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# **The Writ Of Continuing Mandamus – A Step Towards Development Of Constitutional Jurisprudence**

Authored By- Anwita Maheshwari

## **(1) Introduction**

The Indian Constitution has provided its citizens with Fundamental Rights and they form an integral and essential part of our governance, democratic in nature. So as to provide safeguards and to protect citizens from suffering curtailment of rights, the Constitution has provided various writs. A writ in its literal sense refers to “a written order issued by a court, commanding the party to whom it is addressed to perform or cease performing a specified act”. Writs act as an instrument to check on the infringement of the Fundamental Rights and provide immediate relief as required by the case. The Constitution, as a further safeguard, clearly states that — “Laws inconsistent with or in derogation of the Fundamental Rights are void and the same can be challenged through writs”. One of the writ under this is of ‘mandamus’. It in its literal sense means that “an order issued by a court to compel performance of a particular act by lower court or a governmental officer or body, to correct a prior action or failure to act”. When this order becomes continuous or the court checks the implementation of its order or authorise someone to check it, it is known as ‘continuing mandamus’.

## (2) **The Writ Of Continuing Mandamus: Building The Bridge Between Rights And Remedies**

In India, Article 32 and 226 of Constitution of India provides for the safeguard of people of upholding their rights and liberties issued by the Apex Court and the High Courts respectively. The Constitution makers adopted the writ system in India from the British Judicial system as this was an act of great wisdom as it protects the legal rights of people. Dr. BR Ambedkar termed Article 32 as 'heart and soul of the Constitution' because without any remedies the rights given to people are of no use. The writ of Mandamus was introduced in 1773 when the Supreme Court was created by the Letters Patent. In the presidency towns the Supreme Court was empowered to issue writs. "In 1877, the Specific Relief Act substituted an order in the nature of mandamus in the place of the writ of mandamus for the purpose of "requiring any specific act to be done or forbore within the local limits of its ordinary civil jurisdiction by any person holding a public office".<sup>1</sup> As of now this provision has been omitted under the new Specific Relief Act<sup>2</sup> because the Indian Constitution contains a similar and more effective provision for the imposition of public duties.

"The transformation of the Supreme Court of India into a Supreme Court for Indians"<sup>3</sup> has been striking with exceptional pace towards bridging the gap between the rights and its remedies which has also been the major concern cause for the Constitutional makers. "In the context of Social Action Litigation, Upendra Baxi remarked that the 'fundamental issue of how the Court should make the state and its agencies fully liable for deprivations or denials of fundamental rights still remains to be authoritatively answered"<sup>4</sup>. This paper by Baxi traces the multitudinous attempts by the appellate judiciary which has given real meaning to our rights.

<sup>1</sup> Specific Relief Act, § 45 (1877).

<sup>2</sup> Specific Relief Act (1963).

<sup>3</sup> 4, Upendra Baxi, Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India 107 (Third World Legal Studies, 1985).

In the democratic set up, the writ courts are legitimise by a right to constitutional remedy. Even the day dreaming practice can be contrary to the constitutional spirit. While applying this writ of continuing mandamus the court has to interfere in the functioning of executive organ of the system for making it certain that the executive agencies is complying with judicial directions. In this sense, the judiciary plays an important part in constantly re-evaluating and balancing the rights of citizens and governmental action. In this class of litigation, Judges have likewise instituted remedies in private law such as “injunctions” and “stay orders” into what are basically matters of public law.

Mandamus according to Black's law dictionary<sup>5</sup>:

"A writ issued by a court to compel performance of a particular act by lower court or a governmental officer or body, to correct a prior action or failure to act."

Mandamus according to Wharton's Law Lexicon<sup>6</sup>,

"A high prerogative writ of a most extensive remedial nature. In form it is a command issuing in the King's name from the King's Bench Division of the High Court only, and addressed to any person, corporation, or inferior court of judicature requiring them to do something therein specified, which appertains to their office, and which the court holds to be consonant to right and justice. It is used principally for public purposes, and to enforce performance of public duties. It enforces, however, some private rights when they are withheld by public officers."

