**The True Meaning of Rationality as a Distinct Ground of Judicial Review in UK Public Law**

Abstract

Ever since the *Wednesbury* decision in 1947 UK public law has been applying the concepts ‘rationality’ and ‘reasonableness’ indistinguishably. Rationality has also been used as a ‘mega ground of judicial review’, covering many other, distinct grounds of review.

The main purpose of this paper is to promote conceptual clarity in UK public law by indicating the nature of rationality as a distinct ground of judicial review, explaining why it should not be used as mega ground of review, and highlighting the overlooked differences between reasonableness and rationality.

It is argued that (1) reasonableness is in its essence a balancing and weighing test; (2) the most accurate way of understanding rationality review in public law is to perceive it as ‘instrumental rationality’ or as a ‘suitability test’ that reviews the logical and causal connection between means and end; (3) this ‘instrumental’ perception of rationality is already applied in UK public law as part of the proportionality test; (4) rationality, unlike reasonableness, is not a weighing and balancing test, thus it is wrong to use the concepts ‘reasonableness review’ and ‘rationality review indistinguishably’; and (5) it is conceptually wrong and confusing to use rationality as a ‘mega ground of review’.

**1. Introduction**

In this paper it is argued that the common practice in UK public law to equate ‘rationality review’ with ‘reasonableness review’ is misguided – and so is the tendency to use rationality review as ‘mega ground of review’ that includes other, distinct grounds of review. It is argued that the most accurate and helpful way of understanding what ‘rationality review’ means is to perceive it as ‘instrumental rationality’ that reviews the logical and causal relation between means and end – unlike ‘reasonableness review’ which is a weighing and balancing test that focuses on the weight that should be accorded to the relevant considerations.

Rationality is a well-established ground of judicial review in UK public law. At the same time, the meaning of ‘rationality’ as ground of review is far from being clear. The judicial reasoning in cases where rationality review is being applied is all too often incoherent, ambiguous and confusing. Academic writing in this field has yet to clarify the conceptual ambiguity with regard to rationality as a ground of review. This conceptual ambiguity results from two judicial practices. First, and at least since the *Wednesbury* decision in 1947 - courts have been applying the concepts ‘rationality’ and ‘reasonableness’ indistinguishably.[[1]](#footnote-2) Second, rationality has been used as a mega ground of judicial review, covering many other, distinct grounds of review.[[2]](#footnote-3) Equating irrationality with unreasonableness and perceiving rationality as mega ground of review are unfortunate mistakes that result from a misunderstanding of both reasonableness and rationality as grounds of judicial review in public law. This misunderstanding is an ignored aspect of the influence that ‘*Wednesbury* reasonableness’ has had – and to an extent still has – on UK public law. In 1947, the *Wednesbury* decision established ‘reasonableness’ as a ground of judicial review in modern administrative law.[[3]](#footnote-4) In *Wednesbury* Lord Greene described an ‘unreasonable decision’ as a decision that it is so unreasonable that no reasonable authority could ever have come to it’.[[4]](#footnote-5) More than 70 years later, UK judges and scholars are still struggling to comprehend the meaning of ‘reasonableness’ and its relation to ‘rationality’. A better understanding of *Wednesbury* reasonableness – and reasonableness more generally – could clarify the important conceptual difference between reasonableness and rationality as distinct grounds of review in public law.[[5]](#footnote-6)

Rationality, as a distinct ground of review, must focus on the relation between means an end, otherwise it will have no independent meaning. Furthermore, it will be shown below that this perception of instrumental rationally is in fact part of the principle of proportionality that is already applied in UK public law – regarding cases where protected rights are infringed. Perceiving ‘rationality review’ as instrumental rationality and applying it as a general ground or review (i.e. in cases that do not concern protected rights) will therefore also promote consistency and certainty in UK public law. As the distinct nature of rationality as a ground of review becomes clear, it will also lead to a conclusion that perceiving rationality as a ‘mega ground of review’ in cases where other, distinct grounds of review are relevant as well, is both unnecessary and wrong. This better understanding of the concept of rationality will promote a better understanding of UK public. It will also improve the quality of judicial reasoning and will lay out a common ground for normative arguments about the scope and intensity of judicial review in administrative law.

