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Statutory/common law duty to give reasons: A critical appraisal

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Abstract
The issue of both procedural and substantive justice continues to wrestle the minds of legal luminaries, and one controversial point of debate involves whether there is a statutory and/or common law duty to give reasons or not in every given circumstance. This article addresses the bone of contention between those who hold differing views, arguing that reason-giving for decision- makers has great merits except in certain circumstances like national security.

Keywords: reason, justice, administrative, procedural and substantive

Introduction

Virtually all commentators of whatever persuasion regard the provision of reasoned decisions as an integral part of fair procedures and natural justice. Such commentators have looked at the board issue of the rule of law and have stress the role of reason in the structuring of discretion (Richardson: 1986, p.4). Providing reasons may indeed be inconvenient, as Lord Mustill opined in *Rv Secretary of State for the Home Department, Ex parte Doody* [1] (*1994),* but its provision cannot, in every situation, be against the public interest. Reasoned decision is, in principle, central to our general understanding of the judicial process. So the traditional position of there being no general duty to give reasons is speedily becoming the exception rather than the norm (Craig: 1994, p.2). This is an assumption of modern jurisprudence and political theory that a condition of both the legitimacy and justifiability of the exercise of any government power is that those decisions be rational and that those who exercise such powers be in the position to provide reasons which both explain and justify their decisions. To this end, various arguments and reflections have been offered. In recent times, however, a special significance has been attributed to the giving of reasons (Galligan: 1982, p.271; Richardson: 1986, p.4).

Underlying and analysis of the law on reasons is a functional question. To what ends and for what purposes are public decision-makers to be required to give reasons? Are public decision-makers duty bound to provide reasons in every case or are there situations in which they are justifiably accepted from such a duty? Is the provision or rather the duty to give reasons an integral part of procedural fairness? Does the provision of reasons or their absence thereof affect the administration of justice? How does one take the cost-benefit analysis of this duty in relation to the public interest? Is there a relationship and/or difference between reason and notice? Before attempting to address some of these concerns, it is fitting to make a brief point as regard reasons and notice.

Giving Reasons and Notice

There is a difference between a duty to give notice and that to give reason. However, fairness may require both that notice be given prior to, and reasons be given at or contemporaneously with a decision. The crucial difference is that the duty to give notice helps facilitate fair participation by the subject of a decision in the decision-making process and the duty to give reasons exists either to equip one to challenge a decision, to inform the decision as to whether to make a new application or merely to satisfy one's quest to know the basis upon which a decision was made. However, there are instances in which the two are somewhat indistinguishable; for reasons given at first instance may serve as notice upon which an appeal may be launched (Elliot: 2005, pp. 392-393). In the *Rv. Secretary of State for the Home Department Ex parte Fayed and another* [2] *(1997),* for example, the court of Appeal held by a majority that in relation to the Fayed's application for citizenship, fairness had required the minister to highlight prior to the making of the decision the case criteria which they would have to meet to successfully make an application (Toube: 1997. 70).

Duty to Give Reasons at Common Law

Traditionally, the requirements of natural justice did not extend to a duty to give reasons for decision in administrative law. This failure to provide reasons constitutes a very compelling point in the criticism of administrative law. However, there are a number of exceptions to this traditional position, some of which are of statutory nature whilst others are derived from the common law. The Rv. Civil Service Appeal Board, Ex parte Cunningham [3] *(1991)* case ushered in a new dawn by recognizing that it was a common law duty to comply with that of natural justice to provide reasons in certain circumstances. The failure to give reasons was attacked both directly and collaterally as the party concerned was compared with others in analogous situation, where a duty to provide reasons existed. The Board was under a duty to give reasons to the applicant, derived either from a legitimate expectation, or alternatively from the requirement of natural justice or fairness. Lord Donaldson simply stated (at p302) "the Board should have given outline reasons sufficient to show to what it was directing its mind… Any other conclusion would reduce the Board to the status of a free-wheeling palm tree." The second point was that the level of the award was so low as to be prima facie irrational,

in the absence of justification (Herberg: 100, pp. 340-341; Elliott: 2005, p.398). The stance taken in the above case was endorsed in *Doody v.* Secretary of State for the Home Department where Lord Mustill did observe the statutory content which creates a discretionary power is of paramount importance in determining whether a supplementary common law duty to give reasons (Craig: 1994, p.1; Toube: 1997, p. 73). Exercisingdiscretion is good but it "means entitlement to choose the reasons for one's decisions, not to make decisions for which no reasons can be given" and if discretion is used rationally, there will be reasons and such reasons must be made known (Galligan: 1982, pp.272-273).