The writ of mandamus is not a right but is the most extensive remedy and is a command issued by the Apex Court or the High Courts which directs the person to do his specified job which is his duty to do. It is issued only at the discretion of the court and does not issued against private individuals for example in contracts against a private right. This remedial jurisprudence has reached at its zenith point which is now can be named as ‘continuing mandamus’— “a form of adjudication that enables the Supreme Court to ensure and supervise the implementation of its directions”.<sup>7</sup>

Under

'continuing mandamus' instead of giving conclusive or decisive judgment, the litigation keeps ongoing for monitoring purpose and to give order from time to time as needed but this should not be construed as delay, since numerous judgments are of substantive nature and is kept pending because regular hearings are necessary. For the said delay the Government and the administrative authorities submits the affidavit mention the cause for delays and the reason for inaction. The concept was first established by the Supreme Court in the case of *Vineet Narain v. Union of India*<sup>8</sup> where the Supreme Court defined it as a continuous process by which the court issues orders or directions and keeps the case at hand pending for scrutinisation. In this regards, the landmark case was of *Hussainara Khatoon v. State of Bihar*<sup>9</sup> where before the Apex Court the case remained pending for 15 years and more and as many as seven detailed orders were passed with the directions with regards to the under trial prisoners for their release who were suffering due to the pending cases and wanted their speedy disposal. Similarly, the trend which was started in this case was adopted in the cases of public interest, "with the court meting out sweeping affirmative interim relief addressing a pressing need, pushed the final decision as to factual issues and liability determination to a much later date".<sup>10</sup> The concept draws the close relevance from the principle of structural interdicts. Where the structural interdicts is issued by drawing inference from the government's opinion and various stakeholders, the continuing mandamus is issued more often in several kinds of situations to ensure implementations and proper functioning of the court order.

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<sup>4</sup> Id. At 42.

<sup>5</sup> Black Law's Dictionary (7th ed. West Publishing Group, 1999).

<sup>6</sup> Wharton's Law Lexicon (15th ed., 2009).

<sup>7</sup> S. Muralidhar, The Expectations and Challenges of Judicial Enforcement of Social Rights (Apr. 21, 2022).  
[http://www.delhidistrictcourts.nic.in/ejournals/Social\\_Rights\\_Jurisprudence.pdf](http://www.delhidistrictcourts.nic.in/ejournals/Social_Rights_Jurisprudence.pdf).

<sup>8</sup> (1998) 1 SCC 226.

<sup>9</sup> (1978) 2 SCR 621.

<sup>10</sup> Clark D. Cunningham, Public Interest Litigation in the Indian Supreme Court: A Study in Light of the American Experience, 505 J. INDIANL. INST (1987).

### (3) WRIT OF CONTINUING MANDAMUS VIS-A-VIS Pils

Public Interest Litigation (hereinafter PIL) has been defined as “something in which the public, the community at large has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, state or national government”.<sup>11</sup> In PIL any individual having enough interest or cause can maintain an action or be a

member of the PIL implementing a public duty against public authority. Any legal action commencing in the court of law for implementing general or public interest wherein people in general or a class of the group has economical interest or some kind of interest which is affecting their legal rights or liabilities can be called as PILs.

The evolution of PILs was started when the Judiciary realised its constitutional obligation towards the large sections of the society. This included people from poor and marginalised groups as well as the bourgeois

class. Reliance can be placed upon the case of *M. C. Mehta & Another v. Union of India & Others*<sup>12</sup> where

the Supreme Court construed that Article 32 does not merely use to issue direction but it conferred the duty of the court to protect the rights of the people more specifically, fundamental rights. The court also interpreted that beside the constitutional obligations the powers include to design new remedies and carve out new strategies to enforce fundamental rights. Due to the extreme poverty the Court realised that not every section or the member of the society can approach the court. So, to preserve fundamental rights of the weaker section of the society the court by judicial innovation and strategies started giving orders keeping in mind the interest of the public.

