LAW COMMISSION OF INDIA

NINETY-SECOND REPORT
ON
DAMAGES IN APPLICATIONS FOR JUDICIAL REVIEW
RECOMMENDATIONS FOR LEGISLATION

August 1983

JUSTICE K. K. MATHEW

CHAIRMAN
LAW COMMISSION
GOVERNMENT OF INDIA

No. F.2(8)/83-L.C.

Shastri Bhavan,
NEW DELHI

AUGUST 16, 1983

My dear Minister,

I am forwarding herewith the Ninety-Second Report of the Law Commission on "Damages in Applications for Judicial Review : Recommendations for Legislation".

2. The subject was taken up by the Law Commission on its own. The need for taking up the subject is explained in Para I of the Report.

3. The Commission is indebted to Shri P. M. Bakshi, Part-time Member and Shri A. K. Srinivasamurthy, for their valuable assistance in the preparation of the Report.

With regards,

Yours sincerely,

Sd/-
(K. K. MATHEW)

Shri Jagannath Kaushal,
Minister of Law, Justice & Company Affairs,
NEW DELHI

Encls. *92nd Report.*

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CHAPTER 1

INTRODUCTORY

1.1. This Report deals with a subject that touches the law of procedure as well as administrative law, namely, the need for legislation to empower High Courts, in proceedings for judicial review, to award damages. The point appears to be of considerable practical importance and has a vital connection, not only with the aspect of reduction of complexity and delay in litigation, but also with broader considerations of justice. The Law Commission has accordingly considered it proper to take up the subject on its own. The Commission is aware that there are many other areas falling within administrative law, or bordering thereon, to which attention might, in due course, have to be devoted, in the interest of making the administrative process more just and the results more beneficial to all concerned. However, as a matter of practical importance, the point proposed to be taken up at the moment seems to deserve priority. Further, the point appears to be one that can be conveniently dealt with in a separate proposal, independently of wider and more extensive reforms. Need for taking up the subject.

1.2. We may state that on deciding to take up the subject, we had circulated to interested persons and bodies[1] a Working Paper on the subject inviting comments thereon by the 15th June, 1983. Working Paper and comments received thereon.

The Working Paper had been circulated to the Secretary, Legislative Department, Government of India, all State Governments, all High Courts, the Attorney General of India, Bar Associations and other interested persons and bodies. The Commission is grateful to all those who have been good enough to send their comments. Comments have been received from six High Courts[2], one Advocate General[3], four State Governments[4], and one Registrar of a High Court, who has forwarded his personal view[5]. As regards the six High Courts, it should be mentioned that while in the case of five, the replies represent the reaction of the High Courts, as such, in one case, the view of one Judge (agreeing with the proposal) has been communicated and seven other Judges[6] have no views to offer, while the rest of the Judges of that High Court have expressed no reaction.

As regards the remaining five High Courts, one has comments to make[7], three agree with the proposal put in the Working Paper for enacting suitable legislation empowering High Courts to award damages in applications for judicial review[8], one High Court, while agreeing with the proposal in the Working Paper, puts forth the suggestion that in implementing the proposal, the following three aspects may be kept in view:—

(a) the basis on which damages can be awarded, particularly where no evidence is taken;

(b) whether, where the award of damages is refused, the remedy by way of suit will be barred or not;

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[1] Working Paper circulated 22nd April, 1983.
[2] Law Commission File No. F.2(8)/83-LC, S. No. 1, 2, 3, 6, 11 and 12.
[3] Law Commission File No. F. 2(8)/83-LC, S. No. 7.
[4] Law Commission File No. F. 2(8)/83-LC, S. No. 5, 8, 9, 10.
[5] Law Commission File No. F. 2(8)/83-LC, S. No. 4.
[6] Law Commission File No. F. 2(8)/83-LC, S. No. 6.
[7] Law Commission No. F. 2(8)/83-LC, S. No. 1.
[8] Law Commission No. F. 2(8)/83-LC, S. No. 2,3,11.

(c) whether, in such matters, service of notice under section 80, Code of Civil Procedure, 1908 will be necessary[1].

We are happy to note that this High Court has specifically dealt with the mode of implementing the proposal of the Law Commission. Its view is—"Such power can be conferred either by amending article 226 of the Constitution, or by enacting a separate legislation by the Parliament"[2].

