A Comparative Analysis of Duty to Reason-Giving in Administrative Law.

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Abstract— *The Duty to give reasons for a decision is a part of the Audi alteram partem, which is indispensable in administrative law. Earlier, the principles of natural justice did not include any general rule that reasons should be given for decision by administrative authorities. Therefore, failure to give reasons has not been considered as a violation of natural justice principles. Nevertheless, this approach changed from time to time. This study analyzes the previous and new approaches in Sri Lanka, especially with reference to current Sri Lankan university cases compared to United Kingdom (UK) and Indian jurisdictions. In this research, the changes of the duty to provide reasons for a decision by administrative authorities, violation of principles of natural justice, right to equality, and right to information have been discussed. In this research, both primary and secondary sources are attracted to follow the Doctrinal and Comparative research methods. Finally, this research study analyzes the development of administratively affiliated judgments in Sri Lanka with special reference to university cases in other comparative jurisdictions such as the United Kingdom and India. Whereas, Sri Lanka has developed in administrative jurisdiction compared to main common law countries such as India and the UK.*

Keywords— **Administrative Law, Natural justice, Audi alteram partem, Duty to give reasons for decision, University Cases**

I. INTRODUCTION

Natural justice indicates reasonableness, fairness, equity, and equality. Natural justice is a common law concept which is a counterpart of the American concept known as Procedural Due Process. There are 02 main natural justice principles. These are,

A. nemo debet esse judex in propria causa

This Latin maxim simply means no one should be the judge in his/her own case or the rule against bias. The minimum prerequisite of natural justice is that the body delivering the judgment should be made up of fair, unbiased, and free of bias individuals. When this principle is violated, it could be sufficient that the decision be challenged before the court of law.

In the case of *Cooper v. Wilson* (1937), The chief constable of Liverpool dismissed a police sergeant. The police Sergeant lodged an appeal against his dismissal, but the watch committee denied it. The chief constable was present with the watch committee when they decided the appeal. The Court held that the presence of the chief constable, who was the actual respondent to the appeal, was deemed fatal to the decision of the watch committee and *nemo debet esse judex in propria causa* principle was violated.

B. Audi alteram partem

This Latin maxim means let the other side be heard. This is the primary rule of civilized law, and both positive and natural laws uphold it. In other words, a person must be given a fair chance to be heard before an order is made against them.

These rules are indispensable in the administrative law and following them is a matter of essential in all type of administrative decisions even without any express need to observe them. Rule against bias means biased judgment cannot be expected from a judge who has a personal interest in the subject matter of the dispute. *Audi alteram partem* is a basic principle in fair procedure that both sides should be heard in a dispute. This right to be heard in proceedings is reflect on Article 12(3) of *The Constitution of the Democratic Socialist Republic of Sri Lanka 1978* (SL) as a fundamental right. In the case of *Bulankulama and Others v. Secretary, Ministry of Industrial Development and Others* (2000), the petitioners were denied right to participate in the Environmental Impact Assessment process prescribed by the National Environmental Act, where the Court held that unequal treatment of the people who are affected constitute an infringement of right to equality. Any failure to follow *Audi alteram partem* will render the decision as *ultra vires* (beyond the legality); irrespective of whether the need to observe this rule is mentioned in the statute or not.

Audi alteram partem consists of few aspects. Such as, right to have notice of charges, right to know opposing case,

right to present his own case, right to an oral or verbal hearing, procedure to be adopted in an inquiry, right to cross examine, right to legal representation and right to know the reasons for the decision. Whereas these rights increase the public faith over administrative institutions, transparency, and accountability.

This research paper is discussing on right to know the reasons for a decision in judicial proceedings. It means if the decision is challenged in court via judicial review, the decision maker is required to offer reasons to an individual who is aggrieved by the decision and to defend the decision in any way. This right can assist courts in determining whether the administrative authority took relevant issues into account or behaved improperly. The requirement to provide reasons will prevent administrative institutions from making arbitrary conclusions and enhance confidence in society in the administrative decision-making process. The approach of Sri Lankan administrative institutions or public bodies towards duty to give reasons for a decision has been changing over the time.

