



ENFORCEMENT OF FUNDAMENTAL RIGHTS: STUDY IN THE CONTEXT OF USA, SOUTH AFRICA AND INDIA

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Fundamental Rights are the basic bundle of natural rights that are available to each and every individual and the State is bound to provide and maintain such rights so that individuals get the freedom to enjoy their own interests. In many countries, such as the United States of America, South Africa, Canada etc. these rights are known as the 'Bill of Rights'. The Constitution of USA was the first contemporary Constitution to incorporate and guarantee fundamental rights, and thereby made them justiciable and enforceable through the intervention of courts. Thereafter, few other countries with a written Constitution also guaranteed such rights to the individuals to keep it out of the hold of repressive governments. Various countries follow and applies the famous legal maxim 'ubi jus ibi remedium', which means that there can be no right without a remedy and hence, these countries provide certain remedies for enforcement of fundamental rights under their Constitution and preserve and protect the fundamental rights of individuals. This paper shall deal with a comparative study between USA, South Africa and India with respect to:

- i. Which among these countries follows parliamentary sovereignty and which gives supremacy to judiciary in order to check which organ, legislative or judiciary, have been given the power to deal with the

enforcement of fundamental rights of the people?

- ii. What is the mechanism followed for enforcing the fundamental rights of a person and the remedies available, in case of, violation of any fundamental rights?
- iii. Who has the right to approach the court, in case of, violation of any fundamental rights?
- iv. Whether the enforcement of fundamental rights is suspended in case of emergency?

1. Parliamentary Sovereignty vs. Judicial Supremacy

The controversy between Parliamentary Sovereignty and Judicial Supremacy has been the concern of scholars for many years now and it seems to be never ending. In USA, there have been several conflicts between the three organs of the Government but the judicial branch has risen superior in the conflict and the supremacy of the superior court is only due to the character, the purity and the industry of its judges.¹ In one of the most significant case decided by the US Supreme Court, an Act of Congress was declared invalid by the Court and it was ruled by the Court that as the Constitution of US clearly states that it is the supreme law of the land and because it is within the scope of the judiciary to uphold the law, the courts must declare state laws and even Acts of Congress invalid when they are inconsistent with a provision of the Constitution and the same is applicable to the executive actions also.² Professor Dicey, in his book 'The Law of The Constitution' has observed in reference to the USA that 'the powers of the executive are again limited by the

¹ TK Smith, 'The Rise of Federal Judicial Supremacy in the United States: Part I' (1898) Penn Law Review <<https://scholarship.law.upenn.edu/cgi/viewcontent.c>

[gi?article=5613&context=penn_law_review](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=5613&context=penn_law_review)> accessed 28 September 2019.

² *Marbury v Madison* 5 U.S. (1 Cranch) 137 (1803).



constitution'³ and 'the interpreters of the Constitution are the judges'⁴, therefore, 'the Bench can and must determine the limits of the authority both of the government and of the legislature.'⁵ Article III Section II of the US Constitution, 1787 establishes jurisdiction of the US Supreme Court and the Court possess original jurisdiction over certain cases, such as, suits between two or more states and/or cases involving ambassadors and other public ministers, and has appellate jurisdiction on cases that involves a point of constitutional and/or federal law.⁶ The decision of the Supreme Court on questions of constitutionality are final and binding for all other courts and governmental authorities, whether state or federal.

Whereas, in South Africa, before 1994, Parliamentary Sovereignty was placed on a higher pedestal than the judicial supremacy because at that time, apartheid was prevalent in the country, judiciary was open to abuse by a governmental force on the said racist ideology as seen in the constitutional history of the country which reveals how a corrupt government manipulated the judiciary for achieving its ill motives and also, criticised it when it made efforts to suppress the menace of apartheid.⁷ Also, in one of South Africa's most famous constitutional cases , Chief

