ENFORCEMENT OF “RULE OF LAW”

For the enforcement of “Rule OF Law” the remedies provided for redressing the wrong done to the citizens by the actions of the administrators. An important aspect of public law review is not only the enforcement of private right but to keep the administrative and quasi-administrative machinery within proper control. It is no denying the fact that today due to the intensive form of government there is a tremendous increase in the functions of the administration. Therefore, if these newfound powers are property exercised, these may lead to a real welfare state and if abused these may lead to a totalitarian state.[[1]](#footnote-1)1

Against this backdrop the prime function of judicial review is to check the abuse of administrative powers and to enforce accountability on the operators of these powers.

The remedies can be divided into two:

1. Public Law Remedies
2. Private Law Remedies
3. Public Law Remedies
4. Mandamus.

Writ of Mandamus is a judicial remedy in the form of an order of direction from the supreme court or a High Court to any constitutional, statutory or non-statutory agency or body to do some specified act which the agency or body is obligated to do under the law and which is in the nature of a public duty or a statutory duty. The question whether, and if so how for, it goes to compel the exercise of discretion is difficult to answer. The court usually issues Mandamus where a tribunal has refused to exercise discretion when it has a duty to do so. But Mandamus cannot be used to enforce the manner in which the discretion has to be exercised. Mandamus is a positive command to perform a certain act (i.e; duty of public nature) and has no negative function, which is peculiar province of certiorari and prohibition.[[2]](#footnote-2)1

‘Mandamus’ as the word indicates, is the command, which is issued from a court to any person, authority or inferior court requiring them to perform the specific act which they are under a statutory obligation to do, but which they have either failed or refused to do. It is a form of writ which is issued in England from the High Court of Justice to the end that justice may be done “in all cases where there is a specific legal right and no specific legal remedy for enforcing such right, and if may issue in cases where, although there is an alternative legal remedy yet such mode of redress is less convenient, beneficial and effectual.[[3]](#footnote-3)1

In the words of Lord Mansfield, Chief Justice:

“A Mandamus is a prerogative writ, to the aid of which the subject is entitled upon a proper case previously shown to the satisfaction of the court. The original nature of the writ and the end for which it was framed; direct upon what occasions it should be used. It was introduced to prevent disorder from a failure of justice and defect of policy. Therefore, it ought to be used upon all occasions where the law has provided no specific remedy and where justice and good government are to be done.[[4]](#footnote-4)2

Lord Bowen L.J said:

“ A writ of Mandamus, as every body knows, is a high prerogative writ, invented for the purpose of supplying of justice. By Magna Carta the crown is bound neither to deny justice to anybody, nor to delay any body in obtaining justice. If, therefore, there is no other means of obtaining justice, the writ of mandamus is granted to enable justice to be done. The proceedings, however, by mandamus, is most cumbrous and most expensive, and from time immemorial, accordingly the courts have never granted a writ of mandamus where there was another more convenient or feasible remedy within the reach of the subject.”[[5]](#footnote-5)3

English writers trace the development of the writ from the Norman Conquest; however it was only in the early part of the eighteenth century that writ came to be frequently used in the public law to compel the performance of the public duties.

The command may issue to a purely administrative body.[[6]](#footnote-6)1 However, it is not one of the purposes of mandamus to obtain expedition in the matter of orders by government upon an administrative matter of which it is seized. On the other hand, a mandamus can issue to restore a person to office, where he has been dismissed contrary to a rule having a statutory force.[[7]](#footnote-7)2 Infact, mandamus has been employed to restore to office persons wrongfully removed, or to admit to public office persons dully elected or appointed, or to direct an election to a public office.

Hence, constitutional safeguards available to civil servants against arbitrary dismissal or removal from service are not available to servants of registered company or a statutory corporation. Such servants are to be governed by general law of master and servant, and only remedy available to them is to sue for damages for wrongful dismissal and not writ of mandamus.[[8]](#footnote-8)3

The orders passed in excess of lawful authority whether by judicial, quasi-judicial or non-judicial functionaries including functionaries of corporations and autonomous bodies are equally liable to be declared as being of no legal effect.[[9]](#footnote-9)1 A mandamus may issue against the syndicate of a University, an income tax commissioner, a registrar of a High Court acting as taxing officer, the presiding officer at an election to declared the candidate obtaining the higher number of votes successful without asking the result of the election to be declared void, settlement and rehabilitation commissioner, the state bank and the government if they refuse to issue bonus vouchers to a person entitled to them under a duty published scheme, the chairman of a government controlled development corporation, the registrar of joint stock companies, but it will not issued to control the internal management of a company or to enforce a mere contractual right, or to recover damages or to reverse dismissal of an employee of a development corporation. In the same way, High Court is empowered to five directions to settlement authority to demacrate disputed compound and determines matter in accordance with law. Such direction can be given even after issuance of permanent transfer deed.[[10]](#footnote-10)2

