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Moving Towards a General Duty: Should there be a General Duty to Give Reasons in UK Administrative Law?

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Abstract

In UK administrative law, there is a growing acceptance of a duty to give reasons on the grounds of fairness. However, the current approach of the court is to assess the fairness of reason giving on a case by case basis and deny a general duty exists. This paper seeks to argue that the approach of the court creates a discrepancy in the law that negatively affects individuals dealing with UK administration, is poorly justified and is in direct conflict with the UK's liberal democratic principles of accountability, transparency, equality and legal certainty. This paper will then outline some of the solutions to this problematic discrepancy. It will be argued that an amendment to the Freedom of Information Act 2000 or the creation of a general common law duty to give reasons are both accepted possibilities. However, as neither possibility has been adopted, this paper will go on to suggest that a duty to give reasons could be incorporated into the already existing duty to act fairly. It will be seen that the duty to give reasons is ripe for incorporation and in doing so can be contextualised in a way that avoids concerns. However, while this new procedural duty could work, it will not be fully effective due to the "makes no difference" principle now being enforced. Until the importance of procedural duties is recognised by Parliament and the Courts, the duty to give reasons will continue to develop inadequately.

I. Introduction

The duty to give reasons has been the subject of much development since the establishment of the rule that, within UK administrative law, there is no general duty to give reasons for administrative decisions.[1] This means that unless there is a statutory provision requiring the giving of reasons by the specific public body, there is no general obligation for that body to give reasons for its decisions. However, there is a growing judicial trend against this rule that has seen the court recognise a duty to give reasons on a case by case basis. This case-by-case approach clearly recognises the advantages that a duty to give reasons may bring to administrative law. However, despite finding a duty to give reasons in most cases, the court's refusal to overturn the rule altogether demonstrates a failure to endorse the importance of reason giving to society more generally. The aim of this paper is to address the courts current approach, firstly by establishing the problem it raises and secondly by suggesting possible solutions to it.

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[1] *R v Gaming Board for Great Britain, ex p Benaim* [1970] EWCA Civ 7.

This paper will begin by outlining the current approach of the court to the duty to provide reasons and highlighting the problem it presents. It will then consider a) who is affected by the court's approach and how – namely individuals with sufficient interest seeking to inquire into the lawfulness of a decision, b) the justifications for the current approach – in that a general duty would be burdensome, sometimes inexpressible and would ultimately open the flood gates to legal challenge and finally, c) the constitutional importance of solving the problem - expressed as the need to uphold the principles and values of liberal democracy and the rule of law. It will be found that the case by case approach of the court is seriously inadequate. Firstly, it leaves individuals with sufficient interest uncertain as to the duties they are owed by public bodies and allows those bodies to avoid legal challenge. Secondly, the arguments in support of the current approach regarding a general duty are dated and avoidable. Finally, continuing with the current approach directly conflicts with the liberal democratic principles of accountability, transparency, equality and the rule of law.

This paper will then go on to discuss the possible solutions to the problem. The first possibility is a general statutory duty incorporated into the Freedom of Information Act 2000. It will be found that although the general duty was suggested for incorporation, it was never properly considered in the draft bill, consequently, the potential amendment of the act will be discussed. The second possibility is a general common law duty, it will be argued that the creation of the general duty to give reasons has a disciplinary function that follows the direction and development of judicial review in the UK. However, this paper seeks to enter the academic discourse by considering whether a general duty to give reasons could be incorporated into the already existing duty to act fairly as a new rule. It will be found that the duty is ripe for incorporation as a context-sensitive procedural duty; however, the statutory "makes no difference" principle operates as a significant hindrance to the enforcement of any procedural duty, including a general duty to give reasons.

II. The Problem

It has been argued that the origins for the current status of the law regarding reason-giving can be found in the historical long-standing judicial trend against reviewing the exercise of discretionary power.[2] Hence, where the discretionary power of the administrator is definitive as to the grounds to which it is to be exercised, the courts should not scrutinise its reasoning.[3] This is embodied in the most often cited authority for the rule that there is no common law duty to give reasons - the case of *R v Gaming Board for Great Britain, ex p. Benaim*.[4] In this case, Crockfords (a famous London gaming club) applied to the Gaming Board for a certificate to obtain a gaming licence and continue its business. The Gaming Board rejected their application and when asked to explain their reasons for doing so replied, "The Board are not obliged to give their reasons for the decisions they reach, and it is not their practice to do so".[5] At the Court of Appeal, Lord Denning MR held that the gaming board was entrusted with licensing in the public interest and was not bound to give any reasons for its misgivings.[6] However, it will be seen that with the development of judicial review and

[2] Robin Burnett, 'The Giving of Reasons' (1983) 14(2) FL Rev 157. <http://www.austlii.edu.au/au/journals/FedLRev/1983/19.pdf> accessed 17 November 2018.
[3] *Alcroft v London Bishop* (1891) AC 666.
[4] [1970] EWCA Civ 7.
[5] ibid, para 11. (Lord Denning MR).
[6] ibid, para 27.

the various duties now imposed on public bodies, a duty to give reasons is forming. The problem – it is forming inadequately.

The decision in *Benaim* was heavily criticised as it seemingly allows administrative bodies to make any decision they like whilst avoiding accountability under the guise of being entrusted by the public to make the proper decision. While the court firmly upheld the general position in *Benaim* (decided in 1970), it was around this time that it began to view reason-giving differently than it had under the traditional approach. In general, throughout the 20th century the court had been moving away from this approach to discretionary power and was developing judicial review into a body of law capable of corralling UK administration into conformity with the rule of law.[7] The growth of the administrative state throughout the 20th century warranted the development of principles of law applicable to public bodies – these substantive principles would soon come to be known as the heads of judicial review.[8]

The developments in relation to reason-giving came in the form of exceptions to the general position in *Benaim*, which saw the court having to impose a duty where it was deemed necessary, for example: where the decision was of such exceptional nature that the lack of reasons suggested a misuse of power;[9] where the decision created a legitimate expectation of reasons and they must then be provided;[10] or where the decision and its lack of reasons contradicted natural justice by rendering the rights of appeal illusory.[11] Here, we can see that the giving of reasons was imposed on instrumental grounds to justify its existence, however, even though the courts were finding a duty they confined it to specific circumstances and refused to entertain the idea of a general duty.