Justice Centlivres , stated that, '[i]f the provisions of a law are clear , we, as a court, are not concerned with the propriety of the legislation or policy of the legislature , our duty is to minister and interpret it as we find it.'⁸ But the whole situation of parliamentary supremacy in South Africa changed after Sections 4 and 7 of 1993 Constitution came into operation and now these sections are incorporated in the current 1996 Constitution under Sections 2, 7(2) and 8(1) which denotes that the Constitution is supreme and the Bill of Rights binds all the organs of the government/state.⁹ Therefore, the Constitutional Court under the South African Constitution has been given the power to deal with any constitutional matter, which includes any issue involving the interpretation, protection or enforcement of the Constitution¹⁰ and can also declare a law invalid, if proved to be inconsistent with any provision of the Constitution including Bill of Rights.¹¹ Section 39(2) of the Constitution of South Africa, 1996, which falls under the Bill of Rights, provides for duty of the judiciary that for interpreting and developing the law, it has to promote the spirit, purport and objects of the Bill of Rights. In fact, the Constitutional Court in the case of *Carmichele v Minister of Safety and Security and another (Centre for Applied*

³ A. Inglis Clark , 'The Supremacy of the Judiciary under the Constitution of the United States , and under the Constitution of the Commonwealth of Australia'(1903) Harvard Law Review <https://www.jstor.org/stable/1322402?seq=1#metadata_info_tab_contents> accessed 28 September 2019.

⁴ *ibid.*

⁵ *ibid.*

⁶ United State Courts <<https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about>> accessed 1 October 2019.

⁷ John Dugard, 'Human Rights and the South African Legal Order' (1978) Princeton University Press <<http://www.jstor.org/stable/j.ctt13x169k>> accessed 28 September 2019.

⁸ *Collins v Minister of the Interior* 1957 1 SA 552 (A).

⁹ Prof. Francois Venter, 'South Africa Introductory Notes' (North-West University, Potchefstroom Campus, South Africa) <http://www.icla.up.ac.za/images/country_reports/south_africa_country_report.pdf> accessed 28 September 2019.

¹⁰ Constitution of South Africa 1996, s 167(7).

¹¹ Constitution of South Africa 1996, s 172(1)(a).



Legal Studies Intervening)¹², held that the courts are ‘under a general duty to develop the common law when it deviates from the objectives of the country’s Bill of Rights’. The High Court of South Africa also has the power to deal with any constitutional matters, except when, (i) the Constitutional Court has agreed to hear directly; or (ii) by an Act of Parliament assigned the case to another court of a status similar to the High Court of South Africa.¹³ The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless confirmed by the Constitutional Court.¹⁴

The Indian Constitution is a mixture of Judicial Supremacy and Parliamentary Sovereignty, wherein, the former is adapted from the American Constitution and latter from the British Constitution. The Supreme Court and High Courts has been given the power to declare any law, enactment of executive order as unconstitutional if it infringes any provision or basic structure of the Constitution. Also, the court is bound under Article 32(2) and 226 (1) of the Constitution of India, 1950 to issue directions or orders or writs for enforcement of fundamental rights provided expressly in Part III of the Indian Constitution and the Supreme Court has also been given the power to decide what should be the appropriate remedy for enforcement of fundamental right of the petitioner.¹⁵ On the other hand, Article 368(1) of the Constitution of India, 1950

provides the Parliament the power to amend, modify or repeal the Constitution but this power is subject to certain restrictions provided in the Constitution, such as, Article 13¹⁶ provides that the Government of India or State Governments may not enact any legislation inconsistent with Part III of the Constitution, therefore, Parliament does not enjoy an unrestricted power of amending the Constitution.

Hence, in all the three countries, USA, South Africa and India, judiciary has been given the power for enforcement of fundamental rights of its’ people and the highest court of the country has the power to enforce fundamental rights and deal with infringement matters related to the constitution. In India and South Africa, not just the highest court of the country but certain other courts of the country also have been given the power to deal with constitutional matters, including enforcement of fundamental rights but in South Africa, the powers of the other courts are restricted to confirmation by the Constitutional Court. With respect to enforcement of fundamental rights, US Supreme Court has only Appellate jurisdiction whereas in South Africa, the Constitutional Court has both Original and Appellate jurisdiction and the Indian Constitution grants Original jurisdiction to the Supreme Court and also, the High Court in India is granted with Original jurisdiction to exercise the power to issue writs for the restoration of fundamental rights.¹⁷

2. Mechanism for enforcing Fundamental Rights

¹² 2001 (4) SA 938 (CC).