With the increase of technologies, the condition of our environment started to decline which instead of nurturing and protecting us, it started to affect our health conditions and that's when the environment activists started filing cases against the government for violating environmental laws for the development.

When the plethora of cases started to reach the court, it tried to protect the ecology, forest cover and environment orders which also needed the series of directions to be issued by the court and this started the process of ‘continuing mandamus’ in the matters related to environmental laws.

## **2.1] Pils In Environmental Cases**

“Environmental PIL has emerged because of the court's interpretation of Article 21 of the Constitution”.<sup>13</sup> The Supreme Court has in many cases reasserted the fact that Article 21 of the Constitution not only gives right for life but also combine it with right to have the quality of life and anything which threaten this right in derogation with fundamental laws has a right to remedy under Article 32 to take recourse. The first case in this sense is of *Bandhua Mukti Morcha*<sup>14</sup> case where workers were working in inhumane and brutal conditions in certain mines located in Faridabad. Later a writ petition was filed for the improvement of the aforesaid conditions and the Judge held that this was against Article 21 which grants every person to have quality life and these conditions are in derogation with the aforesaid law given in the Constitution of India. The court then continued to monitor the proper implementation of the order passed by it against the state and this was the first instance where court at its discretion issued a continuing mandamus although it wasn't called so.

Further, in the case of *Vellore Citizen's Welfare Forum v. Union of India*<sup>15</sup> a writ petition was filed in the state of Tamil Nadu against the tanneries as their effluents which was emptying in the ground water was left untreated and this was polluting the water. In its decision the Apex Court held that the its the responsibility of the Central Government to create an authority which deals with the above issue. Further the court directed to set up a *Green Bench* to monitor the functioning and implementation of the order passed by the court and the authority which was set up. Therefore, the continuous monitoring by the committee is the another show of continuing mandamus but was not recognised.

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<sup>11</sup> Black Law's Dictionary (7th ed. West Publishing Group, 1999).

<sup>12</sup> AIR 1987 SC 1086.

Another case which can be relied upon is the case of *D.K. Joshi v. Chief Secretary, State of UP*<sup>16</sup> a writ petition was filed for increasing the quality of life for the citizens in Agra. It was claimed that despite several orders given by the Court the authorities concerned was extremely sluggish in implementing directions. The court finally held that after the failure of the authorities in implementing directions a special committee is needed to be set up for the special monitoring. However, the remedy of ‘continuing mandamus’ was not very successful in this case as limited level of efforts was put in by the authorities.

Later in one of the case, seeing the increase in vehicular pollution in Delhi a writ petition was filed by the people in Delhi.<sup>17</sup> The Supreme Court then pass an order for the conversion of diesel into CNG but due to the shortage of CNG the said order was not complied with by the authorities. “This is a case where, in spite of several directions by the Supreme Court, the government had been extremely slow in responding to the order. This was hence an extremely difficult case to implement although the pollution levels have gone down to an extent”.<sup>18</sup>

“In the case of continuing mandamus, it might be argued that although the words ‘appropriate order’ or ‘direction’ in Article 32 of the Constitution have not been defined and have a wide amplitude, the court need not invent new remedies such as that of continuing mandamus, since it was totally unnecessary”.<sup>19</sup> There are times when judiciary interfere with the executive as it is up to them to enforce all these legislation which the court has taken into its own hand due the executive’s inefficacy and also made the government to report back to the court regularly.

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<sup>13</sup> Shreemashu Kumar Dash, Writ of Continuing Mandamus in matters of PILs: A Step towards Development of Environmental IOSR-JHSS 26, 28 (August 2017).

<sup>14</sup> (1997) 10 SCC 549.

<sup>15</sup> 1996) 5 SCR 241.

<sup>16</sup> 1999 (9) SCC 578.