Ultimately, Sedley J in 1993 attempted to outline the general circumstances in which the court will require the giving of reasons. Two distinct situations were established: where the nature of the decision concerned an interest so highly regarded by the law that reasons were required on the grounds of fairness or where the decision is "aberrant" and calls out for explanation.[12] Following this decision, Sedley J's approach was applied in a number of cases soon after to establish a duty to give reasons.[13] The duty was soon being imposed by courts regularly, so much so that it caught the attention of the Lord Clyde in *Stefan v. The General Medical Council (Medical Act 1983).*[14] At paragraph 22 of his judgement he summarises the climate of the duty to give reasons in UK administrative law, 'There is certainly a strong argument for the view that what were once seen as exceptions to a rule may now be becoming examples of the norm, and the cases where reasons are not required may be taking on the appearance of exceptions'

Lord Clyde went on to state that the general position has not been departed from and it would take a case of significant importance to consider departing from it. It would seem that, despite Lord Clyde's observation, a significant enough case is still yet to make it to the Supreme Court and that the general position continues to be upheld.

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[7] T T Arvind and Lindsay Stirton, 'The Curious Origins of Judicial Review' (2017) 133 LQR 91.
[8] *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9.
[9] *R v Minister of Agriculture and Fisheries, ex p Padfield* [1968] UKHL 1.
[10] *R v Secretary of State for the Home Department, ex p Khan* [1984] EWCA Civ 8.
[11] *R v Secretary of State for the Home Department, ex p Doody* [1993] UKHL 8.
[12] *Universities Funding Council, ex p The Institute of Dental Surgery* [1993] EWHC Admin 5.
[13] *R v University of Cambridge Ex p. Evans (No.1)* [1997] 8 WLUK 152; *R. v City of London Corp, ex p Matson* [1997] 1 W.L.R. 765.
[14] [1999] UKPC 10.

Consequently, it is always necessary for the court to consider the statutory scheme of the administrative body to find a duty to give reasons or establish whether fairness requires that reasons be given in the particular circumstances of the case.[15]

It is clear from the case law that the courts are imposing a duty on a case by case basis, however, they continue to reject the idea that a general duty exists, creating a discrepancy in the law. It will be seen that applying the duty in this manner is problematic as it negatively affects individuals in society, is poorly justified and has a detrimental impact on the UK's constitution.

1. Who is affected and how?

The range of people who can be affected by this discrepancy in the law is very broad. Since the leading decision in *ex parte Datafin*, the definition of a "public body" has been broadened to include any organization that holds the power to take decisions that affect the public.[16] This means that the scope of this currently non-existent duty is not limited to government and that it could operate against any large or small decision-making body. Although the government has produced guidelines for good decision making which outline why adequate reasons should be given,[17] it will become clear from the following discussion of recent cases that public bodies at all levels continue to ignore this request thereby reducing the possibility of legal challenges.

In the recent case of *Oakley v South Cambridgeshire*,[18] a local planning committee approved the development of a football stadium on Green Belt land. The statutory duty to give reasons in this area only covers the refusal to grant permission, so the complainant attempted to argue that a common law duty arose because the reasons for the decision could not be inferred from the materials available to the public. He succeeded and the granting of permission was quashed on the grounds of fairness. Similarly, in the case of *Horada & Ors*,[19] over 200 objections were made against a compulsory purchase order. Here, the Secretary of State ignored the objections giving little to no reasons why he chose to do so. Again, the court imposed the duty to enable the objectors to decide whether the decision was susceptible to legal challenge.[20] Herein lies the problem, the complainant in *Oakley* and protestors in *Horada,* as legitimate objectors with sufficient interest in the actions of their local authority, had to initiate expensive and uncertain proceedings in order to obtain the reasons as to why the action was being taken. Only upon obtaining permission for judicial review and hearing the response of the defendant, were they given the reasons for the decisions.[21]

The judgement of Elias LJ in *Oakley* is interesting, as the very reason he gave for allowing the duty contradicted his overall upholding of the case by case approach.

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[15] *R(Hasan) v Secretary of State for Trade & Industry* [2008] EWCA Civ 1311.

[16] *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815.

[17] Government Legal Department, *'The Judge over your shoulder – a guide to good decision making'* (5th edn, published 18th July 2016). <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746170/JOYS-OCT-2018.pdf> accessed 10 January 2019.

[18] *Oakley v South Cambridgeshire District Council & Anor* [2017] EWCA Civ 71.

[19] *Horada & Ors v Secretary of State for Communities and Local Government & Ors* [2016] EWCA Civ 169.

[20] ibid, para 34.

[21] David Hart, 'Thinking about reasons again' (UK Human Rights Blog 21 February 2017). <https://ukhumanrightsblog.com/2017/02/21/thinking-about-reasons-again/> accessed 20 November 2018.

When finding a duty to give reasons, Elias LJ observed that the common law would be failing in its duties if it denied parties with a close and substantial interest in the decision the right to know why it was made.[22] However, he goes on to state that "the common law should only identify a duty to give reasons where there is a sufficient accumulation of reasons of particular force and weight in relation to the particular circumstances of an individual case".[23] If the complainant in *Oakley* or the objectors in *Horada* were not in a strong enough financial position to challenge the lack of reasons in the courts then, due to the absence of an established general duty to do so, they would not have had one imposed by the court and thus been failed by the law.

Furthermore, the lack of a general duty and the presumption that public bodies are not obligated to provide reasons, not only negatively affects UK citizens but also migrants engaging with UK administration (i.e. immigration-related applications). In the case of *Help Refugees Ltd,*[24] the Secretary of State was challenged for his lack of reasons given to unaccompanied asylum-seeking children. Upon rejection, the children were simply told "criteria not met" and sent away.[25] Although the Divisional Court held that it did not improve procedural fairness to compel the Secretary of State to give reasons, the Court of Appeal disagreed, stating that reasons are often required for the courts to perform their supervisory function.[26] With this in mind, the most important aspect of this case is that during the proceedings it was found that the Secretary of State had worked on more detailed reasons but deliberately withheld them to avoid legal challenge.[27] This was confirmed in a series of emails sent between public officials that were disclosed in court. The court did not address this issue at much length but as with all the cases discussed in this section, public bodies can and do employ this tactic when making controversial decisions to protect themselves from challenge. The impact of this will be discussed in subsection C.

III. Judicial justifications

One would assume that given the nature of the problem and its clearly negative impact on the public there would be strong arguments against the imposition of a general duty. Perhaps the clearest statement of the main judicial concerns over the duty was given by Lord Bingham in *R v Ministry of Defence, ex parte Murray*.[28] Lord Bingham made it clear that public interest concerns may justify not communicating reasons to an individual, depicting the general duty as imposing an undue burden on decision makers, demanding the articulation of inexpressible value judgements and inviting people to scour the reasons for grounds of challenge. Lord Bingham's justifications have been reiterated by judges to this day despite being heavily flawed. This therefore warrants a closer analysis.