¹³ Constitution of South Africa 1996, s 169(1)(a)(i).

¹⁴ Constitution of South Africa 1996, s 172(2)(a).

¹⁵ *Kanu Sanyal v District Magistrate Darjeeling* (1973) 2 SCC 674,687: AIR 1973 SC 2684.

¹⁶ Constitution of India 1950.

¹⁷ Constitution of India 1950, Art 226.



Any person whose fundamental rights have been violated has certain remedies available to protect them from such infringement. In USA, the person whose fundamental right is violated can approach the lower court and if he is not satisfied with lower courts judgment, the aggrieved person can approach the highest court of the country, i.e., Supreme Court, for enforcement of his fundamental rights. The doctrine of incorporation is a constitutional doctrine which makes the Bill of Rights applicable to the states via Due Process clause of the Fourteenth amendment, prior to which bill of rights were only applicable to federal government. The Supreme Court has followed 'selective incorporation' for extending to the States almost all of the protections in the Bill of Rights, as well as other, unenumerated rights. With respect to enforcement, if a party is not satisfied by the decision of the lower court, can file a petition to the US Supreme Court asking it for grant of writ of certiorari. The court only accepts for hearing the case if it deals with any constitutional issue. With respect to writs, since the American colonists were well verse with the English common law and the use of prerogative writs by their courts, they decided to incorporate the remedy of writs in its Constitution as well. Earlier, the power of issuing writs was granted by the Congress under the Judiciary Act, 1789 to the Supreme Court and not by the Constitution, and since the Constitution is the supreme law of the land, the Court held in *Marbury v. Madison*¹⁸, that any contradictory congressional act is without force and the power to issue writ of mandamus in the exercise of its original jurisdiction was held to be unconstitutional. Now, there is no specific provision that allows for issuance of

writs; however, Article 1 Section 9(2) of the US Constitution, 1787 provides for a specific prohibition on the suspension of habeas corpus and it constitutes a civil proceeding in USA notwithstanding that the object is by means of it to obtain release from custody under a criminal prosecution.¹⁹ The writs are issued both by the Supreme Court and District Courts, but the Supreme Court uses these powers only in its appellate character.²⁰ The power of the US Supreme Court to issue other types of writs is conferred and regulated by ordinary law, such as, All Writs Act, codified at US Code Title 28, Part V, §1651, which deals with issuance of writs by the Supreme Court and all the courts established by Act of Congress and this Act was a part of Judiciary Act of 1789 and the current form of the Act was passed in 1911 and has been amended several times since then. The remedy of issuing writ of habeas corpus will not lie if there is another adequate remedy by appeal available but if the remedy available is not speedy and efficacious and the constitutional rights also cannot be adequately preserved, the remedy of habeas corpus can be adopted.²¹

In South Africa, Section 167 of the Constitution, deals with the establishment of the Constitutional Court and its powers. It is the highest court in the country which deals with enforcement of fundamental rights. Ways in which a case can reach the Constitutional Court are, as the result of an appeal from a judgment of the High Court or the Supreme Court of Appeal or as an application to the Court, asking it to sit as a court of first and last instance because of the urgency of the matter or as the result of the court below declaring a piece of legislation invalid, which requires confirmation by the

¹⁸ *Marbury* (n 2).

¹⁹ *Ex parte Tom Tong* 108 US 556.

²⁰ *Ex parte Clarke* (1879) 100 US 552.

²¹ *Re Barber* 75 Fed 980.