There are indeed ventures in providing reasons for decisions, especially those which may affect the personal liberty and obligations of individuals. However, it is worthy to note at this initial stage that a general duty to give reasons is not equivalent to a universal duty to give reasons (Elliott: 2005, p.379). Some of the virtues proffered for a general duty to give reasons include (1) the facilitation of appeals and judicial reviews, (2) the satisfaction of the parties, (3) improvement in decision-making as it concentrates the minds on the right question and (4) fairness. That said, there are those who hold a different position. Some of the points offered for the lack of embrace for the duty to give reason include: (1) that the general duty to give reasons impose an intolerable burden on the machinery of government, (2) creates delays in the handling of businesses and at exorbitant cost with little benefit matching the cost, (3) the imposition of a general duty will have far-reaching effects for the central and local governments and for many other public and semi-public bodies. Many decisions will be opened up to the possibility of legal challenge and a further step down the road of judicialisation of affairs will be taken and (4) the general imposition of a duty to provide reasons will not necessarily mean that the true or complete reasons will be provided (Galligan: 1982, p.273; Richardson: 1986, p.4ff; Justice: 1988, pp.70-71). These points given to debunk those which argue in support of a general duty to give reasons are wide, less compelling and could hardly stand at the bar of reason.

Galligan (1982, p. 271) argued that it is a condition for the legitimate exercise of any governmental power that decisions be rational and that "the power-holder be able to give reasons which both explain and justify its exercise". He further went on to argue that administrative law should require of decision-makers to provide a statement of reasons linking the specific exercise of their power "to a wider complex of policies and purposes" Though reason-giving is a necessary and integral part of due process, its value is realized in combination with other criterion of procedural fairness. The provision of reasons must have its merits and in certain circumstances, facts must lend support to the reasons given. As in the Cumbria [4] case, the judge noted that not only was the "paucity of reasons" concerning but also that such reasons were not based on the facts which the secretary of State ought to have predicated his decision. Taking these above points as an aside, let us focus as to whether there is a common law duty to give reasons.

The issue as to whether there is, or should be, a general duty to give reasons in English administrative law is debatable. Arguments have been proffered both for and against such a duty (Campbell: 1994, p. 184; Herberg: 1991, p.340; Toube: 1997, p.68). The midway position was somewhat popularized by the often quoted words of Lord Mustill thus;

I accept without hesitation, and mention it only to avoid misunderstanding, that the law does not at present recognize a general duty to give reasons for an administrative decision. (My emphasis). Nevertheless, it is equally beyond question that such a duty may in appropriate circumstances be implied, and I agree with the analyses by the Court of Appeal in *Reg. v. Civil Service Appeal Board, ex parte Cunningham (1991) 4 All E.R 310* of the factors which will often be material to such an implication.

Lord Mustill's use of the words 'at present' to qualify his take on the issue is telling. Specifically, it leaves the questions of a general duty to give reasons rather more open that previously appeared to be. It is worthy to note that the decision in Doody did not create such a general duty. It merely created a further exception to the rule that there is no recognized general duty to give reason at common law. However, the exception may well be capable of overturning the generality of the rule itself (Craig: 1994, p.1). Thus a duty to give reasons has found support in a number of distinct lines of authority and some of these include: (a) inferring irrationality in the absence of the giving of reasons, (b) the duty of full and frank disclosure, (c) legitimate expectations, (d) the duty to give notice prior to the making of a decision and (e) duty to give reasons (Toube: 1997, p.68). A brief comment will be made on each as the discourse unfolds.

In early cases, the basis of duty to give reasons was regarded as little more than a sign of unreasonableness. The court is more inclined to infer unreasonableness if decisions are made without reasons provided. The Padfield v. Minister of Agriculture, Fisheries and Food [5] (1968) case supports such a possibility in circumstances where a minister is vested with discretion took a contrary decision without giving reasons, even though all the facts and arguments points to another position altogether. Were such to be case, Lord Keith in Lonhro Pic v. Secretary of State for Trade and Industry [6] (1989), opined (at 620) "… the decision-maker, who has given no reason cannot complain if the court draws that he had no rational reason for his decision". It must be stated here that such a position does not imply that reasons must be provided in all circumstances. It simply states that a failure to provide reasons for one's decision may lead the courts to infer Wednesbury unreasonableness (Toube: 1997, p.68).