1. Undue burden on decision makers

The issue of reason-giving as burdening decision makers has been considered by both the courts and Parliament when imposing the duty. The best example of parliamentary concerns over this issue can be seen in the amendments to the Town and Country

[22] *Oakley v South Cambridgeshire District Council & Anor* [2017] EWCA Civ 71 at 58.
[23] ibid, para 76.
[24] *R (Help Refugees Ltd) v The Secretary of State for Home Department & Anor* [2018] EWCA Civ 2098.
[25] ibid, para 131.
[26] ibid, para 127.
[27] ibid, para 133.
[28] [1998] COD 134.

Planning Act 1990. In 2003, an amendment to the act provided that a summary of reasons be given for any grant of planning permission made by the local authority including a summary of the policies and proposals relevant to the decision.[29] However, in 2013 this duty was repealed. In the explanatory memorandum of the order under the title 'Streamlining the planning and application process' the duty was removed upon suggestion that it was both burdensome and unnecessary.[30] However, it is precisely the repeal of this duty that led to the issue in *Oakley, Horada* and other similar cases.[31]

There are various criticisms of the argument that reasons should not be required as they are burdensome. Firstly, the assertion that all necessary information will be available in other materials and therefore a statement of reasons is unnecessary is evidently incorrect. While bodies under a statutory duty have extensive obligations to record all materials,[32] other bodies do not and will not have everything on record. Furthermore, even if the information is on record and available, it may not be easy to decipher what the core reasoning was (which was argued in *Oakley*). If a statement of reasons is required to make sure a decision can be properly understood, then it is part and parcel of the decision maker's work to provide one. Therefore, a statement of reasons cannot be viewed as an additional burden but an integral part of the job.

Secondly, the argument pertains more to the content of the duty and what it entails than it does to the duty itself. The Town and Country Planning Act's duty required a statement of reasons and a statement of the policies and proposals that were relied upon in the decision. While a duty requiring this amount of content may be burdensome, perhaps if the duty was only to provide a summary of the main reasons it wouldn't have been considered as such. If we consider the fact that reasons are being produced throughout the decision-making process anyway, it therefore requires no extra thinking on the part of the administrator to produce them in a document. It is important that the duty only deals with the main reasons to not become burdensome. This will be discussed further in part III of this paper.

Finally, the argument that the duty will lead to further costs and delays is very dated. Technology and the administrative process has come a long way from the 1990's with developments such as cloud data storage that enables administrators to produce and access documents online and communicate them efficiently to individuals. The new systems are so effective that HMRC, the NHS and HM Courts & Tribunals are moving closer and closer to entirely paperless administration.[33] In addition to this, while exercising administrative discretion, reasons can and do often repeat themselves and many decisions are decided based on similar reasoning. This means that the decision maker is not having to 'reinvent the wheel' every time it provides reasons and may simply have to reproduce a previous decision. In the modern era this can be achieved easily with word processors and readily available templates that can be tailored to each decision with minimal effort. The impact of new technologies has seen administration

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[29] Town and Country Planning (General Development Procedure) (England) (Amendment) Order 2003 SI 2003/2047 art 5.

[30] Explanatory Memorandum to the Town and Country Planning (Development Management Procedure) (England) (Amendment) Order 2013 SI 2003/2047 17.1-17.20.

[31] *Dover District Council v CPRE Kent* [2017] UKSC 79.

[32] For example, see: The Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000 SI 2000/3272 part II.

[33] Vincent Kearney, 'NI legal system plans aim for paperless courts' (BBC News, 5 September 2017) < https://www.bbc.co.uk/news/uk-northern-ireland-41150209 > accessed 22 January 2019.

in all areas become cheaper and more efficient which reduces the weight of Lord Bingham's argument significantly.

2. Articulation of inexpressible value judgements

One of the key problems with imposing a general duty on public bodies is that the duty will encompass every different kind of decision that body could make, ranging from important and technical planning decisions to the straightforward shifting of applications. In the latter type of decision, applications are typically decided against set criteria. However, in a situation where a decision maker is faced with equally eligible applications that cannot both be accepted, should a duty force reason from what is essentially a value judgement?

In the case of *R (Asha Foundation) v Millennium Commission,*[34] the commission was required to make a selection from a list of applications for project funding that were all deemed eligible to receive it. Upon rejecting the claimant's application, the commission informed them that '... in light of the competition the commissioners decided that your application was less attractive than those before them'.[35] The court of course held the commission were under no duty to give reasoning than what they had already provided. However, when making this judgement the court found the commission had in fact upheld their duty. The court stated outright that the decision made by the commission required reasons that were appropriate and reasonable to adhere to the requirement of good administration and fairness – thereby establishing that a duty does indeed exist in these types of decisions but not an extensive one.[36] The answer then, is that value judgements are in fact expressible and a duty does exist. However, the content of that duty is reduced due to the nature of the decision, which is again an argument pertaining to the content of a duty and not the duty itself.

3. Scouring for grounds of challenge

Lord Bingham expressed concern over allowing individuals to scour the reasons given to them to raise issues with the decision. This echoes the logic behind the deliberate withholding of reasons by public bodies to avoid challenge and seemingly legitimises it. While the courts are always mindful of what is termed "opening the flood gates" with regards to claims, I would argue this concern is ill-placed as there are now strong mechanisms in place to combat this issue.

For example, in order to make any claim for judicial review a party must prove they have *locus standi* to bring an action. This involves passing the 'sufficient interest' test in that the claimant must have sufficient interest in the matter to which the claim relates.[37] This is a necessary control mechanism that in itself should mitigate fears that a general duty would apply to every administrative decision that can be made. Ultimately, the law does not concern itself with trivial matters and not every decision will be able to even gather sufficient interest from an individual. Only an individual with sufficient interest in the decision will be able to enforce the duty, however the establishment of the duty would prompt the development of reason giving practices to avoid challenge, rather than avoiding challenge by the practice of withholding reasons.

[34] [2003] EWCA Civ 88.
[35] ibid, para 11.
[36] ibid, para 34.
[37] Supreme Court Act 1981, s 31(3).

To further protect against unnecessary claims *locus standi* was amended in 2015 with the so called "makes no difference principle" which states the court must refuse to grant relief where it appears the outcome for the applicant would not be substantially different had the conduct complained of not occurred.[38] This amendment will be discussed in part III of this paper however, we can see how this may in fact render a claim completely unactionable. Therefore, the court should not seek to create a further barrier by denying a general duty as strong barriers are already in place.