Before addressing the main conceptual arguments about the meaning of rationality as ground of judicial review, the paper will discuss (a) familiar arguments about the current understanding of reasonableness in UK public law; (b) the nature of reasonableness as a weighing and balancing test; and (c) the meaning of rationality as part of the proportionality test.[[6]](#footnote-7) This will lay the foundation for the arguments about the misperception of rationality in UK public law – and about the proper way of understanding rationality as an independent ground of judicial review, one that reviews the connection between means and end.

**2. Three unsatisfactory meanings of reasonableness in UK public law**

It is common to refer to three different meanings of reasonableness: first, pre-*Wednesbury* reasonableness; second, *Wednesbury* reasonableness; and third, the modified meaning of reasonableness.

As to reasonableness pre-*Wednesbury*, otherwise known asreasonableness in the ‘umbrella sense’[[7]](#footnote-8): in the pre-*Wednesbury* era the term ‘unreasonable’ was used in the UK – when it was used at all – mainly to describe a host of more specific grounds of judicial review such as acting ultra vires, taking account of irrelevant considerations, acting for improper purposes and so on. Put differently, almost each and every illegal administrative decision was also described or could have been described as ‘unreasonable’.[[8]](#footnote-9)

The pre-*Wednesbury* reasonableness test left traces in the *Wednesbury* decision itself.[[9]](#footnote-10) Almost 70 years later, in the *Braganza* case of 2015,[[10]](#footnote-11) we can still find signs that ‘pre-*Wednesbury* reasonableness’ is still very much alive in UK public law.[[11]](#footnote-12) In this case Lady Hale concluded that the decision that was scrutinized by the court was not arbitrary, capricious or perverse. Yet, ‘it was unreasonable in the *Wednesbury* sense, having been formed without taking relevant matters into account’.[[12]](#footnote-13) Both not taking relevant considerations into account and taking irrelevant considerations into account are separate, distinct, well-established grounds of judicial review in public law.[[13]](#footnote-14) Equating these grounds of review with unreasonableness implies that reasonableness is not an independent ground of review after all.

The pre-*Wednesbury* reasonableness test adds nothing to already existing, more specific grounds of judicial review and thus adds nothing to our understanding of the judicial reasoning and of the scope of judicial review.

In *Wednesbury*, reasonableness was clearly described as an independent ground of judicial review. Reasonableness was also perceived – and rightly so – as the last resort or as a safety net. We can only use it to review an administrative decision after other ‘conventional’ grounds of review are proven to be insufficient.[[14]](#footnote-15) How and when can such a decision still be unreasonable? The iconic answer that was given in *Wednesbury* was that such a decision will be unreasonable and therefore illegal if ‘it is so unreasonable that no reasonable authority could ever have come to it’.[[15]](#footnote-16)

It was clear from the *Wednesbury* decision that reasonableness review should be used only in extreme, maybe even hypothetical, cases.[[16]](#footnote-17) In the *GCHQ* case from 1985 it was said that reasonableness, as a ground of judicial review, will only apply to ‘a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived it’.[[17]](#footnote-18) Other cases required the decision to be so absurd that the decision-maker appeared to have ‘taken leave of his senses’.[[18]](#footnote-19) If we take this rhetoric seriously, it is clear why the *Wednesbury* meaning of reasonableness nearly equates reasonableness with sanity and unreasonableness with insanity, as a public official will have to be almost insane to reach an unreasonable decision.[[19]](#footnote-20) Requiring that something extreme would have to be proven served to defend the courts from the charge that they were intervening too greatly on the merits.[[20]](#footnote-21) The problem, however, is that perceiving unreasonableness as insanity means it can almost never be used in real-world cases.[[21]](#footnote-22) *Wednesbury* reasonableness, therefore, was not in fact an independent ground of judicial review as much as it was a judicial white flag and an expression of judicial deference.[[22]](#footnote-23)

Even though the *Wednesbury* understanding of reasonableness does define what an unreasonable decision means, the definition is vague, tautologous and almost completely useless.[[23]](#footnote-24) This has led to the modified reasonableness test.