Therefore, this research study is mainly focusing on the comparative analysis of Sri Lankan administrative approach with special reference to recent university cases between the UK and Indian judicial systems. Consequently, the purpose of this research study is to identify the nature of judicial approach towards the duty to provide reason for decisions in administrative functions in Sri Lankan jurisdiction comparing to the UK and Indian jurisdiction. In the end, to assess whether this duty to provide reasons for decision requires improvement or not.

II. METHODOLOGY

This research is both Doctrinal and Comparative approach in nature to achieve its objectives. Doctrinal approach or also known as black letter methodology means it focuses more on the letter of the law than the application of the law. By adopting this technique, a researcher provides a descriptive examination of legal provisions found out in primary sources. In this study, doctrinal approach is used to analyze the trajectory of administrative institutions of Sri Lanka regarding the duty to provide reasons, because as primary sources, legal principles, and case laws and as secondary sources, academic writings are the current prominent evidence of changes in administrative law. For a comprehensive understanding of this research area, the researcher limited the scope of this study to administrative disputes in university context due to the prominent changes in recent Sri Lankan university judgments on right to know the reasons for the decision compared to the other recent Sri Lankan administrative case laws. Comparative analysis is the process of comparing items of one jurisdiction to another and distinguishing their similarities and differences. Whereas it involves comparing United Kingdom and Indian jurisdictions with related case laws and legal principles. These countries are the main common law countries which are more similar to the legal system of our country; therefore, these two countries are selected to compare with Sri Lankan approach. Consequently, it will help to understand and find out the best practices and improvements in recent Sri Lankan judicial system on administratively affiliated judgments.

III. JUDICIAL APPROACH TOWARDS REASONS TO DECISIONS IN SRI LANKA

In the case of *R. v. Home Secretary ex p. Doody* (1994), court held that the principles of natural justice do not include any general rule that reasons should be given for decision. Therefore, in the earlier administratively affiliated judgments, failure to give reasons has not been considered as a violation of natural justice principles. Nonetheless, the need for the reason for decision opened due to the expansion of judicial review. where many decisions are appealed against on grounds of error of law, irrelevant consideration, and improper purpose. Wade and Forsythe, (2004) clearly highlighted this position in Administrative Law: “Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. A right to reason is therefore an indispensable part of a sound system of judicial review” (pp.436). Therefore, if an administrative authority fails to give reasons for their decision, in the mind of the ordinary man a reasonable suspicion would appear as regards to the lawful of the decision.

The duty to give reason has two aspects. Firstly, the administrative authority is under a duty to give reason to an individual who is aggrieved by the decision, which is a part of procedural justice. Secondly, the administrative authority is under a duty to justify the decision if the decision is challenged before a court of law for a judicial review, which is based on evidence of substance. Unfortunately, the general duty to give reasons for decision has not developed in most commonwealth jurisdictions. Nevertheless, some recent judgments raised the expectation on duty to give reasons for decision in Sri Lankan, UK, and Indian jurisdictions. Sri Lankan law has changed over the past few years, whereas at first, they refused to impose this general duty on administrative authorities to give reason for their decision. In the case of *Karunadasa v.Unique Gemstones* (1996), the Supreme Court ruled that natural

justice requires that reasons be given. Reasons may not be required in all circumstances; nevertheless, the court of law has the privilege to request the reasons when the matter is in litigation.