Regardless of the barriers, there is also an argument to suggest that reasons could have an opposite effect to opening the flood gates. In *ex parte Singh*, Woolf LJ explained that an individual is more likely to apply for judicial review regardless of the merits of his case if, due to no reasons having been given to him, he thought no proper decision had been taken on his application.[39] While this may seem speculative in nature, there is in fact a psychological basis for it. In 1972, psychologist Jerome Kagan theorised that when an individual cannot immediately gratify his desire to know, he becomes highly motivated to reach an explanation.[40] Kagan suggested that resolution of uncertainty is a primary motive and leads to behaviour, such as a search for answers. If we apply this thinking to reason-giving, i.e. the resolution of uncertainty surrounding a decision, a person may actually be more likely to accept a well-reasoned decision than be left (highly motivated) to make a claim against it.

To conclude this three-part section, the arguments outlined by Lord Bingham are evidently grounded in 20th century concerns for not placing too onerous a duty on public bodies. However, the counter arguments above indicate that in the modern day these concerns are no longer weighty enough to provide any substantial opposition to the creation of a general duty. To avoid the kind of scrutiny made by Lord Bingham, the duty must be properly contextualised, as the court have attempted to do via their case by case approach. Nevertheless, using that approach in this particular aspect of the law has been seen to create a problem that can be framed in a wider context and shown to have a negative impact on the UK constitution, as will now be discussed.

4. *The constitutional importance of solving the problem*

While it has been shown that once taken to court by a complainant the court often imposes the duty, the burden is on the complainant to show why they are deserving of it. This raises two important conceptual and practical issues that run to the very core of our society, its values and its constitution. Firstly, the case by case approach conflicts with our liberal democratic principles, namely that of equality and accountability. Secondly, the case by case approach conflicts with the rule of law principle that the law should be certain.

To begin, liberal democracy is a term encompassing many different principles that not only form the state, but the quality and way of life for the subjects of that state - principles such as equality and accountability.

The principle of equality, more specifically moral equality, states that each citizen is to be given equal concern and respect in the eyes of the law.[41] This encompasses notions

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[38] Criminal Justice and Courts Act 2015, s 84.

[39] *R v Secretary of State for the Home Department, ex p Singh* [1987] QBD.

[40] Jerome Kagan, 'Motives and Development' (1972) Vol 22. Journal of Personality and Social Psychology. Available online < https://psycnet.apa.org/fulltext/1972-24142-001.pdf > accessed 5th February 2019.

[41] Ronald Dworkin, *Taking Rights Seriously* (HUP 1977).

of basic fairness and respect for the dignity of an individual and their rights. Equality before the law is a well-known principle and is guaranteed in many national constitutions and international treaties because without equality there can be no individual freedom, and without individual freedom there can be no liberal democracy.[42] Although individual freedom can be looked at as 'positive freedom' and the ability to do what is good for us by exercising reason and choice,[43] or as 'negative freedom' and the absence of external impediments,[44] we can see how the denial of reasons for a decision affecting an individual generally conflicts with that individual's freedom. For example, a citizen who wishes to set up their own business but receives no reasons as to why the local authority has denied them a license to do so, is not only faced with the external impediment of not being given the reasoning to act on but, in not being able to act on the reasoning, is prevented from exercising their own reason and choice, in regard to improving their application or appealing the decision.

Moreover, the principle of accountability holds that public officials are responsible to the citizenry for their actions and decisions to ensure trustworthiness and legitimacy in the work of the government. One of the many ways in which accountability is achieved is through transparency and openness in official work by making documents and materials available to the public. The principle of accountability is increasingly more important in today's society as modern government becomes increasingly more complex. The scale and scope of governmental activities has grown with networks of departments, public bodies, private and voluntary sector providers all with inconsistent arrangements for oversight and scrutiny.[45] However, the principle of accountability should see government, parliament and the courts taking every opportunity to remedy these inconsistencies with the view to improving administration, especially in light of the already established requirement of good administration, that holds that public bodies ought to deal straightforwardly and consistently with the public.[46] Contrary to this, the courts continued refusal to acknowledge that a duty to give reasons does exist allows the decision maker to assume that they do not have to document or produce their reasons unless taken to court. Furthermore, in conjunction with the argument that a lack of reasons allows the decision maker to avoid being taken to court in the first place, the decision maker is not only permitted to make this presumption but can actively benefit from doing so. This presumption conflicts with the principle of accountability and its importance.

Almost all the advantages and justifications to establishing a duty to give reasons, some of which have been mentioned already in this paper, stem from these liberal democratic principles. By not recognising a general duty and placing the burden on citizens to not only show they have sufficient interest but to show they are actually deserving of reasons, the court is allowing for accountability of public bodies to some individuals, and not to others. Therefore, it can also be argued that the court is allowing for instances of inequality in the treatment of individuals by public bodies. Only when these individuals bring claims does the court rectify the problem and

[42] Liberalism is based on the idea of individual freedom. See John Alder, *Constitutional and Administrative law* (5th ed., Palgrave 2005), 9.
[43] Thomas Hobbes, *Leviathan* (first published 1651, Penguin 1985).
[44] John Alder *Constitutional and administrative law* (5th ed., Palgrave 2005), 16.
[45] The Institute for Government, 'Accountability in modern government: recommendations for change' (published 15 October 2018) <https://www.instituteforgovernment.org.uk/summary-accountability-modern-government-recommendations > accessed 10 December 2019.
[46] *R (Nadarajah and Abdi) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 (Laws LJ).

although all individuals with sufficient interest have equal access to the court, their claims must satisfy the courts uncertain criteria to be successful. While governance by opacity is more administratively efficient and convenient given the judicial justifications outlined previously, it does not sit well with democratic principles, lending itself instead to values associated with a dictatorship.[47]

In the UK, public servants work under many duties to ensure these liberal democratic principles are upheld. For example, in 1995 Lord Nolan set out the Seven Principles of Public Life applicable to all officials and sectors delivering public services, that have served as a guide for various laws and regulations since their publication.[48] The principles include accountability, openness and honesty all of which dictate that a public servant must submit themselves to scrutiny from citizens, be truthful and should not act without clear and lawful reasons for doing so.[49] Not only is a general duty to give reasons within the scope of these principles, it would render them enforceable with a degree of certainty to anyone with sufficient interest in a decision.

This brings us to the second issue created by the court's approach. Yet another key principle in UK governance, argued by A V Dicey as one of the twin pillars of the UK Constitution, is the rule of law.[50] A central element of the rule of law is legal certainty – the law should guarantee all citizens the possibility to foresee the legal consequences of their actions. This element is a guide to both judges and legislators, but it can be summarised as 'the possibility for all citizens to confidently take care of their business and to claim their rights, with good chances of success, with respect to both their social partners and political authorities'.[51] However, the court's approach and the number of considerations it makes when deciding whether a person deserves the reasons for a decision is in direct conflict with this notion.