High Court, in exercise of its constitutional jurisdiction, can also direct refund of any amount found to have been illegally recovered by an authority from petitioner.[[11]](#footnote-11)3

Before a mandamus may issue to a public servant it must be shown that a duty towards the applicant has been imposed upon that servant by statute, so that he can be charged thereon, independently any duty which as a servant he may owe to the state, his principal.[[12]](#footnote-12)1

Under Article 199, what is necessary, subject to other conditions, is that the law should impose on the officer concerned a duty to do what he is refusing or omitting to do and that the applicant should be aggrieved party, i.e., a person who has a legal right to demand that the act be done.[[13]](#footnote-13)2

A writ of mandamus may issue in a negative form. However, a declaratory decree cannot be enforced by mandamus, no will a mandamus issue where the performance of a duty is purely in the discretion of the officer. The order of High Court compelling government to create extra seats is, therefore, not within the competence the High Court.

A refusal to exercise jurisdiction vested by law in a public functionary is one of the grounds for High Court’s interference under Article 199.[[14]](#footnote-14)3

If a statute imposes on public official the duty to exercise his discretion and he does not exercise such discretion, the mandamus will not direct him to act in any particular manner. Thus, High Court would not entertain discretionary proceedings whenever there is slightest possible risk of jeopardizing investigation and punishment of crime.

It is equally clear that where a statute confers on a functionary absolute discretion to take or not to take a step and he exercises his discretion one way or the other, the court will not compel him to do what in the exercise of his discretion he has decided to do or not to do.[[15]](#footnote-15)1

An administrative body is under a duty to act justly, fairly and reasonably and where it acts unreasonably, capriciously or arbitrary, the court will interfere with its judgment. [[16]](#footnote-16)2

A writ of mandamus may issue to a purely administrative authority.[[17]](#footnote-17)3

1. Certiorari.

‘Certiorari’ is a Late Latin word being the passive form of the ford ‘Certiorari’ meaning to ‘inform’. It was essentially a royal demand for information. The king wishing to be Certified of some matter, ordered that the necessary information be provided for him. In the beginning certiorari was never used to call for the record of proceeding of an Act or ordinance for quashing these. Proper remedy in such cases was declaration and mandamus. However with the passage of time the scope of Certiorari has gone under change. ‘Certiorari’ may be defined as a judicial order operating in personam and made in the original legal proceedings, directed by the Supreme Court or High Court to any constitutional, statutory or non statutory body or person, requiring the records of any action to be certified by the court and dealt with according to law.

Writ now can be issued against constitutional bodies (legislative, executive and judiciary or their officers), statutory bodies like corporations and other authorities created under a statute, non-statutory bodies like companies and cooperative societies and private bodies and persons. Certiorari can be issued to quash actions, which are administrative in nature.[[18]](#footnote-18)1

Writ of certiorari is so called because the record of the lower tribunals under the rule issued by the court of King’s Bench Division is to be “ Certified” and sent up for the purpose of being investigated by that court. By means of certiorari the records and proceedings are called for by the High Court with a view to examining their legality, and if the High Court to the conclusion that the inferior tribunal has acted in excess of its jurisdiction or in a manner which is opposed to the principles of natural justice or that there is an error apparent on the face of the record, the impugned orders are quashed by it and put out of the way.[[19]](#footnote-19)2

There are some of the grounds on which superior courts would interfere with the orders that are liable to correction by certiorari. Broadly speaking, these grounds are:

(1) Absence or excess of jurisdiction.

(2) Breach of the rules of natural justice committed by the

 tribunal during the course of the proceedings, and

(3) An error of law apparent on the face of the fecord.[[20]](#footnote-20)1

(4) Infringement of the Fundamental Rights.

(5) Fraud.

(6) Contravention of the law of the land.[[21]](#footnote-21)2

Abuse of jurisdiction is indicated where, as a result of the exercise by the superior court of its power of control of inferior tribunals, it appears to it that the tribunal, in the course of the exercise of its jurisdiction, has acted arbitrarily. Upon analysis it would be discovered that wherever the tribunal acts (a) in daring disregard of the well known forms of procedure, or (b) with a mischievous intention as might be well reflected in its pursuit of purposes that are extraneous to the statute under which it professes to act, or (c) acts malafide, or (d) gravely abuses the discretion given to it by law to do certain things – a case of abuse of jurisdiction would be the result. This is another way of saying that the tribunal must not only act within the law but act in good faith. If the impugned order is, infact, not made in the exercise of the power conferred by or under the Act, or is made for a collateral purpose and is not passed bonafide, it would be struck down on the general ground that it is not an order that it is not an order under the Act and is therefore a nullity. [[22]](#footnote-22)1 As Lord Reading said in the case of Res. Vs. Brixton Prison (Governor) Ex Parte Sarno.[[23]](#footnote-23)2

“If we were of the opinion that the powers were being misused, we should be able to deal with matter. In other words, if it was clear that an act was done by the executive with the intention of misusing those powers, this court would have the jurisdiction to deal with the matte.”