The Advocate General of one state has expressed agreement in general with the Commission's proposal[3], but has added that the proposed power to grant damages should be exercised very sparingly and only where very gross and unjust behaviour is involved and where no inquiry into disputed facts is involved.

Of the State Governments that have sent replies, three[4] are against the proposal, while one[5] agrees with it. The three who are opposed express an opinion that the High Court's burden might increase. The one that favours the proposal emphasises that it will avoid long drawn out litigation in another forum.

One Registrar of a High Court[6], expressing his personal view, states that articles 32 and 226 are wide enough and provide for award of damages where a fundamental right is violated. He further makes the suggestion that District Judges be also invested with writ jurisdiction. Before proceeding to a consideration of the various issues, we may states here that the apprehension expressed in some comments about disputed questions of fact should disappear, once it is borne in mind that our recommendations[7] do not contemplate that the High Court must, in every application for judicial review, also go into damages. As regards the query raised with reference to section 80, C.P.C. we may mention that it is going to be our[8] emphatic recommendation that section 80 should be repealed.

CHAPTER 2

THE QUESTION FOR CONSIDERATION AND THE PRESENT LAW

The Constitutional provisions for judicial review.

2.1. Let us first state in brief the narrow point to which we propose to devote the succeeding paragraphs. In the scheme of the Indian Constitution, judicial review is mainly pursued under two important provisions, applicable to the Supreme Court and to the High Courts respectively. In the first place,

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[1]Law Commission File No. F. 2(8)/83-LC, S. No. 12.

[2]Law Commission File No. F. 2(8)/83-LC, S. No. 12.

[3]Law Commission File No. F. 2(8)/83-LC, S. No. 7.

[4]Law Commission File No. F. 2(8)/83-LC, S. No. 5, 8, 9.

[5]Law Commission File No. F. 2(8)/83-LC, S. No. 10.

[6]File No. F. 2(8)/83-LC, S. No. 4.

[7]Chapter 3, *infra*.

[8]Chapter, 3, *infra*.

under article 32(1) of the Constitution, the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights guaranteed by Part III of the Constitution (i.e. fundamental rights) is guaranteed. Under article 32(2), the Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, mandamus, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the fundamental rights. Secondly, under article 226 of the Constitution, every High Court shall have power, throughout the territories in relation to which it exercises its jurisdiction, to issue to any person or authority, including in appropriate cases any Government within those territories, directions, orders or writs, including writs in the nature of *habeas corpus*, mandamus, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose. This power, as is evident from the wording of the article, is not confined to fundamental rights. It can be used "for any other purpose."

Discussion limited to article 226.

2.2. We are mainly concerned with the power of the High Court[1] under article 226 of the Constitution that being the provision resorted to much more frequently than the remedy under article 32 to move the Supreme Court. The latter though of basic importance in our constitutional scheme, is not so frequently resorted to. We would also leave aside, for the present purpose, proceedings in courts subordinate to the High Court wherein the legality of Governmental action is contested. In such proceedings, the relief claimed may include, *inter alia*, declaratory relief, injunction or damages. Our concern is with the proceedings under article 226 of the Constitution, dealing with the power of the High Court to make certain orders in the nature of writs. The point to which we address ourselves is whether the power of the High Court in proceedings under article 226 should, in the interest of justice, be enlarged so as to authorise the award of damages by the High Court.

Scope of the power under article 226.

2.3. Now, the common understanding of the scope and ambit of article 226, as at present prevailing, is that monetary compensation for an administrative wrong cannot be claimed in these proceedings, and this is so even if as a matter of law, the wrong is an actionable wrong, involving liability on the part of the State. It is to judicial review in the traditionally limited sense of that expression that the aricle mainly addresses itself.

Power under article 226.

2.4. Of course, it is well settled that the powers of the High Court under article 226 are not confined to the issue of "prerogative writs"[2], known to the English law as it evolved through the centuries. The High Court can "mould the relief to meet the peculiar and complicated requirements of this country"[3]. The High Court can, in such proceedings, set aside an executive order, whether or not the writ of *certiorari* is attracted to the fact[4]. In proper cases, declaratory relief may also be granted in a petition under article 226[5]. This is so even though such relief could not be ordered by a prerogative writ under English law. Further, the High Court, under article 226, has also the power to give consequential relief, such as ordering the repayment of money realised without the authority of law or under an invalid law[6]. However, it is generally

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[1] Paragraph 2.1, *supra*.