However, because of the conceptual indeterminacy of the term irrationality, it will be rare that such could be easily found. A decision warranting such a declaration should ideally be one which "cries out for reasons". For case exist in which duty to give reasons were excepted (Toube: 1997, p.72). A decision reached in R v. Devon County Council, Ex parte K [7] (1995) not to provide free transport for a child with special needs who could not walk to school safely unaccompanied was held not to qualify. The same was the case with reference to expert differences on matters of academia. In R. v General Medial Council, Ex parte St. George's University [8], a decision by the General Medical Council not to provide reasons for the non-recognition of the University's qualification of Doctor of Medicine was characterized as an exercise of academic and professional judgment and that the Council was therefore not obliged to give reasons. Another case in which the court took a similar stance is R v. Higher Education Funding Council, Ex parte Institute of Dental Surgery [9] (1994). One could take issue with the court's position of justifying the none provision of

reasons in such cases.

Specifically commenting on the St. George's case, the failure by the GMC to provide reasons for its position is somewhat suspect in the sense that its stance leaves the other party feeling aggrieved as not being properly treated even though it is quite possible for such and similar decision to be right. The provision of reasons may make it easier for a party to accept such decisions even if they are adverse (Richardson: 1986, p. 5). The courts should have asked for the provision of reasons in order to ascertain their cogency or lack thereof. Hence, their admissibility or inadmissibility respectively. Moreover, the GMC's stance could have adverse ramifications on those upon whom the university may confer such a degree. Hence the need for reasons which could help all associated with and those who intend to frequent such an institution make their decisions in life of the reasons why the institution's degree is not recognized by the Council. Because it is an academic matter does not render the non-provision of reason justifiable nor defensible.

As mentioned earlier, there are virtues in the provision of reasons. In R v. Lancanshire County Council Ex parte Huddleton [10] (1986) an obligation to give reasons arose from the of function judicial review in supervising the quality of administrative decision-making. Much of judicial review is concerned with the reasoning process for reaching decisions: distinguishing between admissible and inadmissible reason. Once the green light has been given for judicial review, the defendant finds itself under an obligation to disclose adequate reasons to the court in order that the legality of the decision might be properly assessed. This might be inconvenient but that said, the mere fact that failure to provide adequate reasons in support for a decision could, in certain circumstance trigger an appeal will focus the minds of decision-makers in their legal endeavors. The Huddleton case also did not support the general duty of provide reasons yet, 'the applicant may still not be entitled to reasons, but the court is'. This point shows a relation between the court and the public body. However, the court is not always swift to require full and frank disclosure of reasons to the courts. This requirement for all and frank disclosure operates independently from any duty to give reasons (Galligan: 1982, 271; Toube: 1997, p.69; Elliott: 2005, pp. 400-401).

A public body may, by its clear and unambiguous conduct and/or representation, create a legitimate expectation that it will provide reasons for its decisions. The Cunningham case was at first instance decided on this ground. Also, an obligation to provide the concerned parties with reasons for one's decision may arise from the expectation that a new policy governing the exercise of an administrative discretion will be published had it been the practice. It is worth to note the creation of such an expectation will be rare (Toube: 1997, p.70). In the R v. North and East Devon Health Authority, Ex parte Coughlin [11] (2001) case, the council having given its assurance to the concerned parties that they would be allowed to stay in an accommodation as long as they live, created a substantive legitimate expectation on their part. Changing this policy, even with the best of reasons, would be deemed unjustifiable and rightly so. In all of the cases mentioned above, one could see no reason as to why the provision of reasons may be against the public interest. In fact its provision not only creates a relationship between decision-makers and the public but it further deepens their mutual trust, most especially those of the public. So it could be argued not that in few excepted cases, the English legal system should endeavor to recognize by incorporating into its legal system a general duty to give reasons. This could be done through statutory means. One countervailing argument that could be leveled against such a move is that it would impose an intolerable burden on the machinery of government as it may require making several modifications to current legislations. Though an attractive point, it is less compelling. A single legislation could be enacted which makes for such a position similar to section 3 of the Human Rights Act 1998.