In considering whether the proceedings of an inferior tribunal in respect of which certiorari would lie, should be quashed, the principle question that arises is, whether principles of natural justice in the determination of the causes before it have been followed. Here, the superior court is not concerned so much with notions of abstract justice as to see that certain well known forms of ‘judicial’ as distinguished from ‘court’ procedure are followed by lower tribunals.[[24]](#footnote-24)3 As pointed out in the case of Rex Vs. Brighton Rent Tribunal,[[25]](#footnote-25)4

By Lord Goddard C.J., it is not necessary that the proceedings must be conducted in accordance with the procedure known to ordinary courts of law: if the act itself prescribes the procedure which a tribunal is required to follow, it would be enough if those formalities prescribed by the Act are observed Certiorari also lies in the case of an apparent error that is error appearing on the face of the record of inferior tribunals. Error need not be an error of law going to the root of jurisdiction of the tribunal but it is also true that mere formal or inconsequential errors will not afford a ground of relief in certiorari proceedings.[[26]](#footnote-26)1

In the case of Rex Vs Northumberland Compensation Appeal Tribunal,[[27]](#footnote-27)2 The Entire Case – law bearing on the question in England was surveyed and the concept of error apparent on the face of the record was set forth with remarkable forensic clarity by Denning L.J, he says;

“Extends not only to seeing that the inferior tribunals keep within their jurisdiction but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal, which, on the face of it, offends against the law. The King’s Bench does not substitute its own views for those of the tribunal, as a court of Appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so”

In Pakistan, Certiorari process has been used against every conceivable kind of statutory functionary or department e.g., administrative authorities and tribunals, army, boards of Education, boards of revenue, border area authorities, capital development authority, carriage authorities, Civil Courts, Claims authorities, coast guards, cooperative societies, court of wards, criminal courts custodian of evacue property, district boards, economic reforms authorities, educational authorities educational institutions, election commission, election tribunals, employees social security institutions, etc.Generally, no writ can issue in criminal case.[[28]](#footnote-28)1 However, the High Court in exercise of writ jurisdiction can inspect police files.[[29]](#footnote-29)2

An interference by High Court in constitutional jurisdiction is permissible only where subordinate court or tribunal either exercised jurisdiction it did not posses, or exceeded its jurisdiction, or failed to exercise jurisdiction required to be exercised, or in exercise or its jurisdiction acted with material irregularity, rendering its orders without lawful authority.[[30]](#footnote-30)3 The defects to jurisdiction apparent on face of record will attract Certiorari jurisdiction of High Court, which can set aside the proceedings before the lower court, declaring them to be without legal authority and effect.[[31]](#footnote-31)4

The High Court acts in aid of law and not to hamper the working of the agencies established by law. The superior courts have repeatedly pointed out that constitutional jurisdiction is exercised with restraint and in grave cases where the subordinate tribunals act wholly without jurisdiction or in excess of it or in violation of the principles of natural justice or refuse to exercise the jurisdiction vested in them or there is an error apparent on the face of the record and such act, mission or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it is not so side or large as to enable the High Court to examine for itself the correctness of the decisions impugned and decide what is the proper view to be taken or the order to be made.[[32]](#footnote-32)1 Thus in the exercise of its writ jurisdiction, the High Court does not act as a court of appeal.[[33]](#footnote-33)2

Audi Alteram partem is a well-known principle of justice. An order passed in violation of the maxim audi alteram partem, i.e., nobody to be condemned unheard, will be a nullity. The maxim audi alteram partem, embodies well founded principle of law and even if it is not expressly provided in any statute or rule, it has to be read in to it so as to act fairly and justly with due regard to the principles of natural justice.[[34]](#footnote-34)3

A person, who chooses his own forum, cannot ask for certiorari against the proceedings of that very forum, on the ground of Lack of jurisdiction. Similarly, the court may refuse to interfere where the inferior court’s order has caused no injustice.[[35]](#footnote-35)4

A significant example of discretionary grant of certiorari was when, on one occasion, dissolution of National Assembly and four Provincial Assemblies had been declared as ultra vires and unconstitutional, but court refused grant of relief.[[36]](#footnote-36)5

1. Prohibition.

Prohibition is a judicial order issued by the Supreme Court or a High Court to any constitutional, statutory or non statutory agencies to prevent these agencies from continuing their proceedings in excess or abuse of jurisdiction or in violation of the principles of natural justice or in contravention or the law of the land.[[37]](#footnote-37)1

Prohibition has also much in common with certiorari, both in scope and the rules by which it is governed. But there is one fundamental difference between the two. Prohibition is issued at a stage when the proceedings are in progress to forbid the authority from continuing the proceedings. Certiorari is issued at a stage when the proceedings have terminated and the authority has given final decision to quash the decision. It an agency gives a decision, which does not finally dispose of the matter, Certiorari will lie to quash the decision and prohibition will lie to forbid the agency from further continuing the proceedings.