[2] *Irani* v. *State of Madras*, A.I.R. 1961 S.C. 1731, 1738, para 14.

[3] *Dwarka Nath* v. *I.T.O.*, A.I.R. 1966 S.C. 81, 85, para 4.

[4] *Irani* v. *State of Madras*, A.I.R. 1961 S.C. 1731, 1738.

[5] *B.B.L. & T. Merchants Association* v. *State of Bombay*, A.I.R. 1962 S.C. 486, 496.

[6] *State of M.P.* v. *Bhailal*, A.I.R. 1964 S.C. 1006, 1010, 1011, para 16-18.

assumed that the High Court cannot, in such proceedings, award damages for administrative actions that cause harm illegally.

We proceed to consider in the next Chapter whether there is scope for improvement in the present position.

CHAPTER 3

RECOMMENDATIONS FOR LEGISLATION

Enlargement of power under Article 226 desirable.

3.1. We have stated above the present position under the constitutional provisions as to judicial review. It appears to us that it would be in the interest of justice if the High Court is given power in proceedings under article 226 to award damages also. Such an enlargement of the powers of the High Court would remedy one defect in the present procedural set up, under which a claimant seeking both judicial review of the nature contemplated by article 226 and damages for the wrong in respect of which such review is claimed must pursue each remedy in a different forum. He must seek the first relief in the High Court and the second relief in the ordinary court. It is true that some High Courts in India have ordinary original civil jurisdiction, in the exercise of which they can, *inter alia*, entertain a claim for damages. But this jurisdiction itself is subject to a pecuniary minimum; moreover, this jurisdiction, in so far as it is vested in the High Courts in the three Presidency Towns, is confined to their own local limits as defined for the purposes of their original jurisdiction. Apart from this, proceedings under article 226 technically belong to the extraordinary jurisdiction of the High Court. A claim for damages cannot at present be included in such proceedings, even in the High Courts exercising ordinary original civil jurisdiction as stated above. The reason is, that article 226 of the Constitution is invoked by a petition seeking the appropriate order. In contrast, the ordinary original civil jurisdiction of a High Court, wherever it exists, is, in general, envisaged as invocable only by a plaint framed in accordance with the provisions of the procedural law, whether contained in the Code of Civil Procedure, 1908 or in the rules of procedure framed by the High Court for the exercise of its own jurisdiction.

Recommendation for enacting Central Act permitting claim for damages in application for judicial review under article 226.

3.2. It would, therefore, be necessary to amend the law, if the reform indicated above is to be incorporated in our legal system. What we have in mind is a provision to be enacted in a separate Central Act, under a suitable title. The principal provision of such Central Act could be somewhat in the following terms:—

"On an application for judicial review[1] under article 226 of the Constitution, the High Court may award damages to the applicant if—

(a) the applicant joined with his application a claim for damages arising from any matter to which the application relates; and,

(b) the High Court is satisfied that, if the claim had been made in a suit instituted by the applicant at the time of making his application, he would have been awarded damages".

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[1] "Judicial Review" is not an expression employed in the Indian Constitution, but it is well understood.

Grant of damages to be discretionary.

3.3. While conferring on the High Court the power to grant damages as recommended above,[1] some provisions should also be inserted to make it clear that even if the illegality of the act complained of is established, the High Court is not bound to award the relief of damages in every case where the relief is claimed. It is well understood that the High Court may, even now, refuse to grant relief by way of writ under article 226, where there has been undue delay in making the application or where there are other adequate grounds for such a refusal. In our view, it is proper that in regard to the newly added relief also, such a discretion on the part of the High Court should be recognised. The object can be achieved by inserting a provision somewhat, in the following terms, in the legislation to be passed to give effect to our main recommendation.[2]

> "Nothing in this Act shall be construed as rendering the award of damages obligatory, on an application for judicial review under article 226 of the Constitution where the High Court considers that—
>
> (a) there has been undue delay in making the application, or
>
> (b) the grant of such relief would involve the determination of questions which cannot be conveniently gone into in a proceeding under that article, or
>
> (c) for any other reason it is inappropriate to determine the question of damages in such application.

Another incidental point—Effect of refusal to award damages.