While there are various interpretations of precisely what the rule of law concept entails, it is widely accepted that at its core the rule of law requires certainty, insofar as the law is accessible, intelligible, clear and predictable.[52] However, from the core certainty requirement further elements can be implied that are not as amplified or extended as other interpretations of the rule of law. For example, Lord Bingham argued a further element that ordinarily, questions of legal right or liability should be resolved by application of the law and not the exercise of discretion.[53] This is because with broad discretion comes subjectivity and the potential for arbitrariness - the antithesis of the rule of law and ultimately our system of administrative law.[54] Therefore, in the context of reason giving, a conflict with certainty arises as the law surrounding the duty to give reasons and the ensuing liability for breaching it operates

[47]Nicholas Dobson, 'The age of reasons' (2007) NLJ 7281. <https://www.newlawjournal.co.uk/content/age-reasons > accessed 2 February 2019.
[48] Committee on Standards in Public Life, First Report of the Committee on Standards in Public Life (Stationary Office Books 1995), 7. For an example of its influence, see Cabinet Office, 'Ministerial Code' (2010) < https://www.gov.uk/government/publications/ministerial-code > accessed 5 February 2019.
[49] Committee on Standards in Public Life, *Striking the Balance: Upholding the Seven Principles of Public Life in Regulation* (Sixteenth Report, 2016) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/554817/Striking_the_Balance_web_-_v3_220916.pdf > accessed 20 January 2019.
[50] Albert Venn Dicey, *Introduction to the study of the Law of the Constitution* (8th edn, MacMillan & Co 1915)
[51] Danilo Zolo, *The Rule of Law: History, Theory and Criticism* (Springer 2007), 24.
[52] Tom Bingham, '*The Rule of Law*' (Allen Lane, 2010), 37.
[53] ibid, 48.
[54] ibid, 48.

purely as an exercise of discretion rather than the application of a legal rule (as the rule is in fact that no duty should exist). This creates a situation whereupon similar cases can be treated differently by public bodies and the court, highlighted by Lord Mance in his speech on certainty: 'Paradoxically, it is uncertainty introduced into domestic legal systems in order to achieve greater consistency with and certainty in the application of ... fundamental legal principles'.[55]

The court's case by case approach for applying the fundamental legal principle of fairness to the common law rule on reason giving is one such paradox. However, the certainty argument was considered by the Supreme Court in the case of *Dover District Council*.[56] The court held that 'it should not be difficult for councils to identify cases which call for a formulated statement of reasons' and that typically there will be legal policy reasons, such as cases decided in the face of substantial opposition or against advice.[57] However, the court acknowledges that it would be 'over-prescriptive' to lay down a single set of policies in a single case,[58] thereby acknowledging that this response to the overall uncertainty argument is not universally applicable. The response of the court echoes the case by case approach in that, in the opinion of the court, there will be differing distinctions and qualifications that warrant the duty depending on the nature of the decision. However, the lack of a framework or any concrete guidelines creates uncertainty.

Lord Reid, writing extra-judicially, discussed the doctrine of precedent and certainty in the law as being no better obtained than accumulating actual decisions. He described circumstances which destroy certainty as 'an impenetrable maze of distinctions and qualifications'.[59] The pure doctrine of precedent that currently dictates how and when a duty to give reasons arises, outside of statute, has created one such maze. It is not possible to accumulate the decisions in this area to create the possibility for citizens to confidently take action, as the duty has been developed by judicial creativity on the grounds of fairness rather than the formulation of a hard rule that reasons are required.

While creativity and flexibility in the law at the expense of certainty can be desirable to achieve justice, in this particular concern it is not. Typically, when scholars and judges discuss legal certainty, opinions are formed depending on the context, i.e. the commercial or public sector, with the former seeing certainty and predictability as a necessity and the latter favouring creative justice.[60] Here we have a combination of the two sectors, as although public bodies operate in the public sector, they engage with and decide over issues affecting commercial business (as we have seen in the planning cases discussed). The argument that the current approach conflicts with legal certainty is therefore quite a substantial issue and one that is not just theoretical but has significant practical importance also. For example, in *Benaim* the business was left with no reasons to act on in order to continue their operation and subsequently closed down.[61]

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[55] Lord Mance, '*Should the law be certain?*' The Oxford Shrieval Lecture (2011), para 28.
[56] *Dover District Council v CPRE Kent* [2017] UKSC 79.
[57] ibid, para 59.
[58] ibid, para 59.
[59] Lord Reid, '*The Judge as Law Maker*' (1972) 12 Journal of the Society of Public Teachers of Law 22, 24.
[60] Geoffrey Vos, *'Certainty V Creativity: Some Pointers Towards the Development of The Common Law'* (SAL, 2018), para 52.
[61] *R v Gaming Board for Great Britain, ex p Benaim* [1970] EWCA Civ 7.

To conclude, it has been argued that the current approach of the court conflicts with the constitutional principles of liberal democracy and the rule of law. These principles transcend the concerns of individual cases and instead speak to the very principles the UK prides itself on. The logical answer is to create a general duty that places the burden on decision makers to argue why reasons should not be given to an individual with sufficient interest in the decision. This would ensure moral equality regardless of the nature of the decision and create legal certainty, in that individuals with sufficient interest will obtain the reasons for any decision unless there are genuine reasons for non-disclosure,[62] which should be more predictable and legitimate than the current reasons for not requiring them.

IV. The Possible Solutions

It is clear that the lack of a general duty in UK administrative law is problematic and creates a significant discrepancy in the law that is worthy of attention. We know that the solution is to create a general duty, but it is not clear how and in what way this should be achieved. This section will consider possible solutions. Firstly, the possibility of a statutory duty created by Parliament will be considered and found in the form of an amendment to the Freedom of Information Act, although the duty may not function as effectively as it could outside of that statutory framework. Secondly, the creation of a common law general duty will be considered, but calls for a separate general duty will be argued to be unnecessary as the duty could be included as part of the already established duty to act fairly.

1. *A General Statutory Duty*

Due to the nature of statutory law, in that it is not created 'after the fact' and can be used to fix problems in the common law, it has been suggested that legislation may be required before we are likely to see a general legal obligation to give reasons.[63] These suggestions are fuelled by anecdotal evidence from other countries, such as Australia's successful implementation of an extensive statutory duty in the Administrative Decisions (Judicial Review) Act 1977.[64] However, the difficulty in establishing a statutory duty has been highlighted in the academic discourse, particularly with how the duty will be consolidated with the other statutory duties and frameworks that already exist. The UK statute book already contains many different types of explanatory duty that a general duty would need to reconcile.[65]

There is, however, a statutory framework currently in force in the UK that has received judicial approval (in the case of *Hasan*) for governing the giving of reasons - the Freedom of Information Act 2000 (FOIA).[66] The act was intended to cultivate openness, accountability and public participation in the democratic decision-making process but,[67] in contradiction to those intentions, does not currently contain a specific general duty to give reasons. Consequently, even if the judicial approval given in Hasan

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[62] Such as national security as seen in *R v Home Secretary, ex parte Hosenball* [1977] 3 All ER 452.