Constitutional Court or as a Bill of parliament asks the court to review. The court in *Dudley v. City of Cape Town and Anr.*²², held that the Constitutional Court deals with the matter of direct access to the court and the Constitution allows a person for direct access, ‘*when it is in the interest of justice and with leave of the Constitutional Court.*’²³ The cases initiated in the High court which has the power to grant various remedies and can declare legislation invalid, and then it reaches the Constitutional Court passing through the Supreme Court of Appeal. The judges of Constitutional Court judge decide if an important principle relating to the interpretation of the Constitution has been raised and examines whether there is a reasonable prospect that the appeal may succeed and, thereafter, if satisfied, will grant leave to appeal.²⁴ The writ of habeas corpus is not used in South Africa but ‘*interdictum de homine libero exhibendo*’ is a remedy which is equivalent to the said writ, under which a person who is arrested or detained can challenge the legality of his or her detention, and be released if it is found to be unlawful.

In India, under Article 32 and 226 of the Constitution of India, 1950, a person whose fundamental rights are violated has been given the right to approach Supreme Court or High Court for enforcement of his rights. These courts have been given the power to issue directions, orders or writs, such as, habeas corpus, mandamus, prohibition, certiorari and quo warranto for enforcement of fundamental rights against any authority in the State, when a right of an individual is infringed.²⁵ The petitioner may enforce his

fundamental rights by other proceedings, such as a declaratory suit under the ordinary law or an application under Article 226 or by way of defense to legal proceedings brought against an individual²⁶ but he also has a fundamental right to approach the Supreme Court for enforcement of his fundamental right under Article 32 as it falls under Part III of the Constitution which makes it itself a fundamental right and hence, this right of the petitioner cannot be abrogated, abridged or taken away by an Act of the legislature. An application under Article 32 of the Constitution of India, 1950 cannot be refused merely on the ground that the petitioner has another adequate legal remedy open to him, where a fundamental right appears to be infringed.²⁷ Also, the Supreme Court is given under Article 32(2) the power to decide among issuance of directions or orders or writs for enforcement of such fundamental right, what should be the appropriate remedy for enforcement of fundamental right of the petitioner.²⁸ The High Courts have been vested with the power to issue writs under Article 226²⁹ of the Constitution but this power of the High Courts is wider than the power provided to the Supreme Court because writs can be issued by the Supreme Court in case of infringement of the fundamental rights only, but High Courts have been provided with the jurisdiction to issue writs not only in such cases but also where an ordinary legal right has been infringed provided a writ is a proper remedy in such cases according to well established principles.

²² [2004] ZACC 4.

²³ Constitution of South Africa 1996, s 167.

²⁴ *ibid.*

²⁵ *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161; AIR 1984 SC 802, 813-14.

²⁶ Durga Das Basu, *Introduction to the Constitution of India* (22nd edition, Lexis Nexis) 143.

²⁷ *ibid.*

²⁸ Kanu Sanyal (n 14).

²⁹ Constitution of India 1950.



Therefore, the mechanism followed for enforcing the fundamental rights, is evidently quite different in the three countries. The peculiarity of Article 32(2) of Indian Constitution is that the power to issue writs is conferred by the Constitution, but the same is left with the legislature in US. The remedy of issuing writ of habeas corpus in US lies only when there is no other adequate remedy available but the same is not with India. And in all the three jurisdictions, the availability of writ of habeas corpus or interdictum de homine libero exhibendo (in case of South Africa) is entrenched in the fundamental rights or bill of rights.

3. Locus Standi

Since fundamental rights are basic rights available to a person, they would be meaningless if not enforced. In USA, the Fifth, Ninth and Fourteenth amendments to the Constitution grants all fundamental rights to every person and the right to enforce fundamental rights is itself a fundamental right. Therefore, whose fundamental rights have been violated have a Constitutional right to have their complaint properly considered in a reasonable and unbiased court in a timely manner and it must include the right to public trial, the right to present relevant evidence, and the right of consensual assistance of counsel of one's choice.³⁰ Any person whose fundamental rights have been infringed can only bring action before the court against such infringement.³¹ Although, there are few circumstances under which a person other than whose fundamental rights

have been directly infringed can move before the court on the latter's behalf, such as, when as direct consequence of the infringement of another's rights substantial economic injury is faced by the petitioners³²; or criminal prosecution³³, where the rights of the petitioner and the other person are so intertwined that unless the petitioner advocates the rights of such other person, these rights cannot be effectively vindicated³⁴ and when the one injured cannot properly bring such complaint, in case, he is denied freedom of speech or the he is a child or mentally disabled or dead or tortured.³⁵