<sup>17</sup> *Supra* note 13 at 27.

<sup>18</sup> Id.

The remedy has often been considered fruitful in the case of rights children where the executive has continuously failed to enforce their rights. Thus to protect child rights the only remedy which is left is PIL. The court has not invented any new remedies but has only given a new name to the existing one.

#### **(4) Covid Times And Continuing Mandamus**

The unexampled health emergency, brought by the spread of the COVID-19 pandemic, has blown the conch for a large number of difficulties to be faced by all over the world and its people. The class which had been extremely affected by the spread of the virus are those who are at the foreground of weaker section of the society which is exposed at ease. In other countries as well as in India, the worst storm affected the migrant labourers, who were left in the streets or in the city to fight for themselves in such atrocious times. The greater part of them survived on limited food supplies, and even had to sleep on an empty stomach for days together. The pandemic affected them so much that they do not have sufficient resources to take care of their health and was not able to buy medicine. Many of the people did not comply with the order passed by the government for waiving of the rent which made their condition worsen and was forced to migrate without any adequate facilities.

All this hardships faced by the labours attracted the attention of the Supreme Court which in turn took suo motu cognisance of the matter seeking replies from the union and the state executives. The relief which was granted by the court directly affected the lives of millions of migrants who were affected by the said pandemic during the lockdown. The court issued order for the free food, water and transportation for the stranded labours. In its order dated 28th May 2020 it also directed the states to send the migrant labours home within 15 days from the date of the said order. "Subsequently, state and central governments started arranging for Shramik trains under the aegis of the Indian Railways for cross border conveyance of the migrants".<sup>20</sup> But due to the large population the government was unable to provide for the exact number of migrants who have not been covered under this operation. Later again an order was passed by the government for activating schemes for

benefitting the migrants and also directed the state to spread about the same. The court shows its dissatisfaction for the state of Maharashtra for the poor management and failure to provide the status for the migrant workers. This approach by the court to an extent reveals the use of the writ of 'continuing mandamus' where it cautiously overstepped its domain. Continuous monitoring by the court for ensuring effective implementation of the order shows that the court is following the path of continuous mandamus. Periodic follow ups by the court where the executive has been ineffective in its functioning is the situation which has been seen many times in the past also. One such example is the case of *Olga Tellis v. Bombay Municipal Corporation*<sup>21</sup> where the court directed the state government for the proper accommodation of the slum dwellers before being evicted from their places but unfortunately the state government did not comply with the said order and the dwellers were evicted without being provided with proper housing which was promised to them.

The dictum of the Supreme Court on the Migrants' issue is likely to touch upon the basic rights falling under Article 21, such as food, shelter, and healthcare.<sup>22</sup> When the court gives only directive with regard to this issue, its of no use without their proper implementation as reality do not meet the ends of justice. The objective of the court when it issues the writ of continuing mandamus is that even the last person in the line is not excluded from the benefit received from the remedial jurisprudence.

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<sup>19</sup> *Supra* note 13 at 33.

<sup>20</sup> Govt. of India, Ministry of Railways, Press Release ID 1620027 (May 1, 2022).

#### **[4.1] SOCIO ECONOMIC RIGHTS AND CONTINUING MANDAMUS**

The executive and judiciary should work in collaboration to offer explicitness to socio-economic rights by emphasising on accountability, clear standards and prioritisation to make sure that the minimum core of socio-economic rights are being ensured by the State. However, such judicial overreach raises concern since it impede the doctrine of separation of powers, one of the cornerstones of the Indian Constitution. Therefore, before delivering any judgment it is the duty of the court to ensure that the Court does not disobey executive's domain. "The Supreme Court of India has time and again given mandatory orders to the government instead of limiting its powers to declaration of remedies".<sup>23</sup> In the case of *Consumer Education and Research Centre v. Union of India*<sup>24</sup> the court keenly observed the actions of the government (such as health status of workers, rules and regulations of factories, etc.) while recognising healthcare rights of the workers. During this judgment the Supreme Court realised that the socio economic rights of the workers cannot be achieved by one time orders and thus constant monitoring and scrutinisation is required. This approach by the court was evolved as the writ of 'continuing mandamus' which ensured that the justice is delivered in reality.