Over the years, and especially since the 1990s, UK courts have loosened the *Wednesbury* test (even in cases that had nothing to do with fundamental rights). The question that is now being asked is ‘was the decision one that a reasonable authority could have reached?’.[[24]](#footnote-25) The court has to be satisfied that the challenged decision was so unreasonable that it would not have been made by any reasonable public authority. The modified meaning of reasonableness is now being applied alongside *Wednesbury* reasonableness.[[25]](#footnote-26)

The conceptual problem that was found both in the pre-*Wednesbury* era and in *Wednesbury* reasonableness still remains. No proper definition of an unreasonable decision was given by the courts, not even by judges who criticised the lack of conceptual clarity of *Wednesbury* reasonableness,[[26]](#footnote-27) thus leaving the concept – and inevitably judicial reasoning – vague, inconsistent and at times arbitrary.[[27]](#footnote-28) Indeed, it is not at all clear how – and to what extent – the wording of the ‘modified’ reasonableness test is different from that of ‘Wednesbury reasonableness’. The problem of lack of understanding of what reasonableness in fact means in public law did not therefore disappear after introducing ‘modified reasonableness’. More specifically, there is still lack of explicit and consistent acknowledgement that reasonableness is in fact a balancing test. In the next section, the nature of reasonableness will be described. A better understanding of reasonableness as a balancing test will then help in distinguishing between reasonableness and rationality as grounds of judicial review.

**3. Reasonableness as a balancing test**

In 2013, Paul Craig described the proper way to understand what reasonableness means.[[28]](#footnote-29) Craig argues that ‘reasonableness is concerned with review of the weight and balance accorded by the primary decision-maker to factors that have been or can be deemed relevant in pursuit of a prima facie allowable purpose’.[[29]](#footnote-30) This is the most accurate way of understanding how reasonableness review is being applied, though mostly implicitly, in judicial reasoning. As Craig rightly puts it, if reasonableness were not about weighing and balancing it would have no role as an independent ground of review.[[30]](#footnote-31)

Back in 1947, Lord Greene stated in the *Wednesbury* case that courts can scrutinize the reasonableness of an administrative decision only after establishing that the decision was intra vires; that the decision-making process was intact; that all the relevant considerations were taken into account; and that irrelevant considerations were not taken into account – or that the administrative body did not try to achieve improper purpose.[[31]](#footnote-32) Lord Greene failed to reach the inevitable conclusion: that after taking all relevant considerations and nothing but relevant considerations into account, the only thing that can go wrong with regard to the legality of the administrative decision is the weight accorded to the relevant considerations. Therefore, for reasonableness to have any meaning in public law it has to allow the courts to scrutinize the weighing and balancing process of the administrative body. As Craig puts it, ‘if weight really were off-bounds, if it really were heretical to consider it, then there would be no reasonableness review, since it would have no content once the court had adjudged the relevancy and purpose issues’.[[32]](#footnote-33) In his article Craig shows that perceiving reasonableness as a balancing test explains what UK courts actually have been doing – albeit implicitly – when they applied the reasonableness test (regardless of whether a remedy was granted).[[33]](#footnote-34)

This perception of what reasonableness in fact means, gives some content to the empty or vague meaning of both *Wednesbury* reasonableness and modified reasonableness. To describe a decision as unreasonable tells us nothing of whythe decision is unreasonable – or in *Wednesbury* terminology – why the decision ‘defies logic’.[[34]](#footnote-35) When we perceive reasonableness as a balancing test we acknowledge that unreasonableness can only mean taking into account all the relevant considerations, and only the relevant considerations, while according an improper or distorted weight to those considerations.