Therefore, when someone provides legal representation to groups or individuals that have been unrepresented or under-represented in the legal process, this noble process is known as Public Interest Litigation. These include not only the poor and the disadvantaged sections, but also ordinary citizens who have lacked access to courts, administrative agencies, and other legal forums, by reason of their inability to afford lawyers to represent them.³⁶

The South African Constitution, expressly includes the persons who have a right to approach a competent court, in case, a right in the Bill of Rights has been infringed or threatened, and they are: (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.³⁷ In a case

³⁰ 'Fundamental Rights' (MIT) <<http://web.mit.edu/dmytro/www/FundamentalRights.htm>> accessed 30 September 2019.

³¹ *U.S v Raines* (1960) 362 US 17 (22).

³² *Pierce v Soc. Of Sisters* (1925) 268 US 510 (535).

³³ *Grisworld v Connecticut* (1965) 381 US 479 (481).

³⁴ *NAACP v Alabama* (1958) 357 US 449.

³⁵ Fundamental Rights (n 30).

³⁶ Report By Council of Public Interest Law, USA (1976).

³⁷ Constitution of South Africa 1996, s 38.



where the court rejected a public interest case seeking to enforce the right to water, Justice O'Regan recognised the important role of public interest organisations in bringing socio-economic rights litigation, '*South Africa is fortunate to have a range of non-governmental organisations working in the legal arena seeking improvement in the lives of poor South Africans. Long may that be so. These organisations have developed an expertise in litigating in the interests of the poor to the great benefit of our society. The approach to courts in constitutional matters means that litigation launched in a serious attempt to further constitutional rights, even if unsuccessful, will not result in an adverse costs order. The challenges posed by social and economic rights litigation are significant, but given the benefits that it can offer, it should be pursued.*'³⁸ In another case, Justice Sachs observed, '*Interventions by public interest groups have led to important decisions concerning the rights of the homeless, refugees, prisoners on death row, prisoners generally, prisoners imprisoned for civil debt and the landless.*'³⁹

In India, any person whose fundamental rights have been infringed can move to the Supreme Court or High Court for the enforcement and protection of his fundamental rights⁴⁰ but any third person on behalf of a person whose fundamental rights have been violated can move to the court, only if the issue involved is in the public interest, therefore, in India also Supreme Court and High Courts accept the remedy of Public Interest Litigation or also known as

Social Action Litigation, where it is not necessary for the affected person to himself approach the court, a petition or a letter espousing the cause of poor which can be accepted as writ petition can be filed by a public spirited person or body or the court can even take cognizance of the matter suo moto. Justice P.N. Bhagwati, who is referred to as the Father of Public Interest Litigation in India, has stated, '*A new dimension has been given to the doctrine of locus standi which has revolutionized the whole concept of access to justice*'⁴¹ and has also accentuated that public interest litigation is '*a strategic arm of the legal aid movement*' which is intended to bring justice within the reach of the poor masses who constitute the low visibility area of humanity.⁴²

Therefore, in all the three countries, the person whose rights have been infringed has the locus standi to approach the court but under few circumstances a third person can approach the court on his behalf, commonly by using the remedy of Public Interest Litigation. In all three democratic countries, citizens have access to justice to vindicate legal rights and the legal duties should be judicially enforced so that people feel a sense of participation.⁴³

4. Suspension of enforcement of fundamental rights in case of Emergency:

State of Emergency is a situation which hinders and affects the normal functioning of a State and during such situation government performs actions differently. Government can declare such state during a disaster, civil

³⁸ *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (4) SA 1 (CC).

³⁹ [2009] ZACC 14; 2009 (6) SA 232 (CC) para 19.

⁴⁰ Constitution of India 1950, Art 32, 226.

⁴¹ M.P. Jain, *Indian Constitutional Law* (7th Edition, Lexis Nexis 2016) 1371.