#### **[4.2] BENEFITS OF CONTINUING MANDAMUS AS COMPARED TO THE WRIT OF MANDAMUS**

The writ of continuing mandamus has wider scope than that of writ of mandamus. Continuous mandamus rightly bridges the gap between the rights and the remedies which has been the primary objective of the constitution makers to provide to people rights with remedies. Only rights without remedies are of no use to people because they cannot enforce them in the court when their rights get infringed.

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<sup>21</sup> 1985 SCC (3) 545.

<sup>22</sup> Chameli Singh v. the State of UP, 1995 Supp (6) SCR 827.

<sup>23</sup> Rohan J Alva, Continuing Mandamus: A Sufficient Protector of Socio-Economic Rights in India 210, 44 Hong Kong L.J. 207, 230 (2014).

<sup>24</sup> (1995) 3 SCC 42.

The writ of continuing mandamus is used as a tool to combat the inactions of the executive and ensures that justice is delivered in its full sense and in practicality not just in essence. The judiciary is the last resort for the person whose rights have been infringed and as seen as the effective tool to uphold the true sanctity of justice when executive fails to do so. The present situation is that if any order is passed by the court, it can monitor the implementation or enforcement of that order if it deems fit to the court which results in proper functioning of the executive making this as a viable tool for the problem.

(5) **CASE ANALYSIS: T. N. Godavaraman Thirumulpad V. Union Of India & Others**

FACTS:

In order to protect and conserve the Nilgiris forest, a writ petition was filed with the Supreme Court of India for illegal timber operations. The Supreme Court using its discretion expanded this case of one forest reformation into the policy of whole country's forest reformation. Firstly the Supreme Court granted an injunction against the respondent in order to stop cutting of trees which eventually badly affected the wood based industries. During the hearing of eight hundred interlocutory applications the Court has assumed the positions of policy maker, interpreter of law and administrator of policy. The present case opened up Pandora's Box that affects the industries and forest dwellers continuously in the country. The court for the first time defined the term forest which will help them to determine that which region of land will come under the said definition.

ISSUES:

- (i) Whether the appointment of the regulator at a national level is advisory or mandatory in nature?
- (ii) Whether section 2 of the Forest (Conservation) Act, 1980 should be r/w section 3 of the Environment(Protection) Act, 1986 and the Forest Policy 1980?

HELD:

The Supreme Court in the present case used the concept of 'continuing mandamus' which made it a landmark judgment in the history. It delivered orders in several parts periodically from time to time. In its first part, the court granted an injunction order banning the felling of trees across the nation. The court held it mandatory to take prior permission of central government in order to carry out any non-forest activity including mining and sawmills, in

any area coming under the dominion of forest according to section 2 of FCA, 1980 and if prior permission is not granted then the legal authorities have the power to cease such activity. The court further gave instructions to state government for forming an expert committee within one month to identify areas which are forest irrespective of any ownership or classification, recognising the areas which were initially a part of “the forest but now are cleared lands due to illegal activities like deforestation, and figuring out the areas comprising of plantations and segregate those belonging to the government from those of private individuals”.

### (6) Comparative Analysis: Philippine

“The new Rules of Procedure for Environmental Cases also integrate another procedure that was adopted by the Supreme Court in the Manila Bay case in its *en banc* decision of December 18, 2008”.<sup>25</sup> The present case is concerned of cleaning up of Manila Bay where the group of people won a court action which compels the government of Philippine for cleaning Manila Bay.