3.4. At the same time, it is necessary to provide that the refusal by the High Court of the claim for damages, under the above provision[3] shall not be a bar to the institution of a regular civil suit for damages in a competent court. Some such provision appears to be advisable, since refusal of the nature contemplated would be not on the merits or by reason of any mandatory statutory bar, but would be attributable to the inconvenience of deciding a claim for damages in the proceeding under article 226. We are not suggesting any draft for the purpose, but the gist of the provision would be as above.

Limitation.

3.5. We have considered the question whether it is necessary to make it clear specifically that the power to grant damages would be subject to the law of limitation. It appears to us that this is not necessary. The manner in which we have formulated the proposal implies that limitation would be a bar.[4] Of course, this is in addition to the discretion of the Court to refuse judicial review for laches or for other adequate reason.[5]

Legislative competence.

3.6. To revert to the recommendation that we are making[6] we have devoted some thought to the question whether the legislation that we have proposed would fall within the legislative competence of Parliament. On an examination of the matter, we are satisfied that it would so fall.[7] The proposal can be viewed as dealing with the "procedure" for claims for "actionable wrongs". The topics of "civil procedure" (Concurrent list, entry 13) and "actionable wrongs" (Concurrent list, entry 8) are both matters falling within the Concurrent List.

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[1] Paragraph 3.2, *supra*.

[2] Paragraph 3.2 *supra*.

[3] Paragraph 3.3 *supra*.

[4] Paragraph 3.2 *supra*.

[5] Paragraph 3.3 *supra*.

[6] Paragraph 3.2 to 3.4 *supra*.

[7] Constitution of India, Seventh Schedule, Concurrent List, entries 8, 11A, 13 and 46.

In the alternative, the recommendation could be viewed as relating to the "administration of justice"—a matter now included in the Concurrent list (Concurrent list, entry 11A). If this regarded as too general a source, the proposal can be viewed as dealing with "jurisdiction and powers of all courts except the Supreme Court with respect to any of the matters in the Concurrent List" (Concurrent list, entry 46). One or more than one of the entries referred to above, taken singly or taken in combination, must cover the proposed legislation. We do not think that it should be necessary to go to the residuary entry.

Recommendation to delete Section 80, Civil Procedure Code, 1908.

3.7. While carrying out the above changes in the law, it is also desirable that the provisions of section 80 of the Code of Civil Procedure, 1908 requiring notice to be given where a suit is to be instituted against the government or a public officer should be deleted. A recommendation to that effect has been made in successive Reports of the Law Commission[1] and it is our most emphatic recommendation that the section should disappear from the statute Book. Analogous provisions in other special laws should also be removed, as recommended already by the Law Commission[2] in a separate Report on the subject. Such provisions are totally indefensible in modern society. The deletion of section 80 of the Code, and of provisions analogous thereto as contained in special enactments, should be regarded as a substantive recommendation of our own.

CHAPTER 4

SUBSTANTIVE LAW OF STATE LIABILITY

Substantive law not affected.

4.1. We may make it clear that the present report is not concerned with the position in substantive law as regards the liability of public authorities. The legal principles as to the cases in which relief can be claimed for administrative illegality remains unaffected. However, we cannot help observing that it is desirable that the reforms already recommended on the subject by the Law Commission in various Reports—particularly, the recommendations relating to government liability in tort[3]—should be implemented as early as possible, in the interests of social justice and in conformity with modern trends.

Court fees.

4.2. For the present purpose, we do not pause to consider the question of court fees on a claim for damages, when such claim is included in an application for judicial review.

CHAPTER 5

MISCELLANEOUS

Reforms in the Commonwealth

5.1. The recommendations which we have made may seem very modest, in comparison with some of the more ambitious schemes concerning adminis-

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[1] Law Commission of India, 27th and 54th Reports (Code of Civil Procedure, 1908).
[2] Law Commission of India, 56th Report (Notice under certain statutory provisions).
[3] Law Commission of India, 1st Report (Liability of the State in Tort).

trative law, introduced elsewhere. Professor De Smith has summarised some of them as under[1]—

> "A number of notable reforms to the procedural and remedial aspects of the law of judicial review of administrative action had already been introduced over the last few years in several common law Commonwealth jurisdictions. For instance, legislation passed in New Zealand in 1972 conferred jurisdiction upon the Administrative Division of the Supreme Court to administer the new remedy of an application for review in which an applicant may request any relief to which he would be entitled in proceedings for an order of certiorari, prohibition or mandamus, or for an injunction or declaration[2]. A broadly similar scheme had been introduced in Ontario in 1971 as part of a larger legislative package of reforms covering a wide range of administrative law issues[3]. Also in Canada, the federal Parliament had enacted in the previous year important legislation establishing a Federal Court whose jurisdiction included supervisory and appellate review of administrative agencies created by federal legislation[4]; for our purposes the most interesting aspect of this Act is that it creates a new statutory remedy, the application for judicial review, complete with a statutory list of grounds upon which the remedy will be granted[5]. And more recently, important statutory reforms relating to the judicial review of federal administrative tribunals have been introduced by the Parliament of the Commonwealth of Australia[6]."