The definition of prohibition given in Halsbury’s Laws of England, states that an order of prohibition forbids an agency to continue proceedings in Contravention of the law of the land. This would prima facie mean that erroneous interpretation of law, especially statute law, which forms the bulk of the law in operation, is included in the grounds for the issue of prohibition.[[38]](#footnote-38)2

A writ of prohibition, as its name indicates, is issued to prohibit an inferior body or tribunal from continuing to act in relation to a matter, which is beyond its authority or jurisdiction. Certiorari proceedings are commenced with a view to quashing orders passed by inferior bodies or tribunals and prohibition will go to stop from going on further with proceedings that are adjudged to be without foundation.[[39]](#footnote-39)1

In the case of Hong Kong and Shanghai Corporation Vs. Bhaidas Pranjivandas; [[40]](#footnote-40)2 Shah. J remarked that.

“A writ of prohibition and a writ of Certiorari are two complementary writs. A writ of Certiorari is issued requiring that the record of proceedings in some cause or matter pending before an inferior court be transmitted to the superior court to be dealt with, for rectifying an order or proceeding. The writ is issued where an order has been passed by a tribunal laving judicial or quasi-judicial authority but the tribunal had no jurisdiction to pass the order or hold the proceedings complained of. A writ of prohibition is issued for preventing a tribunal from continuing a proceeding pending in it on the ground that it has no jurisdiction to hold the proceedings. A writ of Certiorari is remedial, whereas a writ of prohibition is preventive.”

Where a defect of jurisdiction is apparent on the face of the record, a prohibition will lie if an order, void for want of jurisdiction, is about to be executed. Similarly, if a tribunal laving becomes functus officio, assumes jurisdiction to do so something further, a prohibition will lie. A prohibition is justified only where there is unlawful assumption of jurisdiction as distinguished from an erroneous and improper exercise of it. Moreover, prohibition is a right where an excess of jurisdiction is made out and the tribunal is under a duty to act judicially.[[41]](#footnote-41)1 Where the absence of jurisdiction is apparent on the face of the record, prohibition may be claimed as of right despite acquiescence in the exercise of jurisdiction, the reason being that if prohibition were not to issue, the case might become a precedent if allowed to stand without impeachment.[[42]](#footnote-42)2

The writ of prohibition is an order directing an inferior tribunal to refrain from continuing with a proceeding therein, on the ground that the proceeding is without or is in excess of jurisdiction or contrary to the laws of the land, and proceedings may be without jurisdiction if they contravene some enactment or some principle of common law.[[43]](#footnote-43)3

While a prohibition will lie at an earlier stage of the proceedings, a Certiorari will lie only after the proceedings. Therefore, a prohibition will not issue where a tribunal has become functus officio and the execution of the order does not lie in its hands or the hands of any of its officers or any one acting under its contraol.[[44]](#footnote-44)1 However, where a defect of jurisdiction is apparent of the face of the record, a prohibition will lie if an order, void for want of jurisdiction is about to be executed. Similarly, is a tribunal having become functus officio, assumes jurisdiction to do some thing further, a prohibition will lie, even if the act sought to be done is the execution of an order for costs against the petitioner himself. Thus, an application for an order of prohibition is never too old as long as there is something left for it to operate upon. For instance, a writ may be issued prohibiting a tribunal from further proceeding with or upon its orders purporting to have been passed under the provisions of a statute held to be ultra vires.[[45]](#footnote-45)2

A prohibition can issue only against an inferior court or tribunal, having legal authority to determine questions affecting the rights of citizens and having the duty to act judicially.[[46]](#footnote-46)3

In case of prohibition, a public officer of the kind described in Article 199, may be restrained from doing an act which is in excess of the authority given to him by the law under which he is functioning, provided an aggrieved party moves the High Court for the purpose and he has no adequate remedy under the ordinary law. If these conditions are satisfied, the court is not required to enquire further whether the person against whom prohibition is sought is acting judicially or quasi-judicially.[[47]](#footnote-47)4

If the order, when made, will be without jurisdiction either in respect of the subject matter or the parties to the cause or the territory to which the dispute relates, or because of the defective constitution of the tribunal or the illegality of the order, the proceedings will be void, all that the party applying will be required to who to entitle him to a writ would be that if made, the order will adversely affect him. If, however, the order is within the lawful authority of the officer such as the statue permits him to make his own notion of expediency or policy, or because the law, in other respects constitutionally valid, makes him the sole judge of facts on the basis of which the order is to be made, a prohibition will not be even if the order may adversely affect the applicant in some respect. However, a statutory functionary acting malafide, or in a partial and unjust or oppressive manner is amenable to the writ jurisdiction of the High Court.[[48]](#footnote-48)1