After ten years of litigation the Supreme Court of Philippine ordered to prepare a plan of action to be prepared by the twelve national government agencies for conservation of the environment and to restore the productivity of Manila Bay so that it can nurture marine life in it. For ensuring the effectiveness of the ordered passed, the government from the respondent side was asked to submit every ninety days reports’ progress to the Supreme Court so that the Court can monitor the measures taken up by the government. In this process the judges of the Supreme Court took an unexpected tour and inspected the clean up progress of Manila Bay. It was the judicial inspection where the Court was updated by the lead agency and the respondent. The court in this case realised the difficulties people have in filing separate suits so the judgment encourages the people to file class action suits for infringement of their environmental laws and they were also not required to pay fees at the beginning of the action.

There is no hindrance for the Supreme Court of Philippine to formulate and design new Rules of Procedure for Environmental Cases. Under the Constitution of the Philippine 1987, it has the power to formulate rules which concerns the protection and implementation of constitutional rights.<sup>26</sup> The Civil Code of Philippines states about the freedom of laws

enforced through judicial decision and their validity without the hinderance of any other law and make those laws part of the legal system of the country.<sup>27</sup> “Variations of this writ have been utilized in other jurisdictions like Australia, India, Pakistan, and the United States of America”.<sup>28</sup>

## (7) Conclusion

The writ of continuing mandamus has proven to be effective in the environmental jurisprudence. It has successfully acted as the guardian of the environment making available for the public the right to healthy environment. The judiciary held that Article 21 grants every person to have quality life and the conditions of the environment was in derogation with the fundamental right of the people. In the case of *Vineet Narain* the development of procedural innovation of the writ of continuing mandamus had taken place. The judiciary has done the commendable job in effectively implementing mandamus orders. Especially in the Crime Bureau Investigation cases the implementation of continuing mandamus helped throughout the investigation as the court supervises the process of investigation. Before the term was originated the judiciary had the similar kind of approach where it used to pass orders and then check its implementation. This was done when the legislature fails to perform its responsibility and to avoid injustice to people. “However, the legislature’s inactions cannot be taken as an excuse by the judiciary to micromanage policy-making decisions. This is exactly what happened in the *Godavarman* case which is the most glaring example of the judiciary exceeding its mandate and therefore violating the doctrine of separation of powers”.

The whole process can be seen as a broader concept for social welfare where all, the state, key actors, stake-holders, citizenry and interest-groups are involved with the judiciary acting as its ombudsman. Fruitful involvement of the judiciary will require closer attention to the environment of such involvement, although the judiciary should step in with much caution when an extreme measure is required. It can be said that the writ is the step towards developing of environment.

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<sup>25</sup> Metro. Manila Dev. Auth. v. Concerned Citizens of Manila Bay, G.R. 171947-48 (S.C. Dec. 18, 2008) (Phil.).

<sup>26</sup> Constitution of Philippine, Art. VII, § 5(5) (1987).

<sup>27</sup> Civil Code of the Philippines, Art. 8 (1950).

<sup>28</sup> Gregorio Rafael P. Bueta, Environmental Jurisprudence from the Philippines: Are Climate Litigation Cases Just Around the Corner? (Apr 23, 2022), <https://www.iucn.org/news/world-commission-environmental-law/201906/environmental-jurisprudence-philippines-are-climate-litigation-cases-just-around-corner>.

The writ of mandamus came as a saviour for the migrants workers in the COVID times. The hardship that labours were facing because of migrating to their hometown attracted the attention of the Supreme Court and the court directed the state for the supply of free food, water and transportation for the stranded labours. This order by the Apex Court affected the millions of labours which was affected by the said pandemic.

### **[7.1] Suggestions**

- Proper implementation of the court's order is necessary for the effective application of the writ of continuing mandamus.
- In order to save the environment from degrading the court should issue mandamus orders to the authorities for taking care of the nature.
- The blame should not be taken by the Judiciary to have extent it limit and enter the arena of legislature in checking the implementation of the orders through self acclaimed principle rather the judiciary has done a commendable job in maintaining the balance as enshrined under the Constitution.
- We should make contempt proceedings more credible in order to spread awareness of such writ.