5.2. Those are far reaching and exhaustive reforms. In the present Report we have limited ourselves to the narrow question posed at the outset, for reasons already stated.

Position in England.

5.3. As to England, by recent reforms, it has been provided that in an application for judicial review, not only a declaration can be made or an injunction granted, but damages, if claimed, may also be joined with the application. The law now appears as section 31 of the Supreme Court Act, 1981. This section is a codification of (new) Order 53 of the Rules of the Supreme Court, establishing the procedure for application for judicial review introduced in 1977. The new procedure had implemented the recommendations of the English Law Commission[7]. Codification was considered appropriate because of the importance of the new procedure.

Appendix.

5.4. For convenience of reference[8] we give, in an Appendix to this Report, an extract of section 31 of the Supreme Court Act (Eng.) referred to in the above paragraph[9].

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[1] S.A. De Smith, Judicial Review (1980), page 565.

[2] Judicature Amendment Act, 1972; see also Judicature Amendment Act, 1977, sections 10—15.

[3] Judicial Review Procedure Act, 1971; see J.M. Envas (1977) 55 Can. Bar Rev. 148.

[4] Federal Court Act, 1970.

[5] Section 28, For a critical analysis, see David J. Mullan, The Federal Court Act Administrative Law Jurisdiction (1977). a background paper published by the Law Reform Commission of Canada.

[6] Administrative Decisions (Judicial Review) Act, 1977. For a comment on this legislation, and the work of the Administrative Tribunal, see G.D.S. Taylor (1977) 51 A.L.J. 804; H. Witmore and M. Aronson Review of Administrative Action (1978) 15—29.

[7] English Law Commission, Report on Remedies in Administrative Law, Comm. No. 73, Cmd. 6407 (1976).

[8] See Appendix.

[9] Paragraph 5.3 *supra*.

APPENDIX

EXTRACT OF SECTION 31, SUPREME COURT ACT, 1981[1] (c. 54).

31. (1) An application to the High Court for one or more of the following forms of relief, namely—

(a) an order of mandamus, probibition or certiorari;

(b) a declaration or injunction under sub-section (2); or

(c) an injunction under section 30 restraining a person not entitled to do so from acting in an office to which that section applies,

shall be made in accordance with rules of court by a procedure to be known as an application for judicial review.

(2) A declaration may be made or an injunction granted under this subsection in any case where an application for judicial review, seeking that relief, has been made and the High Court considers that, having regard to—

(a) the nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition or certiorari;

(b) the nature of the persons and bodies against whom relief may be granted by such orders; and

(c) all the circumstances of the case,

it would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be.[1]

(3) No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

(4) On an application for judicial review the High Court may award damages to the applicant if—

(a) he has joined with his application a claim for damages arising from any matter to which the application relates; and

(b) the court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he would have been awarded damages.

(5) If, on an application for judicial review seeking an order of certiorari, the High Court quashes the decision to which the application relates, the High Court may remit the matter to the court, tribunal or authority concerned, with a direction to reconsider it and reach a decision in accordance with the findings of the High Court.

(6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—

(a) leave for the making of the application; or

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[1]Cf. O. 53, r. 7, R.S.C. discussed in *Chief Constable* v. Envas (1982) 3 All E.R. 141, 156 (H.L.)

(b) any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

(7) Sub-section (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made.

(K. K. MATHEW)
CHAIRMAN (Sd.)

(NASIRULLAH BEG)
MEMBER (Sd.)

(J. P. CHATURVEDI)
MEMBER (Sd.)

(P. M. BAKSHI)
PART-TIME MEMBER (Sd.)

(VEPA P. SARATHI)
PART-TIME MEMBER (Sd.)

(A. K. SRINIVASAMURTHY)
MEMBER-SECRETARY (Sd.)

Dated: *August* 16, 1983.

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