A prohibition is justified only where there is an unlawful assumption of jurisdiction as distinguished from an erroneous and improper exercise of it. Mere errors or irregularities in matters over which there is jurisdiction being no a ground for a prohibition.[[49]](#footnote-49)2 For instance, an order cannot said to be without lawful authority, merely because the law under which action is taken is not published in the Gazette if the intension to bring it into operation immediately is clear and the notification in the gazette can be made at any time. Moreover, prohibition is a right an excess of jurisdiction is made out and the tribunal is under a legal duty to act judicially.[[50]](#footnote-50)1 Thus, where the absence of jurisdiction is apparent on the face of the record, prohibition may be claimed as of right despite acquiescence I the exercise of jurisdiction, the reason being that if prohibition were not to issue, the case might become a precedent if allowed to stand without impeachment.[[51]](#footnote-51)2 Hence, under Article 199, it is not valid objection to the power to issue a writ that the officer is acting purely under an executive or administrative capacity, provided the constitutional conditions of excess of jurisdiction and of the applicant being an aggrieved party having no other adequate are satisfied. Which Article 199 will not have the effect of reopening past and closed transactions, the remedy provided it, being in its nature procedural, will operate on cases which have not yet concluded. [[52]](#footnote-52)3

Constitutional jurisdiction of High Court provides, inter-alia, relief of a prohibitory order, jurisdiction in which is discretionary. Hence, dissolution of National Assembly by the president, having been declared an abuse of power, relief of restoration of National Assembly may still be denied. In the same way, where the defect of jurisdictions apparent on the face of the record, a writ of prohibition may be asked as of right, but where such defect is latent, the writ is neither of right nor of course and the court has a discretion to refuse it on the ground of applicant’s conduct e.g. lashes acquiescence, ect.[[53]](#footnote-53)1

1. Quo Warranto

Writ of quo warranto is issued upon an information which may be lodged against a person who claims or usurps “Office, franchise or liberty”, and upon such information being laid the court will inquire by what authority the person who claims or has usurped the office, supports his claim. The proceedings are commenced in appropriate cases to have the right to the office or franchise determined. [[54]](#footnote-54)2

The leading case on the subject of quo warranto is that of Rex Vs. Speyer,[[55]](#footnote-55)3 a case in which Lord Reading summed up the law relating to information in the nature of quo warranto as it obtains in England; Lord Reading Observes:

“In early times the writ of quo warranto was in the nature of a writ of right for the King against any subject who claimed or usurped any office, franchise, or liberty, to inquire by what authority he supported his claim in order to determine the right”.

In Rex Vs. Hertford Corporation[[56]](#footnote-56)1; It was decided that information’s in the nature of quo warranto were within the purview of this statute and thereafter the King’s coroner did not file information’s without the order of the court. Subsequently, the statute of 9 Anne, C.20, was passed to render information’s in the nature of quo warranto more speedy and effectual and for the more easy trial of the rights of officers and franchises in corporations and boroughs. Since that time there has been a tendency to extend the remedy, subject to the discretion of the court to grant or refuse information’s to private prosecutors according to the facts and circumstances of the case, and hence it is that it becomes so difficult to reconcile many of the decisions. The writ of quo warranto will not lie in respect of an office of a private nature.

The writ of quo warranto reaches the person who has usurped office and it is no defence on his part to say that an intermediary process as a result of which be claims to exercise office having been declared as sacrosanct by law, that factor by itself should be deemed to operate as a bar to the exercise of jurisdiction. This point arose specifically in the case of Rex Vs. Speyer, where the relator, who filed information in the nature quo warranto in regard to the impugned appointment of a privy councilor that had been made by the Queen, was virtually questioning the validity of the order passed by the sovereign. It was contended before the court that by the issue of the writ of quo warranto virtually the court would be passing an order upon the sovereign, a thing that no court can do in England. As to this argument, Lord Reading made the following reply:

“The second ground proceeds upon the assumption that if the court were to pronounce a judgment of ouster in this case we should be making an order upon the sovereign. If that were the true view of such a judgment, I should, of course agree, as this court could not make an order upon the sovereign.[[57]](#footnote-57)1

To use the words of cockburn C.J in Reg. Vs. Lords Commissioners of the treasury, we must start with this unquestionable principle, that when a duty has to be performed by the Crown; the king is out of question. Over the sovereign we can have no power.

“But a judgment against the respondents would have effect against them only, it would be an order upon the subject, not upon the crown. It is then agued that this court would be powerless to enforce a judgment of ouster in this case, that we could not order the clerk to the privy council who is the servant of the King, to remove the names from the roll of privy councilors, neither could we prevent the immediate reinstatement of the names if the King thought fit to alter it. It is sufficient for the present purpose to say that a judgment pronounced in favour of the relator would not involve the making by this court of an order upon the clerk, neither would this court be powerless to enforce the judgment if it were disobeyed by those against whom it was made. Although it may be interesting and useful for the purpose of testing the propositions under considerations to assume the difficulties suggested by the Attorney General, none of them would in truth occur. This is the King’s court; we sit here to administer justice and to interpret the laws of the realm in the King’s name. It is respectful and proper to assume that once the law is declared by the competent judicial authority, it will be followed by the crown.”[[58]](#footnote-58)1