A. Previous Application in Sri Lanka

In Emerging Trends in Public Law by Gomez (1998), pointed out that in earlier cases, the court of law had taken the view that reasons were essential in an appeal from a decision of the tribunal, and a writ had been issued in the absence of reasons for decision (pp.185). Justice Sarath Silva highlighted that in the landmark case of *Kusumawathie v. Aitken Spence* (1996): "the common law of this country has evolved so as to require every tribunal or administrative authority whose decision is subject to a statutory right of appeal to give its reasons for such decision. It is also seen that in the absence of a statutory requirement to give reasons for a decision or a statutory appeal from a decision, as aforesaid, there is no requirement of common law or the principles of natural justice, that a tribunal or an administrative authority should give reasons for its decision, even if such a decision has been made in the exercise of a statutory discretion and may adversely affect the interests or the legitimate expectations of other persons" (pp.27-8). This judgment is hard to accept, whereas it will lead administrative authorities to act arbitrarily or ad hoc in the decision-making process. Nonetheless, former Justice H.W. Senanayake held contrary to this concept in some cases, which helped for the development of the duty to give reasons for decision not only in basic administratively affiliated judgments but also in academic or university-affiliated judgments.

B. New Application in Sri Lanka

Justice H.W. Senanayake held that in the case of *Perera v. Ebert* (1993), it is a duty on administrative authority to give reasons where there is a right of appeal. Moreover, in the case of *Kalawana Multi-Purpose Cooperative Society v. Cooperative Employees Commission* (1993), he held that it was a healthy practice to give reasons for all who exercise their power over others. He went on to state: "In my view, public confidence in the decision-making process is enhanced by the knowledge that supportable reasons have to be given by those who exercise administrative power" (pp.8). Further, in *Unique Gemstones v. Karunadasa* (1995), he emphasized that rules of natural justice required that reasons be given and added a note to that: "The action of the Public Officers should be 'transparent' and they cannot make blank orders. The giving of reasons is one of the fundamentals of good administration. …it is implicit in the requirement of a fair hearing to give reasons for a decision" (pp.360-61). Which was also affirmed by the Supreme Court on an appeal and pointed out that it was in favour of developing a general duty over administrative authorities to be required to give reasons. Eventually, in the course of time, different grounds or approaches emerged to this system. For instance, section 15(4)(d) of the *Human Rights Commission of Sri Lanka Act 1996* (SL) (No. 21 of 1996) corroborate that reasons must exist in administrative law. Justice Fernando highlighted Article 12(1) of *The Constitution of the Democratic Socialist Republic of Sri Lanka 1978* (SL) in the case of *Karunadasa v.Unique Gemstones* (1996), as there was: "an even more compelling reason for administrative law and enforcement of fundamental rights, giving reasons is becoming, increasingly, an important protection of law" (pp.5) comparing to the UK judiciary, to develop a general duty to provide reasons for decisions to assure the equal protection of the law. Moreover, in the case of *Tennekoon v. de silva* (1997), Supreme Court cited Article 12(1) of *The Constitution of the Democratic Socialist Republic of Sri Lanka 1978* (SL) with the reference to academic H.W.R. Wade and held that: "As to the failure to give reasons for administrative decisions, Wade's observation-in the context of judicial review-apply with even greater force in our fundamental rights jurisdiction, especially the equal protection of the law"(pp.32).

Furthermore, the duty to provide reasons for a decision in many jurisdictions influenced by the classification of functions doctrine. Whereas the classification of functions includes Legislative, Judicial, Quasi-Judicial, Administrative, and Ministerial functions. Indian courts compel the duty to provide reasons for decision only when the authority was performing Quasi-Judicial or Judicial functions. Therefore, they are not under a duty to provide reasons for decision in any administratively affiliated cases. Nevertheless, in Sri Lankan jurisdiction, as one of the recent great developments in public or administrative law, as we discussed earlier, this duty to provide reasons for decision has been imposed by our courts in administratively affiliated judgments. Whereas this condition is encouraged by academic Gomez (1998), as to this will expand the integrity and transparency of a decision and indicate that the decision is not being made on an arbitrary or ad hoc basis (pp.187). Even though English law recently rejected the classification of function system for duty to provide reasons for decision, this will not apply to all cases. For instance, in the case of *R v. Civil Service Board ex p. Cunningham* (1991), Lord Donaldson stated that: "the appointment or promotion of an employee or office holder or the failure of an examinee would not be capable of the duty to provide reasons" (315-16). However, Sri Lankan jurisdiction is not limited to that scope, this application expands even more to academic-related cases,

whereas it is relevant to the appointment or promotion of a university employee or academic. Which is an exceptional development in administrative law compared to India and the UK. Recent university cases are evidence of such developments.

