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Critical Analysis of Scope of Article 226 and Article 227 of the Indian Constitution

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Abstract

A common practice of filing a writ petition with the High Court under Article 226 read with Article 227 of the Indian Constitution. The scope and powers given by such provisions, on the other hand, are vastly different. This research study compares and contrasts Articles 226 and 227 and identifies the differences.

Introduction

Articles 226 and 227 are the parts of the constitution which define the powers of the High Court.

Article 226, empowers the high courts to issue, to any person or authority, including the government (in appropriate cases), directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto, certiorari or any of them.¹

What are these Writs?

Habeas Corpus - A simple dictionary meaning of the writ of Habeas Corpus is "a writ requiring a person under arrest of illegal detention to be brought before a judge or into court, especially to secure the person's release unless lawful grounds are shown for their detention".

Mandamus – “A writ issued as a command to an inferior court or ordering a person to perform a public or statutory duty.”

Prohibition – “A writ of prohibition is issued primarily to prevent an inferior court or tribunal from exceeding its jurisdiction in cases pending before it or acting contrary to the rules of natural justice.”

Quo warranto - This simply means "by what warrant?". “This writ is issued to enquire into the legality of the claim of a person or public office. It restrains the person or authority to act in an office which he / she is not entitled to; and thus, stops usurpation of public office by anyone. This writ is applicable to the public offices only and not to private offices.”

¹ Pushkraj Deshpande, Articles 226 And 227 Of The Constitution Of India – Their Scope, Powers And Differences, Singh & Associates

Certiorari- Literally, Certiorari means "to be certified". "The writ of certiorari can be issued by the Supreme Court or any High Court for quashing the order already passed by an inferior court, tribunal or quasi-judicial authority."

Scope of Article 227

In 1774, 247 years ago on 26th March 1774 King George III signed a letter establishing a court of record called Supreme Court of Judicature at Fort Williams at Bengal. With this came along the powers to issue writ, in the beginning only two types of writs were being issued i.e Certiorari and Prohibition. In 1823 on the lines of Supreme Court of Judicature at Fort Williams, two more supreme Courts were established at Bombay and Madras and these two supreme courts also inherited the same power, i.e the power to issue writs.

There are 5 basic prerogative writs incorporated in the body of the Article 226 which are Writ of Habeas Corpus, Writ of Mandamus, Writ of Certiorari, Writ of Prohibition, Writ of Quo-Warranto/Habeas Corpus. As successors of these three Supreme courts, the three High Courts in these presidency towns which were known as chartered high courts i.e. Bombay, Madras and Calcutta, they started issuing writs. After 1851 when the high courts act was brought some more legislations were also brought in, two of them which are important are CrPC of 1861 which was substituted by Crpc of 1882 and other was Specific Relief act of 1877, these two enactments are important because high courts started issuing writ of Habeas Corpus in the appellate jurisdiction exercised under Section 491 under CrPC. High courts were not initially exercising the writ of Habeas Corpus in exercise of their Original Ordinary Jurisdiction as in the case of Certiorari or Prohibition. Similarly, Section 45 of Specific Relief Act of 1877 was used to issue the writ of Mandamus. This is the order of how writs used to function starting from 18th Century to the 19th Century.

With the Advent of the Indian Constitution in the 19th Century. Article 32 which is included in the Part III of the constitution which essentially means that it is a fundamental right itself that is guaranteed to the citizens whereas article 226 which falls in Part 6 Chapter 5 of the constitution which deals with the High Courts. The advantage of not incorporating Article 226 in the Part III of the Constitution is that during the National Emergency, fundamental rights were suspended, but article 226 which lies in the Part III of the Constitution remains un eclipsed and unaffected. Writs that are issued under the article 226 are not confined only to the fundamental writs. Order in the nature of Certiorari, Habeas Corpus, Mandamus, Prohibition can be passed, secondly writs can be passed for any other purpose which is not the power available under Article 32. Article 32 is confined to the fundamental rights. Article 139 empowers the parliament to empower the Supreme Court to issue writs for any other purpose, if Supreme Court wants to issue writs for any other purpose, then it has to be authorized by the parliament whereas for High Courts these powers are vested in them under Article 226 itself, they don't need to be authorized by the parliament to exercise writs for any other purpose.

Article 226 was initially prepared as Article 202 in the Draft Constitution², and when the draft constitution was being debated by the Constituent Assembly on 7th June 1949 and 9th September 1949 when constituent assembly debated on the structural language of article 202,

² Power of High Courts to issue certain writs, Constitution of India

https://www.constitutionofindia.net/constitution_of_india/the_states/articles/Article%20226

these debates eventually led to an amendment and Article 202 eventually was renumbered as Article 226. It said that all High Courts would be allowed to exercise writs as back then only three High Courts were allowed to exercise writs. Limited writs were issued prior to the advent of the Constitution, this brought uniformity to all the High Courts.

Scope of Article 227:

The bench of 7 judges under *L. Chandra Kumar vs Union Of India*³ besides dealing with the judicial review powers of Article 226, dealt with the power of Superintendence under article 227 and held two very important pronouncements which are extremely critical to the health of Article 226 and Article 227. Article 226, 227 along with Article 32 are part of the basic structure of the constitution forming its essential and integral feature. These powers cannot be tampered with or taken away by any constitutional amendment or by any parliamentary legislation in exercise of article of 368 or 246.