In the cases of Pir Illahi Bakhsh Vs. M.A. Khuhro,[[59]](#footnote-59)2 and Muhammad Akbar Vs. Dr. Khan Sahib, Chief Minister of West Pakistan,[[60]](#footnote-60)3 for the circumstances in which quo warranto would issue. It was held;

“The rule that no person may invoke the court’s aid in respect of a wrongful act of a public nature, no affecting prejudicially the real and special interest or a specific legal right of the relator is true only so far as the issue of writs of mandamus and certiorari are concerned. In respect of writ of quo warranto, there is no such restriction and a member of the public may challenge a public act of the state provided that he does not do so mala fide as an instrument of others.”[[61]](#footnote-61)4

There are some conditions for the grant of quo warranto,

1 Office must be a public office.

2 Public office must be substantive in nature.

3 The person must be in actual possession of the office.

4 The office must be held in contravention of law.

Locus Standi for the writ of quo warranto;

The proposition that a writ can be issued on the petition of a person whose rights are adversely affected has no application to the writ of quo warranto. A petition for quo warranto is maintainable at the instance of any person, although he is not personally aggrieved or interested in the matter.[[62]](#footnote-62)1

Moreover, a pre-election disqualification may be a ground for a writ of quo-warranto. In this context, it is worth mentioning that a member of an electoral College under the constitution of the Islamic Republic of Pakistan 1962, did not occupy an office to subject him to a writ of quo warranto, and further, since by reason of a constitutional provision, the election law attached finality to the decision of the tribunal, a writ of quo warranto could no issue against a member of an electoral college or a member of the legislature under that constitution.[[63]](#footnote-63)2

High Court can require a person who is within its territorial jurisdiction holding or purporting to hold a public office, to show under what authority of law he claims to hold that office. However, where person proceeded against is neither resident within territorial jurisdiction of High Court nor has his office within such jurisdiction, mere location of the office of his subordinates in High Court’s territorial jurisdiction will not entitle such court to issue writ of quo warranto as such writ can be directed against a person himself or his office only.[[64]](#footnote-64)1 In case where a person is holding the public office situated within the territorial jurisdiction of High Court, the said High Court has jurisdiction to entertain and adjudicate upon the matter. Moreover, mere pendency of a constitutional petition on identical question against a person in one High Court will not divest jurisdiction of another High Court to decide the petition for similar relief. However, where no action of Chief of Army Staff in relation to any officers or cantonments within territorial jurisdiction of High Court is challenged, but it is holding office of Chief of Army Staff as such with headquarters outside territorial jurisdiction of Court, which is subject to Challenge, High Court has no territorial jurisdiction.[[65]](#footnote-65)2

Constitutional jurisdiction of High Court provides, inter alia, relief for an order in the nature of quo warranto, but jurisdiction in such matter is discretionary.[[66]](#footnote-66)3 For instance, in case where dissolution of National Assembly by the president has been declared an abuse of power, relief of restoration of National Assembly may still be denied.[[67]](#footnote-67)4

Thus, the writ of quo warranto is not a writ of course and the court may, in exercise of its discretion, refuse it, if the application is made for a collateral purpose. Similarly, it is not a writ in aid of injustice. However, it is not to be refuse, where the refusal would amount to perpetuation of an irregular order. In the same way, where oath has been administered to all elected persons, petitions for quo warranto, even it premature on date of being filed, mature later. The petitions cannot, thus, be dismissed simply on ground of prematurely particularly in view of result not likely to be different even if fresh petitions are filed.[[68]](#footnote-68)1 Moreover, delay in proceedings in nature of quo warranto, by itself, is never considered sufficient for purpose of defeating petition.[[69]](#footnote-69)2

A decision given by High Court in favour of the holder of the office is a sufficient warrant for him to hold the office.[[70]](#footnote-70)3 Similarly, where a writ of quo warranto is applied for against a returned member of legislature, a notification containing the name of respondent as returned Candidate is a complete answer.[[71]](#footnote-71)4 The Supreme Court will not interfere where the High Court has exercised its discretion on sound judicial principles, but if the discretion has been exercised which diverts the law into wrong Channels by the formulation of conclusions which are unsustainable in law, its right to interfere is beyond question.[[72]](#footnote-72)5

1. Habeas Corpus

The writ of Habeas Corpus and subjiciendum at recipiendum (that you have the body for submitting to and receiving) is undoubtedly a remedy of far reaching importance. It is a remedy, which the law allows for the enforcement of the right to personal liberty.