1) Dr. Karunanada v. Open University of Sri Lanka and Others (2006): A Senior lecturer (Petitioner) involved with the Open University complained against his non-appointment as a computer science professor or assistant professor, pointed out that the non-appointment is malafide, discriminatory, irrational, and arbitrary and is in violation of Article 12 (1). The petitioner is a Bachelor of Science (Honours) Graduate in Mathematics from the University of Colombo, obtained in 1985. He also obtained a Master of Philosophy in Computer Science from the Open University of Sri Lanka in 1993 and a Doctor of Philosophy in Computer Science (Artificial Intelligence) in the United Kingdom in 1995. He had served as a Lecturer, Senior Lecturer and the Head of the Department of Mathematics and Computer Science at the Open University of Sri Lanka, he published nearly 80 research papers in international and national journals, made presentations at International Conferences, and published nearly 10 books in Sinhala on Computer Science for school, public, and university students. He had submitted his application for the post of professor or associate professor in Computer Science at the open university in terms of University Grants Commission Circular No. 723 dated 12.12.1997. Later he was informed by the Senior Assistant Registrar that he had failed to obtain the required minimum marks for 'research and creative work' and 'teaching and academic development'. Whereas according to his self-assessment he performed well, he appealed to the university to know the reasons for their decision, but they refused his application. Therefore, he complained against them in court of law. However, respondent counsel argued that such attributes could be assessed only by an 'academic mind' and that such evaluations may not be with the reasoning of a judicial mind, and therefore such assessments could only be carried out by similarly qualified peers from the academic community. Nevertheless, Justice Shirani Bandaranayake stated that: "I am not in agreement with the view that academic decisions are beyond challenge, there is no necessity for the Courts to unnecessarily intervene in matters 'purely of academic nature'. However, if there are allegations against decisions of academic institutions that fall under the category in terms of Article 126 of *The Constitution of the Democratic Socialist Republic of Sri Lanka 1978* (SL), there are no provisions to restrain this Court from examining an alleged violation relating to an infringement or imminent infringement irrespective of the fact that the said violation is in relation to a decision of an academic establishment, and also here it had been dealt with unfairly without adhering to procedural fairness, which infringed one's right to equality" (pp.226).

2) Prof. (Dr.) Chelliah Elankumaran v. The University of Jaffna and Others (2013): This case was decided on May 17, 2019. The petitioner joined the University of Jaffna as an Assistant Lecturer in Economics in 1990. He applied for the post of professor, but he was not appointed by the university, because he did not obtain the minimum marks set out in marking scheme. As he was unhappy with the decision of the University of Jaffna to not appoint him as a professor, he appealed to the University Services Appeals Board (USAB), but they refused his appeal. Therefore, he lodged an appeal against the said decision. The Court of Law followed the case of *Dr. Karunananda v. Open University of Sri Lanka and others* (2006) to determine whether this case could be questioned before the court or not. According to the self-assessment of petitioner, he had earned sufficient marks to be eligible to be a professor. The petitioner has complained to the Court that the USAB failed to consider the several irregularities that are said to have been committed by the respondents in the evaluation of his application as well as in the allocation of marks, and he has the right of appeal to the USAB in order to rectify any error committed by such University in respect of any matters set out in Section 86 of the *Universities Act*. However, no explanation has been offered by the respondents as to why the average marks of the two External Experts were not considered by the university. Therefore, the court held that the procedure that was eventually adopted by the university was completely unknown to Circular No. 723, and even to Circular No. 869, and the university had adopted a procedure of its own. Such arbitrary action is not only illegal but is procedurally improper and cannot be condoned by this Court". Further, the court held that he was eligible to be appointed as a professor and not an associate professor. In this circumstances, the Court issues a Writ of Certiorari; quashing the order of the USAB not to promote the petitioner to the post of professor, and a Writ of Mandamus on the respondents to promote the petitioner to the post of professor