⁴² Jain (n 44).

⁴³ Sunita Chhabra 'Public Interest Litigation in India and USA a comparative study' <https://shodhganga.inflibnet.ac.in/bitstream/10603/49011/9/09_chapter%204.pdf> accessed 1 October 2019.



unrest or armed conflict. The term 'Emergency' is not expressly mentioned in the Constitution of USA but the framers considered the question of how to deal with emergencies, or 'exigencies', and trusted that they had formulated a document which would permit the government to do so effectively.⁴⁴ The Constitution of USA incorporates specifically English common law procedure of a suspension clause under Article 1 Section 9 clause 2, which states that, '*the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it*', whereas there is no provision for suspension of other writs. Power of the suspension of the habeas corpus can be exercised by both, the President and Congress, but the President cannot exercise this power without express authorization of Congress.⁴⁵

In South Africa, Section 37 of the Constitution of South Africa, 1996 deals with 'State of Emergency'. During the state of emergency, any legislation enacted may derogate from the Bill of Rights only to the extent that- (A) the derogation is strictly required by the emergency; and (B) the legislation- (i) is consistent with the Republic's obligations under international law applicable to states of emergency; (ii) conforms to subsection (5), and (iii) is published in the national Government Gazette as soon as reasonably possible after being enacted.⁴⁶ There are certain fundamental rights which are inviolable including amongst others the right to life and

to human dignity; the prohibition of discrimination on the grounds of race, sex or religion; the prohibition of torture or inhuman punishment; and the right of accused people to a fair trial.

In India, the right to move Supreme Court for enforcement shall not be suspended except as provided by the Constitution of India⁴⁷ and this exception is included in Article 359 of the Constitution of India, 1950 which deals with the suspension of the enforcement of the fundamental rights during emergencies, where the President has been given powers to declare that the right to move to the court for the enforcement of fundamental rights (except Article 20 and 21 of the Constitution) shall remain suspended for the period during which the proclamation of emergency is in force and as soon as the order ceases to be operative, the infringement of any fundamental right made either by legislative enactment or by executive action can perhaps be challenged by the citizen in a court of law.⁴⁸

Therefore, in all the three countries, fundamental rights are suspended during the emergency period but the organs of government who have the power to suspend fundamental rights are different. Under India and South Africa, there are certain rights which are inviolable in case of emergency.

CONCLUSION

In all the three jurisdictions, USA, South Africa and India, judiciary has the power to enforce the fundamental rights of a person in case of their breach or infringement and the

⁴⁴ William B. Fisch, 'Emergency in the Constitutional Law of the United States' (1990) University of Missouri School of Law Scholarship Repository, Faculty Publications
<<https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1417&context=facpubs>> accessed on 1 October 2019.

⁴⁵ *Fisher v Baker* (1906) 203 US 174.

⁴⁶ Constitution of South Africa 1996, s 37(4).

⁴⁷ Constitution of India 1950, Art 32(4).

⁴⁸ Durga Das Basu, *Commentary on the Constitution of India* (8th Edition, Part 3, Lexis Nexis Butterworths Wadhwa Nagpur, Reprint 2012).



legislature does not have any power to make a law which abrogates or violates any of these rights. The right to enforce fundamental right is itself a fundamental right in all the three countries. In India and South Africa, the procedure and mechanism to be followed for enforcing the fundamental rights of any person is expressly mentioned in their Constitutions whereas in USA the mechanism is not completely expressed in the Constitution but it has become clear only after judicial intervention. The mechanism followed in all the three countries are quite different; and the jurisdiction and procedure of the authority, i.e., the courts, enforcing the rights are also different. But in these countries the person aggrieved as well as a public-spirited person on behalf of the victim is allowed to approach the court in case of infringement of fundamental rights. During the state of emergency, fundamental rights are suspended in all the three jurisdictions, the difference being, in USA and South Africa it is not expressly mentioned in the Constitution whereas in India it is. In South Africa, the executive has the power to suspend fundamental rights during emergency whereas in USA and India, executive has the power to suspend but only after the approval of the legislature, the rights get suspended.