The constitution of this writ has been traced to the earliest phases of the history of ”common law of England”, and its origin are shrouded in the mist of antiquity, if not completely lost in obscurity.[[73]](#footnote-73)1

The constitution of United States in the second clause of the 9th section of Act.1 provides that the privilege of the writ of Habeas Corpus shall not be suspended unless when in case of rebellion or invasion, the public safety may require it. This provision is also to be found in several constitutions of the states composing the United State. And the study of the case law of that country shows that although the writ of Habeas Corpus is a part of the statutory law, its scope has not been construed as in any manner delimiting or diminishing the common law jurisdiction of the court to issue this writ. While the writ may not be used as a substitute for appeal, it provides a quick and or constitutional errors without limit as to time.[[74]](#footnote-74)2

The object of the writ to secure the liberty of the subject by means of a summary adjudication of the legality of his detention. It is immaterial whether the person applying has been detained in private or public custody. The writ is available in all cases where any illegal and improper deprivation of personal liberty of the subject has taken place. [[75]](#footnote-75)1

The writ of Habeas Corpus has now given a constitutional status in our constitution and when asked for in relation to the enforcement of fundamental rights, it would be regarded by the Supreme Court, as even by the High Court, as a writ of right. In England, too it is regarded as a writ of right but not of course. In the United States it is regarded as an extraordinary legal remedy and when properly issued it supersedes all other writs, [[76]](#footnote-76)2 and in times of peace “every human power must give way to it and no prison door is stout enough to stand in its way.[[77]](#footnote-77)3

 It is true that the courts in the exercise of their jurisdiction to issue writs of Habeas Corpus will not go into question relating to legality or otherwise of a conviction recorded by a court of law and would be contented to limiting these powers of interference to merely scrutinizing the warrants of imprisonment in the light of what appears on it face. But instances such as these are however only exceptions to the rule of common law engrafted in England a statute.

 In cases where actions under laws enabling the executive to deprive subjects of their personal liberty are performed malafide or for a collateral purpose, it will be for the Supreme Court and our High Court to enquire into the allegations of facts which are calculated to prove that the order passed by the executive is contrary to the purposes of the Act and has been passed malefide.

Scott L.J said; “The question in such cases is, whether the subject is lawfully detained. If he is, the writ cannot issue. If he is not, it must issue.”

“In any matte involving the liberty of the subject the action of the Crown or its ministers or officials is subject to the supervision and control of the judges on Habeas Corpus. The judges owe a duty to safeguard the liberty of the subject not only to the subjects of the Crown, but also to all persons within the realm who are under the protection of the Crown and entitled to resort to the courts to secure any rights which they may have, and this whether they are alien friends or alien enemies. It is this fact, which makes the prerogative writ of the highest constitutional importance, it being a remedy available to the meanest subject against the most powerful. No peer or Lord or parliament has privilege of peerage or parliament against being compelled to render obedience to a writ of habeas corpus directed to him.”[[78]](#footnote-78)1

In proceedings under habeas corpus, the legality of the detention is to be judged at the time of the return as distinguished from the date of the institution of proceedings in court or the date of detention. If a valid order in support of detention could be produced, the court will not have the power to direct the release o f the prisoner merely because it thinks the original order under which he was initially detained was illegal. [[79]](#footnote-79)1

Writ of Habeas Corpus can be filed by any person on behalf of the person detained or by the detained person himself. However, every petition must be supported by an affidavit stating the facts and circumstances of detention and, where relevant, the reasons as to why the prisoner is unable to make application. In the case of a minor, any person entitled to the custody can file a petition. If no such person is available, any other person may file such petition.

In order to maintain a petition for habeas corpus, physical confinement is not necessary. It is sufficient if some kind of control, custody or restraint is exercised over the person. Thus if a child is forcibly kept away from his parents, if a man is alleged to be prevented from leaving her convent, the court will always issue the writ of habeas corpus.[[80]](#footnote-80)2

The purpose for which the writ of habeas corpus may be issued may include;

(i) Testing the regularity of detention under preventive detention laws and any other laws.

1. Securing the custody of minor.
2. Securing the custody of a person alleged to be lunatic.
3. Securing the custody of a marriage partner.
4. Testing the regularity of detention for a breach of privilege by the house.
5. Testing the regularity of detention under court-martial.
6. Testing the regularity detention by the executive during emergency etc.[[81]](#footnote-81)1

Writ of habeas corpus provides security against administrative and private ‘lawlessness’ but not against judicial foolishness.

Therefore, if a person has been imprisoned under the order of conviction passed by a court writ would not lie. The normal procedure in such case is appeal. In exercise of its discretion, the court may refuse the petition if there is special alternative remedy available. But it is not a rule of the limitation of jurisdiction. The court may still grant relief in appropriate cases.[[82]](#footnote-82)2

