

was limited by the principles of legality, necessity, and proportionality. In this case, such a balance tipped in the petitioner's favour. The petitioner was, therefore, released and the constitutional petition allowed, accordingly.

Shireen Mazari Case

On May 21, 2022 Dr Shireen Mazari, a former Federal Minister for Human Rights, was arrested from Islamabad for being charged under a property case (Shireen Mazari's arrest, 2022). On the same day, a petition of habeas corpus was filed in Islamabad High Court under Article 199 of the constitution. The court ordered the authorities to release her and directions were issued to the government for a judicial inquiry into her arrest (Azeem et al., 2022). This is the latest case where the writ of habeas corpus was issued to safeguard the liberty of a citizen from unlawful detention.

Discretionary Nature of Writ Jurisdiction

Writ jurisdiction is discretionary in nature. The court may decide to refuse or provide another remedy regardless of whether a plaintiff has established that a public body acted unlawfully (Ryan, 2014). The granting of a remedy is at the discretion of the court. The court, while exercising writ jurisdiction, may refuse to grant relief if proceedings are commenced with unreasonable delay or even if public interest is harmed by granting a remedy (Cane et al., 2018).

The remedies of prohibition, mandamus, and certiorari are discretionary reliefs as mentioned above. Hence, we cannot claim their application as a matter of right. The said relief may be refused by the court of law on the ground of laches or due to the conduct of the petitioner (PLD 1963 SC 233). In Pakistan, Article 199 of the constitution says that the High Court may issue an order accordingly if it is satisfied that no adequate alternative remedy is available. Thus, writ jurisdiction is subject to the availability of alternative remedies.

Conclusion

To encapsulate, the roots of constitutional law remedies or prerogative writs can be traced back to common law. Historically, public law remedies have been granted in the name of the Queen. Writ jurisdiction is discretionary in nature. The court may grant or refuse any remedy on different grounds. Moreover, no discretion is absolute and it must be exercised in accordance with the well-settled principles and guidelines laid down by the apex court.

Under the constitution of Pakistan, there are five kinds of writs which include habeas corpus, prohibition, certiorari, quo warranto, and mandamus. However, the hereinbefore mentioned names are not directly addressed in the constitution. Furthermore, habeas corpus is also provided under Section 491 of the Code of Criminal Procedure, 1898. Under the said provision, power is further delegated to district and session judges in order to provide easy access to justice.

To conclude, writ jurisdiction is an essential tool of the courts to control the acts and omissions of administrative authorities. Courts have an inherent power to review the acts of the executive branch under the golden concept of judicial review. The contemporary jurisdiction of high courts to issue orders is similar to the relic prerogative writs, as discussed hereinabove.

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