3) Dr. C.J.A. Jayawardena v. University of Colombo and Others (2018): This case was decided on June 22, 2020. The petitioner, having obtained B.Sc. in Mathematics with First Class Honours from the University of Colombo, joined the University of Colombo as a Temporary Assistant Lecturer in January 1986. He completed his M.Sc. in Mathematics and Ph.D. in Pure

Mathematics at the University of Memphis, USA. The petitioner continues to serve the University of Colombo as a Senior Lecturer and had applied to the post of associate professor or professor, but his application was not being considered by the University as he had not obtained the minimum required marks. Therefore, the Council decided not to promote him to the post of an associate professor or professor. In Administrative Law by Wade and Forsyth (2004), it has been pointed out that courts will be refused to enter: "issues of academic or pastoral judgment which the University was equipped to consider in breadth and depth but on which any judgment of the Courts would be jejune and inappropriate. That undoubtedly included such questions as what mark or class a student ought to be awarded or whether an aegrotat was justified" (pp.537). The Court followed the same case, *Dr. Karunananda v. Open University of Sri Lanka and Others* (2006), and referred to the aforementioned quotation of Justice Shirani Bandaranayake. Moreover, the Court referred to the words of Lord Bingham: "They (judges) are auditors of legality; no more, but no less" (pp.61). Furthermore, it emphasized that: "whether the decision relates to academic matters or not, this Court can and will exercise the jurisdiction vested in it by Article 140 of *The Constitution of the Democratic Socialist Republic of Sri Lanka 1978* (SL). Where any adjustments are carried out, the Selection Committee must set out the reasons for such an adjustment and, if needed, provide to the Court the basis on which the marks given by the experts were adjusted" (pp.15). The Petitioner stated that he was refused to inform the reasons for such a non-allocation, even though he has specifically raised this issue in the petition. The Respondents have failed to provide the reasons why the Experts Panel and the Senate Appointed Panel did not allot the marks claimed by the Petitioner in his self-assessed application. Although traditionally, English common law does not recognize a general duty to give reasons for administrative decisions, it is becoming increasingly clear that our courts consider the duty to give reasons an indispensable part of a sound system of administrative justice. Further, the court discussed deeply the duty to give reasons and pointed out that it can be divided into three components on a tiered basis, which are interconnected. The first tier would be whether the evaluators were under a duty to substantiate non-allotment of marks in their reports submitted to the Selection Committee. The second tier is whether the University was required to provide reasons to the petitioner at the time it informed the petitioner that his application had been rejected. The third tier is whether the first Respondent was under a duty to provide this Court with detailed reasons for its decision. Of course, one would see that the reasons in the first tier should ultimately be the reasons for the second and third tiers, except where the Selection Committee has amended the marks allotted by either of the panels, in which event the reasons of the selection committee.

This case explained the duty to provide reasons for decision in administrative-related cases, especially in university-affiliated cases. The development of the duty to give reasons for decision increasing gradually from not being able to impose the duty on administrative authorities to being able to impose even for university cases. As discussed earlier, this approach was introduced in other administratively affiliated cases, the importance of this approach was discussed and developed in a detailed and strict manner of application in recent university cases. Especially, this judgment separately discussed the details on duty to provide reasons for decision.

The article 14A of *The Constitution of the Democratic Socialist Republic of Sri Lanka 1978* (SL), which is introduced via 19th amendment and *Right to Information Act 2016* (SL) (No. 12 of 2016) set rules and regulations regarding the right of the citizens. Whereas it emphasizes the free availability of information, responsibility of state institutions to publish information, and responsibility to release information related to different personnel upon a due request. These are strengthening the duty to provide reasons for a decision by administrative authorities and the other way around the impact of the duty to give reasons for a decision is reflected in the Article 14A of *The Constitution of the Democratic Socialist Republic of Sri Lanka 1978* (SL).