An order restricting the movements of a person to a particular place amounts to detention. Ordinarily, a person detained should apply, as the necessary facts, to be disclosed in an affidavit in support of the application, are within his personal knowledge, though if he is not a position to apply, there is no legal bar to a friend or a relation applying on his behalf.[[83]](#footnote-83)3 The question as to who may apply, and in what manner, is one to be regulated by the High Court by rules to be framed under the constitution, but it seems that until such rules are framed any being discretionary, the High Court may not make the order asked for, where the applicant has no interest whatsoever in the matter or is actuated by a personal or political motive.[[84]](#footnote-84)1 Similarly, where a person is detained in prison under a wholly illegal order, the son may apply for a writ. In the case of a minor, however, the application should be by a person who is entitled to the custody of the minor and in the absence of such person, by a person interested in the welfare of the minor, and the sale is the same in the case of a lunatic.[[85]](#footnote-85)2

The High Court has no jurisdiction to order the release of a person who is not confined within the territorial limits of its jurisdiction. Thus, the High Court jurisdiction is attracted only a detenu is confined to the territory where its writ runs or the order of the detention is passed in such territory. However, if a detenu is out side the jurisdiction, but the order is made within the limits of the High Court, the courts, if moved by an aggrieved party, can declare the order to be without lawful authority.[[86]](#footnote-86)3

Apart from the power of arrest given to police officers and private persons and the power to execute sentences of imprisonment conferred on courts, there is a variety of statutes empowering different authorities to arrest an detain persons in circumstances specified in those statutes. It may be stated as a general rule that where a return to a writ of habeas corpus is accompanied by a warrant for arrest or detention and the warrant is ex facie valid and proper in the sense that it applies to the prisoner and the authority issuing the warrant is authorized to arrest by the law under which the arrest is made, the return will be a sufficient reply to the allegation of illegal arrest and the rule nisi will have to be discharged and the court will not go into the question whether the order is wrong is wrong or improper.[[87]](#footnote-87)1

In England, by the Habeas Corpus Act, 1816,[[88]](#footnote-88)2 the applicant can controvert the facts stated in the return to the writ and the court is empowered to enquire into them, including the question whether the officer acting under the Act has, before he takes action, the state of mind which is made by the Act a condition precedent to his taking the impugned action.[[89]](#footnote-89)3 If the state of mind of the arresting authority can be proved to be different from that required by the Act, the detention will be considered as illegal.[[90]](#footnote-90)4

In Pakistan, if investigation launched is malafide or clearly beyond jurisdiction of investigation agencies, the same can be corrected by proceeding under extra-ordinary jurisdiction of High Court; High Court can examine lack of bonafide or misuse of powers and has power to interfere when question of liberty of citizen is involved; High Court can review actions of detaining authority to satisfy itself with regard to legality of detention; High Court can grant relief to a person arrested illegally within its jurisdiction; and allegations leveled against accused can be looked into to find out if case has been registered under proper offence. The jurisdiction of High Court is not ousted by mere registration of a case under any law.

The relief in certiorari is discretionary, but in an application for writ of habeas corpus, the court is bound to release the prisoner once it is found that his detention is with out lawful authority.[[91]](#footnote-91)1

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3. 1 Halsbury’s Law of England vol. 9. p. 744. [↑](#footnote-ref-3)
4. 2 Fundamental law of Pakistan by A.K. Brohi . p. 458 [↑](#footnote-ref-4)
5. 3 In Re Nathan 12 Q.B.D. p. 478. [↑](#footnote-ref-5)
6. 1 District Magistrate Vs. Raza Kazim PLD (1961). SC. 178. [↑](#footnote-ref-6)
7. 2 Abdul Hafeez Vs. Lahore Municipal Corporation. PLD (1967) Lah. 1251 [↑](#footnote-ref-7)
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9. 1 Sirajul Islam Vs. University of Peshawar. PLD (1980) Pesh. 158. [↑](#footnote-ref-9)
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13. 2 Pakistan Builders Ltd. Vs. Government of Pakistan. PLD (1962) Kar. 429. [↑](#footnote-ref-13)
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17. 3 S.M.Giribala Basu Vs. East Bengla, PLD 1960 Dacca. 768. [↑](#footnote-ref-17)
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23. 2 (1916) 2 K.B. 742. [↑](#footnote-ref-23)
24. 3 Ibid [↑](#footnote-ref-24)
25. 4 (1950) 2 K.B. 410. [↑](#footnote-ref-25)
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28. 1 Ramzan Vs. Mohammad Aslam PLD (1972) Lah. 809. [↑](#footnote-ref-28)
29. 2 Mohammad Ali Khan Vs. Mohammad Nawaz Khan. PLD (1974) Lah. 189. [↑](#footnote-ref-29)
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31. 4 Sind Employees Security Institution Vs. Mumtaz Ali Taj PLD ( 1975) S.C. 450. [↑](#footnote-ref-31)
32. 1 Quetta Club Ltd. Vs. Muslim Khan. PLD (1983). Quetta 46. [↑](#footnote-ref-32)
33. 2 Muzaffar Ali Shah. Vs. Registrar of Cooperative Society. PLD (1968) Kar. 422. [↑](#footnote-ref-33)
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77. 3 State ex el Evams Vs. Boaddus, 245 Mo. 123,14,149,SW. 473. [↑](#footnote-ref-77)
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