In *State v. Navjot Sandhu [JT (2003) 4 SC 605 : (2003) 6 SCC 641]*, SCC pp. 656-57, para 28⁴. The Supreme Court held:

- (i) The jurisdiction under Article 227 cannot be limited or fettered by any Act of the State Legislature;
- (ii) The supervisory jurisdiction is wide and can be used to meet the ends of justice, also to interfere even with an interlocutory order;
- (iii) The power must be exercised sparingly, only to keep subordinate courts and tribunals within the bounds of their authority to see that they obey the law. The power is not available to be exercised to correct mere errors (whether on the facts or laws) and also cannot be exercised "as the cloak of an appeal in disguise."

Power under Article 227 is closest to the writ of Certiorari in Article 226, however the power in Article 227 is even wider than Article 226 in the sense that power of supervisory jurisdiction is not subject to any technicity or procedure which may be found in a writ jurisdiction under Article 226. As far as Article 227 is concerned, historically it is a reproduction of Section 107 of the 1915 Government of India Act, but there is one very important distinction, Section 107 of the government of India Act secured supervisory jurisdiction of High Courts in relation to the subordinate courts, whereas Article 227 brings the supervisory jurisdiction not only to subordinate courts, but also in relation to the tribunals.

Difference between Article 226 and 227⁵

The Supreme Court, in *Ram Kishan Fauji vs State of Haryana*, (2017) 5 SCC 533⁶, clarified that under Article 226, the High Courts have the ability to issue directions, orders, and writs to any person or entity, including the government. Every High Court has the authority of

³ L. Chandra Kumar vs Union Of India <https://indiankanoon.org/doc/1152518/>

⁴ State v. Navjot Sandhu <https://indiankanoon.org/doc/1769219/>

⁵ Sameer Vashisht, Scope of Article 226 and Article 227: That the same result can be achieved by 2 different processes, does not mean the processes are the same, OP India

⁶ Ram Kishan Fauji vs State of Haryana, (2017) 5 SCC 533 <https://indiankanoon.org/doc/12721854/>

Superintendence over all Courts and Tribunals across the region over which it has jurisdiction under Article 227. The authority to issue writs, on the other hand, is not anything like the power of superintendence. Between the two, there is a delicate line to be drawn. There has been ambiguity as to whether a petition should be submitted under Article 226 or Article 227 when appealing a decision made by an administrative authority. There have been cases where a lawyer, in order to evade the Court's objection, labels the petition under both Articles 226 and 227 of the Constitution.

The Hon'ble Supreme Court described the problem in detail in the case of *Umaji Keshao Meshram vs Radhika Bai*⁷, which was reported in 1986 (Supp) SCC 401. These two Articles, according to the Supreme Court, are built on very distinct foundations. It was emphasized that just because two separate procedures might sometimes produce the same outcome does not indicate that they are the same. Their source and genesis are distinct, as are the models from which they are patterned. The authority to issue writs under Article 226 was likewise determined to be distinct from the power of Superintendence under Article 227. The supervisory jurisdiction bestowed on the High Court by Article 227 is in addition to the supervisory jurisdiction granted on the High Court by Article 226.

The main distinction was that under Article 226, the person, authority, or state requested the directive, order, or writ is considered an essential party. However, under Article 227, the order or judgement of a subordinate Court or Tribunal is brought before the High Court for the purpose of determining whether the subordinate Court or Tribunal acted within its jurisdiction and in accordance with the law in issuing such judgement or order. Furthermore, under Article 227, the High Court, in addition to throwing aside the Tribunal's decision or order, can provide directions to the subordinate Court or Tribunal to behave in a certain manner, whereas Article 226 gives the High Court no such jurisdiction. The proceeding under Article 226 is an original proceeding when it concerns civil rights of a person whereas a proceeding under Article 227 is not an original proceeding.⁸

Therefore, if an order issued by a lower court or a tribunal is challenged in the High Court without the option of filing an appeal, it must be determined whether it is seeking a simpliciter setting aside of the order or whether it is also seeking certain directions in addition to the setting aside/abashment of the order. A petition may only be brought under Article 227 of the Indian Constitution if specific directives are given in addition to the prayer for setting aside. Even though the petition is labelled under Article 226, the High Court is required to evaluate it under Article 227 rather than Article 226 under the aforementioned conditions. If a petition is filed under both Article 226 and Article 227 of the Constitution, the outcome will be same. However, if a person's civil rights have been violated by a government entity or state, the sole remedy available is under Article 226 and not under Article 227.

Conclusion

As a result, there is no difference between Articles 226 and 227, which is a contradiction. Instead, it is no longer res-integra that Articles 226 and 227 function in various situations and in different locations. A Court's jurisdiction under Articles 226 and 227 differs, as do its

⁷ Umaji Keshao Meshram vs Radhika Bai <https://indiankanoon.org/doc/1817407/>

⁸ An explanation of Article 226 and 227 of the Indian Constitution, Lex Repository
<https://www.thelexrepository.com/an-explanation-of-article-226-and-227-of-the-indian-constitution/>

powers under both. At the risk of repetition, it is stated that under Article 226, High Courts have the authority to issue directions, orders, and writs to any person or authority, including the government, and that under Article 227, every High Court has the authority to supervise courts and tribunals throughout the territory over which it has jurisdiction.

Article 227 gives every High Court the power of superintendence, which is a supervisory jurisdiction designed to guarantee that subordinate Courts and Tribunals work within their authority and in accordance with the law. Article 226 orders, instructions, and writs are not designed for the purpose of exercising the superintendence jurisdiction placed on the High Court by Article 227. Rather, the powers granted by Article 227 are in addition to those granted by Article 226 to the High Court. The fact that two separate processes might sometimes produce the same outcome does not imply that they are the same.

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