[63] S.A. De Smith, Lord Woolf & J. L. Jowells, *'Principles of Judicial Review'* (Sweet & Maxwell 1999) 360.

[64] JUSTICE-All Souls Committee, '*Administrative Justice - Some Necessary Reforms: A Report of a JUSTICE-All Souls Committee*' (Oxford 1988) ch. 3.

[65] A. P. Le Sueur, 'Legal Duties to Give Reasons' (1999) 52 Current Legal Problems 1, 166–172.

[66] *R(Hasan) v Secretary of State for Trade & Industry* [2008] EWCA Civ 1311 at 21

[67] Justice Committee, 'Post-legislative scrutiny of the Freedom of Information Act 2000' (2012) <https://publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/9605.htm> accessed 10th February 2019

(which was not decided on an entirely accurate basis) was upheld, the FOIA would require amendment before a general statutory duty is created.

In the case of *Hasan*, the Secretary of State for Trade and Industry, while arguing against the imposition of a common law duty, stated that the terms of the Freedom of Information Act were a strong indication that Parliament had already set parameters for the disclosure of reasons.[68] The court accepted the submission and held the act may properly be seen as Parliament's considered statutory framework on the matter.[69] However, the Act in fact represents a departure from the government's initial revolutionary stance on the issue as outlined in the 1997 command paper entitled '*Your Right to Know*'.[70] The 1997 White Paper, which the Act is based upon, contains a section entitled 'Duties to publish information' which lists 5 instances in which information is to be published, including 'reasons for administrative decisions to those affected by them'.[71] However, other than this short statement the paper contains no more about reason giving and there are a number of key indicators that suggest parliament did not consider the giving of reasons when drafting the legislation.

Firstly, the Act defines 'information' in section 84 as information recorded in any form. If a general duty only applied to reasons that were written down, only public bodies under a duty to record the reasons would be required to disclose them.[72] Secondly, in order to properly implement the Act an FOI officer is normally established to handle requests. This means that a request is not being made to the decision maker itself but is instead sent to a different department in order to be processed. These two realities of the Act indicate that it was never considered as a means of obtaining reasons from a decision maker and has therefore not set parameters for their disclosure. However, what is not in contention about the Act is that it intended to establish a wide general right of access to information held by public authorities and its original proposal did include the publication of reasons to affected persons.[73] Consequently, the judicial approval given in *Hasan* can be criticised, but it so far remains authority for the proposition that reason giving, outside of the common law, is governed by the FOIA.

Therefore, to achieve the desired duty, a stand-alone provision creating a legal obligation for the publication of written reasons would be required. This was in fact suggested by the Select Committee on Public Administration shortly after the draft bill was published.[74] Nevertheless, the addition of a general duty into the framework of the FOI does have both advantages and disadvantages. In regard to the advantages, firstly, the framework contains a clear and enforceable procedure. Unlike a common law duty that would require legal proceedings to enforce, the FOIA procedure would allow a complainant to formally request the reasons with a guaranteed response within 20 working days or other reasonable period, providing access to the information

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[68] *R(Hasan) v Secretary of State for Trade & Industry* [2008] EWCA Civ 1311 at 16
[69] ibid, para 18.
[70] --, '*Your Right to Know: The Governments Proposals for a Freedom of Information act*' (Cm. 3818, 1997)<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/272048/3818.pdf > accessed 10th February 2019.
[71] ibid, para 2.18.
[72] A P Le Sueur, 'Taking the Soft Option? The Duty to Give Reasons in the Draft Freedom of Information Bill'(1999).<https://publications.parliament.uk/pa/cm199899/cmselect/cmpubadm/570/570me27.htm > accessed 15th February 2019. p. 5 -17.
[73] Michael Supperstone, Timothy Pitt-Payne, *The Freedom of Information Act 2000* (Butterworths 2002)
[74] The Commons Select Committee on Public Administration, Third Report, Session 99 (HC 1999) para 48-50.

commissioner and an appeals process.[75] Secondly, the circumstances in which reasons would not be disclosed are clearly laid out as exemptions to the general right of access under part two of the Act. This means the complainant can be more certain of the outcome of his request and the current issue of legal certainty would be dramatically improved.[76]

Unfortunately, there are two significant disadvantages to this proposition. Firstly, the Act states that the public body does not have to comply with a request unless a fee is paid.[77] On the one hand, the burdensome nature of the duty would be mitigated as the public body would be receiving payment for formulating the statement of reasons. On the other hand, requiring payment to impose a duty, which has been argued in this paper to be fundamental to our liberal democracy and rule of law, would erode the importance of equality and transparency by turning the principles into a service. This has been highlighted as a general issue of a number of FOI regimes.[78] Ultimately, requiring payment undermines the principles the duty is trying to uphold.

The second disadvantage is a conceptual problem with the FOI with regard to the nature of a general duty. The Act assumes that public bodies are under no obligation to disclose information until a request is made and payment is given. Consequently, a duty would only exist after a successful request, and not exist generally. Therefore, any duty provided under the Act would not be a general duty for the purposes of compelling public bodies to publish reasons with decisions. However, the Act does contain a provision for publication schemes that proactively compels public bodies to publish information which have included the reasons for certain decisions.[79] Unfortunately, it is left to the discretion of the body as to what is included in their schemes and until reasons are required to be included there can be no general publication of reasons under the Act.

To conclude, the creation of a statutory duty in the form of an amendment to the Freedom of Information Act is a legitimate possibility. However, there are a number of issues with that possibility, mainly that requiring payment undermines the duty and does not compel the giving of reasons to interested persons at the point the decision is made. Unless the provision containing the duty to give reasons is formulated in such a way as to require the proactive publication of reasons to affected parties via a general scheme, a completely separate piece of legislation would be required in order to achieve an effective general statutory duty to give reasons.

V. A General Common Law Duty

The second possibility for creating a general duty comes from the common law, which has been the vehicle for imposing the duty where none had existed and does this firmly on the grounds of fairness in cases where no other discernible interest can be invoked (see part II). It is for this reason that a common law general duty is a possibility and

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[75] Freedom of Information Act 2000, s 10.

[76] Jim Amos, Dick Baxter, Jeremy Croft and Robert Hazell, '*A practical guide to the Freedom of Information Act 2000*' (The Constitution Unit 2001), para 3.8.