IV. APPROACH OF UNITED KINGDOM VS. APPROACH OF SRI LANKA

Earlier, there was no general duty to give reasons in the UK, it described as unenforceable to public authorities to provide reasons for the decision, but a person may have a statutory right to reasons. Moreover, as an aspect of procedural propriety, the common law may require reasons to be given. According to European Community Law and recent decision *R v. Civil Service Board ex p. Cunningham* (1991), the court held that the principles of administrative law in some judgments require that reasons be given to those who are aggrieved by the decisions. However, this does not apply to everything. For instance, as discussed earlier, this will not apply to the appointment or promotion of an employee, whereas in Sri Lanka, there are case laws related to the appointment or promotion of a professor or associated professor. In *Regina v. Higher Education Finding Council Ex-parte Institute of Dental Surgery* (1944), the court held that: "we would hold that where what is sought to be impugned is on the evidence no more than

an informed exercise of academic judgment, fairness alone will not require reasons to be given" (pp.242). When comparing the approach of the United Kingdom with the approach of Sri Lanka, approach of Sri Lanka is more developed than the former. Even in the aforementioned Sri Lankan university cases, *Regina v. Higher Education Finding Council Ex-parte Institute of Dental Surgery* (1944) was used for argument by counsels, but the court preferred to follow Article 12(1) of *The Constitution of the Democratic Socialist Republic of Sri Lanka 1978* (SL), and the concept of academic decisions is not beyond challenge.

V. APPROACH OF INDIA VS. APPROACH OF SRI LANKA

Indian author Massey (1990), pointed out that there is no general requirement for administrative bodies to give reasons in the absence of a statutory requirement in the Indian legal system (pp.178). Indian courts are influenced by the classification of functions doctrine. In the recent case *Gautam v. Union of India* (1993), the court held that the Indian courts were willing to impose a duty to give reasons where the body is judicial or quasi-judicial. Whereas in the case of *Kishan Chand Arora v. Commissioner of Police* (1961), Supreme Court held that the commissioner was exercising administrative powers and administrative authorities are not under an obligation to give reasons. According to the Indian legal system, the duty to provide reasons for the decision is only imposable where there is a statutory duty or where the body is performing judicial or quasi-judicial functions. Sri Lankan courts are not influenced by the classification of functions and not limited the duty imposing between those functions. Moreover, the duty to give reasons for decisions was even imposed on recent Sri Lankan university cases.

VI. CONCLUSION

According to this research study, the attitude of the Courts since the beginning of the 20th century clearly shows that even though there is no explicit duty to give reasons for the administrative decisions, the Courts have observed this principle as a matter relating to procedural fairness. An administrative decision must have rationale in particular, to a person who is aggrieved due to the decisions so that he/she can exercise his/her right to appeal and quell all the uncertainties over decision. This right enhance the public trust in administrative system, and actively participating in a decision-making process. It preserves the accountability and transparency against the secrecy of the administrative process for the public. Moreover, it has more impact when it emerges with the Right to Information, which is found in Article 14A of *The Constitution of the Democratic Socialist Republic of Sri Lanka 1978* (SL), and *The Right to Information Act 2016* (SL) (No. 12 of 2016). The aspect of right to know the reasons for the decision clearly followed and developed more in Sri Lankan jurisdiction than in the UK and Indian jurisdictions. Sri Lankan jurisdiction is exceptionally developed in administratively affiliated judgments, especially through university cases. As a consequence, Sri Lankan judiciary and other administrative institutions are following this duty to give reasons for the decision it created. Finally, this paper concludes that in recent years, Sri Lanka has developed in administrative jurisdiction compared to other main common law countries such as India and the UK. Therefore, on comparison, Sri Lankan administrative jurisdiction needs no special improvement; rather, it is a forerunner for the aforementioned countries.

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