Statutory Duty to Give Reasons

An express duty to give reasons can spring from a couple of resources. Sections 12 of the Tribunals and Inquiries act 1971 obliges any Tribunal subject to the Act or any minister following a statutory inquiry to furnish when taking a decision, to state the reasons". The broadest statutory duty to give reasons is imposed by section 10 of the Tribunals and Inquires Act 1992. Alternatively, the legislation setting up the body may impose a specific duty to give reasons or such a duty, in the words of Lord Clyde (at 1297) in the case Stefan v. General Medical Council [12] (1999) "may arise through construction of the statutory provisions as a matter of implied intention" (Richardson, 1986, p.5.). And on very rare occasion, reasons will be demanded in the absence of a specific statutory duty. Cases in support of this latter possibility include Pepys v. London Transport Executive [13] (1975) and R v. Secretary of State for Social Services, Ex parte Connolly [14].

The Freedom of Information Act 2000 also provides in section 17 for giving of reasons by any public authority that refuses to disclose any information requested. This is not as easy as it appears and like almost all the statutory provisions to provide reasons, by what standard reasons is determined is almost non-existent and this makes such a determination falling the jurisdiction of the superior courts. Not every information could be disclosed. This is justifiably so especially as regards those which may threaten the security, peace and stability of the nation and those that will not serve the public interest. It is under the latter that governments of every persuasion could justify certain decisions and actions excepting themselves from providing reasons. We need to stable how the Freedom of Information Act 2000 is related to the limited common law duty to provide reasons. Both the Information Act and the Common law duty to provide reasons for decision are underpinned by the philosophy of open governance, transparency and accountability. As to whether the Information act advances the duty to give reasons is not that clear as there are so many information which are expected as set out in part two of the Act which includes those dealing with security matters (s. 23), national security (s. 24), defence (s. 26) and others. Providing reasons for the refusal to disclose certain information in such categories may in certain circumstances be inconvenient but the harm such a disclosure may cause could far outweigh its supposed benefits.

Article 6(1) of European Convention on Human Right requires the giving of reasons for decisions taken. As these Conventions rights have now been incorporated into the national law of the United Kingdom through the Human Rights Act 1998, decision-makers are thereby bound by the relevant provisions of such an Act. Though it is somewhat unclear as to the extent to which the provision of reason is

covered by the said article yet such a duty to give reasons arise automatically in any legal deliberation which falls under this article. In the Stefan case which was decided just before the coming into force of the HRA 1988, Lord Clyde opined (at 1301) "that the provisions of article 6(1) of the Convention on Human Rights … will require closer attention to be paid to the duty to give reasons, at least in relation to those cases where a person's civil rights and obligations are being determined…"

So, though the traditional position of there being no general duty to give reasons is speedily becoming the exception rather than the norm, the unclear scope of articles 6 (1) narrows the range of administrative cases it could cover in comparison to the common law (Elliot: 2005, p.410). Lord Sedley mentioned (at 46) this status quo "the common law sets high standards of due-process in non-judicial settings to which the European Court of Human Rights … declines to apply articles 6" and claimants could therefore enjoy better protection from the common law than from the said article. One could say that the availability for the applicability of both the common law and conventions rights provides a far better tool at the hands of legal luminaries in their determination of such cases. The convention rights could complement common law and vice versa.

To conclude, we note the enormous potential benefits to be derived from reason-giving but its practical role is limited. It is mainly preoccupied with the facilitation of appeals and judicial review. Other issues which need input stem from questions such as who determines the adequacy of reasons provided and why? What will be the consequences for failure to give reasons? What happens if the reasons given are adequate but not properly explained? Presumably, reasons which are adequate as to determine that there is no error in law are automatically sufficient to satisfy the parties despite the inadequacies in the explanation provided. The determination of the adequacy of reasons was tailored to fit and is the sole reserve of the superior courts in their supervisory capacity. Even when other virtues are raised, the ultimate test is still being defined in terms of the facilitation of appeals (Richardson: 1986, p.14). After giving thought to the questions posed, reason-giving must be encouraged and legislation must indicate the precise legal consequences of a failure to provide adequate reasons. It must also specify the issues to be covered by the reasons in any given case. We must therefore reject the specious arguments leveled against its practice.

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