[77] Freedom of Information Act 2000, s 9(2).

[78] In Australia for example, see. John McMillan, '*Review of charges under the Freedom of Information Act 1982: Report to the Attorney General*' (2012) Part 3. Available online < https://www.oaic.gov.au/freedom-of-information/foi-resources/foi-reports/review-of-charges-under-the-freedom-of-information-act-1982#general-concerns-with-the-current-charges-framework > accessed 25th February 2019.

[79] The Freedom of Information Act 2000. s 19(3)(b).

that UK courts should create a general duty to give reasons. Firstly, the importance of reasons to the process of administrative law will be outlined. Secondly, that the creation of the duty conforms to the development of judicial review thus far. Finally, however, it will be seen that the creation of an entirely new duty on public bodies to give their reasons is unlikely.

As seen in part II of this paper, the court has found a duty to give reasons on many different grounds including the facilitation of appeal, the assessment of a misuse of power, the meeting of legitimate expectations and more recently in achieving fairness.[80] However, the emergence of the courts willingness to find a duty to give reasons in certain cases alludes to the importance that the duty serves. Firstly, reasons serve the interest of the court in performing their supervisory function in that the reasons for a decision will no doubt assist in the reviewing of that decision.[81] Secondly, reasons serve the interest of the individual in that they know why a decision was made, whether it was considered correctly and whether they have grounds to appeal it. Finally, and most importantly, is that requiring reasons can serve the interests of the decision maker by providing discipline when a decision is being made.[82] It has been well observed that the formulation of reasons concentrates the mind of the decision maker to the relevant issues, eliminates extraneous considerations and provides for consistency in decision making.[83] Furthermore, a duty to give reasons in its disciplinary function can be seen to be committing the decision maker to rationality, in that the formulation of reasons forces the decision maker to make sense of their decision.[84] It is clear that a duty to give reasons has multiple functions in administrative law, but most fundamentally is its ability to compel a decision maker into making lawful decisions.

This function reflects the very purpose of judicial review. It has been highlighted by Sedley J that public law is not at its base about rights, but about wrongs i.e. the misuses of public power.[85] It is through this base that judicial review has developed into a body of law able to control public administration under its three grounds of review.[86] In the words of Lord Woolf, the primary purpose of judicial review is now "enforcing public duties on behalf of the public as a whole".[87] It follows then that the justification for a general duty to give reasons at common law must be based in the avoidance of wrong-doing on the part of the decision maker rather than as a right of the affected individuals. In part II of this paper, it was argued that the liberal democracy of the UK values equality and accountability in public administration not as a right of specific individuals but as a value of the UK as a whole. The Seven principles of public life outlined in part II detail the precise 'public duties' that a duty to give reasons would serve to enforce. Admittedly, there is much debate over the practical implementation of these values and how best to achieve justice that may indeed lie outside of judicial review.[88] However, if the argument is accepted that equality and accountability are

[80] See also. Paul Craig, 'The Common Law, Reasons and Administrative Justice*'* (1994) C.L.J. 53, 2. 282-302.

[81] *R v Lancashire County Council ex p. Huddleston* [1986] 2 All ER 941.

[82] Michael Fordham, 'Reasons: The Third Dimension*'* (1998) J.R. 3, 3. 158.

[83] S.A. De Smith, Lord Woolf & J. L. Jowells, *'Principles of Judicial Review'* (Sweet & Maxwell 1999) 344-345.

[84] A. P. Le Sueur, 'Legal Duties to Give Reasons*'* (1999) 52 Current Legal Problems 1, 154.

[85] *R v Somerset CC Ex parte Dixon* [1998] Env. L.R. 111 at 121.

[86] T T Arvind and Lindsay Stirton, 'The Curious Origins of Judicial Review' (2017) 133 LQR 91, 27-30

[87] Harry Woolf, '*Protection of the Public'* (Stevens & Sons 1990) 34.

[88] Harry W. Arthurs, '*Re-thinking Administrative Law: A Slightly Dicey Business'* (1979) Osgoode Hall Law Journal. 17, 1. 42-45.

values of the UK and that there exist various public duties to that effect that are enforced by judicial review, a general duty to give reasons conforms with the purpose of judicial review and should therefore be enforceable.

The normative basis for a duty to give reasons has been considered most notably by Mark Elliott. Elliott argues that a duty to give reasons should exist as a separate general duty to be aligned with comparable principles of good administration (such as the overarching duties to act fairly and to act reasonably).[89] However, if the court remains reluctant to complete the development of the general duty by reversing their current approach – in that the duty remains an exception and not a rule - it seems highly unlikely that the court would be willing to create an entirely separate stand-alone duty as Elliott suggests. It would follow then, that the best route to a general duty to give reasons would be to recognise the duty as part of an already accepted head of review – such as the duty to act fairly, that Elliott himself acknowledges as being underpinned by strikingly similar arguments.[90] As we have seen in part II of this paper, the court currently uses fairness as a flexible ground for imposing the duty to give reasons. It will now be argued that the duty can be incorporated into the duty to act fairly, rather than operate alongside it.

VI. The duty to act fairly and the giving of reasons

'The duty to act fairly' was first laid down in the landmark House of Lords decision in *Ridge v Baldwin*.[91] In *Ridge*, the Lords implemented the rules of natural justice regarding procedural fairness into the realm of administrative decision making. The rules of natural justice are the rules against bias and the right to a fair hearing that ensure a foundation of fairness in all judicial hearings. However, the Lords in *Ridge* were of the opinion that natural justice is in fact fair play in action and should apply to all decisions judicial and administrative in the form of a duty to act fairly. This section will argue that firstly, the duty to act fairly could be extended beyond the two current rules to include the giving of reasons and secondly, that the duty to give reasons conforms to the practical application of the duty to act fairly. However, it will be seen that the 'makes no difference' principle of the Senior Courts Act creates a significant barrier to the operation of this proposal.

This proposition has been suggested as early as 1932 in the Donoughmore Report, where it was proposed that the refusal to give grounds for a decision is plainly unfair and, where there is a possibility of further proceedings, is contrary to natural justice's two rules and could therefore warrant a third rule.[92] However, a third rule has only been discussed in the context that a lack of reasons may frustrate appeal and not in relation to the giving of reasons as a requirement of fairness only.[93] The proposition has since been opened up in the case of *ex parte Cunningham.*[94]

The decision in *Cunningham* demonstrates two things. Firstly, it supports the view that natural justice and fairness are not to be treated as separate concepts and secondly, that the principles of natural justice are to be broadly interpreted as

[89] Mark Elliott, '*Has the Common Law Duty to Give Reasons Come of Age Yet?*' [2012] University of Cambridge Faculty of Law Research Paper 7/2012. 56.
[90] ibid, 63.
[91] [1964] AC 40.
[92] Report of the Committee on Ministers Powers (The Donoughmore Report) (1932) p. 80.
[93] Geoffery A Flick, '*Natural Justice: Principles and Practical Application*' (Butterworths 1979) Ch 5, p.96.
[94] *R v Civil Service Appeal Board, ex p. Cunningham* [1991] 4 All E.R. 310.

applicable to procedure both *at* the hearing of an individual's case and *after* it.[95] The determination of a decision is therefore no less subject to natural justice than the process by which it is achieved.[96] Currently, the two rules of natural justice only cover the process of decision making and not after it when the decision is handed down. However, the rules of natural justice are not 'set in tablets of stone' and the courts may well imply additional safeguards as will ensure the attainment of fairness.[97] Accordingly, a third rule as part of the duty to act fairly that requires the giving of reasons could be established.

The operation of the third rule must conform to the way in which the courts apply the duty to act fairly. In the case of *McInnes v Onslow Fane*, the operation of procedural fairness was held to be context-sensitive, in that the duty arises differently depending on the nature of the case - a 'sliding scale of harm'.[98] This reasoning is understandable, as it is not always practical to give a proper hearing to every individual in every case. However, this reasoning is only applicable to the current rules of the duty to act fairly and therefore, the context sensitive reasoning in *McInnes* must be adapted to fit with the giving of reasons if the third rule is to work.

The approach of the court can be adapted by creating a sliding scale in relation to the content of the reasons. In order to balance the need for an effective duty alongside Lord Bingham's concerns of an undue burden, the duty must be context sensitive.[99] The very same reasoning is applied by the court in *McInnes* when Megarry VC formulated his sliding scale, stating that 'the concepts of natural justice and the duty to be fair must not be allowed to discredit themselves by making unreasonable requirements and imposing undue burdens'.[100] The court has fluctuated on precisely what content is required to fulfil the requirements of fairness and there is a large body of case law to that effect. However, the default position is that reasons must be "intelligible" and "adequate", and this could work as a good starting point for the creation of a context sensitive scale. This approach to creating a context sensitive duty works within the current approach of the courts in *McInnes* and would not require too much departure from accepted practice. Therefore, the duty as a third rule is not only a conceptual possibility but a practical possibility also.

Finally, we must consider whether the duty to give reasons would operate effectively in this way. In 2015 the Senior Courts act was amended to include the 'makes no difference' principle that compels the High Court to refuse relief if it appears the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred, unless it is appropriate for reasons of 'exceptional public interest'.[101] The principle has been feared to render any duty to give reasons unenforceable as the reasons may make no difference to the decision. Nevertheless, it has been suggested that a strict interpretive approach as to the nature of the word "outcome" could circumvent the principle, in that the relevant outcome for the courts

[95] ibid. (Donaldson LJ) and (Leggatt LJ).
[96] S.A. De Smith, Lord Woolf & J. L. Jowells, *'Principles of Judicial Review'* (Sweet & Maxwell 1999). 350.
[97] *Lloyd v. McMahon* [1987] 1 A.C. 625. 702-703 (Lord Bridge).
[98] [1978] 1 WLR 1520.
[99] Mark Elliott, '*Has the Common Law Duty to Give Reasons Come of Age Yet?*' [2012] University of Cambridge Faculty of Law Research Paper 7/2012. 65.
[100] *McInnes v Onslow Fane* [1978] 1 WLR 1520 at 1535.
[101] Criminal Justice and Courts Act 2015, s 84.

could be the actual provision of the reasons.[102] However, this interpretation could be seen to be going too far. What has not been considered is whether reasons could be considered an 'exceptional public interest'. However, both conceptually and practically, a general duty could not effectively operate as an exception to a statutory rule.

While this paper does not intend to critique the 'makes no difference' principle, it is clear that it represents a departure from the development of judicial review.[103] The principle effectively condones unlawful administrative action by refusing citizens relief, in being completely focused on the outcome of decisions and not the enforcement of public duties on behalf of the public.[104] Therefore, until the 'makes no difference' principle is re-examined, it stands as a significant barrier to the creation and enforcement of other duties - including the duty to give reasons.

VII. Conclusion

The purpose of this paper was to explore the approach of the court regarding the duty to give reasons in administrative law, identifying the problem it presents and suggesting possible solutions to it. To begin, it was conclusively outlined that the court's current case by case approach creates a significant discrepancy in the law that is poorly justified. This gap turns into a problem when the effects of a case by case approach are considered. It was argued that citizens with sufficient interest in a decision are left uncertain as to the duties they are owed by public bodies and that those bodies can avoid challenge by withholding reasons as they are entitled to do so. Finally, the problem was framed in the wider context of the values of the UK and the rule of law in an attempt to indicate the seriousness of the problem and the need to find a workable solution.

Three solutions were then proposed. The first solution was a statutory duty in the form of an amendment to the freedom of information act, that recognises reasons for administrative decisions as a fundamental aspect of the general right of access to information that the act created. However, it was found that including the duty in this statutory framework would create a service and not a pre-emptive duty to give reasons for decisions. The second solution was establishing a common law duty justified by its disciplinary function, to fit with the development of judicial review in the UK. It was argued that the best way to achieve this outcome is to recognise the duty as part of the already existing duty to act fairly. In doing so, the duty to give reasons becomes part of a well-established, context sensitive duty enforced to ensure fair and proper procedural decision making.

Unfortunately, it was found that the current statutory 'makes no difference' principle hinders the enforcement of the duty, as unless it can be shown that the outcome of an unlawfully made decision would be different, the court must refuse relief. Until this principle is revised or repealed it will render any common law duty to give reasons, or

[102] Mark Elliott, *'The duty to give reasons and the new statutory "makes no difference" principle'* (*Public Law for Everyone* 18th April 2016) < https://publiclawforeveryone.com/2016/04/18/the-duty-to-give-reasons-and-the-new-statutory-makes-no-difference-principle/ > accessed 10th March 2019.
[103] Rebecca Williams, '*No Pyrrhic Victories. The Makes a Difference Rule and the Nature of Judicial Review*' (Admin law blog, 5th April 2017) < https://adminlawblog.org/2017/04/05/no-pyrrhic-victories-the-makes-a-difference-rule-and-the-nature-of-judicial-review/ > accessed 20th March 2019.
[104] Harry Woolf, '*Protection of the Public*' (Stevens & Sons 1990) 34.

any duty pertaining to the procedural aspects of decision making, extremely difficult to enforce.