The UK Supreme Court has recently indicated that ‘there are also authorities which make it clear that reasonableness review, like proportionality, involves considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision-maker’s view depending on the context’.[[35]](#footnote-36) It should be noted though that in the UK the authorities which make it clear that reasonableness review involves considerations of weight and balance are still rare exceptions to the common tendency to ignore the issue of weighing and balancing while applying the reasonableness test.[[36]](#footnote-37)

If reasonableness is – and must be – a weighing and balancing test,[[37]](#footnote-38) it sheds a new light on the relation between reasonableness, rationality and indirectly – proportionality – as grounds of judicial review.

**4. Rationality and proportionality**

It is impossible to explore the meaning of rationality as ground of review without referring to the principle of proportionality. This is so because rationality (or ‘suitability’) is a sub-test of the general proportionality test. UK courts have traditionally been unwilling to apply proportionality as a ground of review in cases which fall outside the scope of EU law or the ECHR. The common reason for this reluctance was – and still is – the (misguided) assumption that proportionality prescribes inappropriate ‘judicial activism’ by allowing or requiring courts to overstep their role and to ‘make the decision for the administrative body’.[[38]](#footnote-39)

Since the Human Rights Act 1998 came into force in the UK and required UK courts to apply the proportionality test with regard to protected rights, there has been an ongoing and fierce academic dispute about whether the proportionality test should (or even can) be a general ground of judicial review in public law. Here the term ‘general ground of judicial review’ refers to proportionality being applicable to cases that do not concern protected rights or EU law. Sometimes the question is formulated slightly differently, when the dispute is about whether proportionality should be applicable to cases involving interests rather than rights (and here the assumption is that the reasonableness test can and does apply to cases concerning rights and interests).[[39]](#footnote-40) I will not try to summarize the main arguments here.[[40]](#footnote-41) Whether proportionality should or should not be a general ground of review in UK public law, it is well-established that it is a ground of review in cases concerning protected rights and EU law. This means that during the last decades UK courts and public law scholars have been familiarising themselves with the proportionality test – and its sub-tests, including that of rationality.

It is common to refer to the principle of proportionality as a four-stage test which includes: (1) legitimate aim, (2) suitability (or rational connection); (3) necessity (or applying the least intrusive measure); and (4) proportionality in the narrow sense (or proportionality stricto sensu).[[41]](#footnote-42) These sub-tests are normally applied in the following way.

The first stage under the principle of proportionality is to find a legitimate aim. The aim should be of the kind that can justify imposing limits on rights or interests. It should also be an aim that the administrative body is authorized to pursue. In fact, we are asking whether the administrative body took into account only relevant considerations or was acting to achieve a legitimate or proper purpose.

The second stage is the suitability or rationality test. Here we are asking whether the means (that is, interfering with a protected right or interest) can achieve the legitimate aim of the law or of the administrative decision. If there is no rational connection of any kind between the means and the end, that is, if the means cannot or does not achieve the end, then this is a decision that no rational person could have made. Rationality, understood in this way, is an existing ground of judicial review in the UK.[[42]](#footnote-43)

The third stage is the necessity test. Here the administrative body is required to prove that the means that were applied are necessary to achieve the end. It must find the least restrictive means (in term of restricting protected rights) that is still equally effective. A less restraining demand would be to find a less restrictive means (rather than the least restrictive one) that is still equally or similarly effective. Here we still assume that the administrative body is allowed to achieve its legitimate purpose in full. We simply require it to achieve its purpose while inflicting less harm – or the least possible harm – to rights or interests.

Once the least restrictive means has been found, we apply the fourth sub-test, which is the narrow test of proportionality – or proportionality stricto sensu. Here we ask whether the least interference possible with the protected right or interest is still too excessive or indeed disproportionate. Under the narrow proportionality test, we ask whether the weight accorded to the legitimate aim and to the protected right or interest was distorted. We ask whether the legitimate aim is sufficiently weighty to justify the least restrictive means that was applied, which can still be a harsh one. The narrow proportionality test is clearly a test of weighing and balancing and as such it is not different in any sense from the reasonableness test.

This common understanding of the proportionality test, together with perceiving reasonableness as a balancing test, sets the conceptual background for the overlooked differences between rationality and reasonableness as grounds of review – and for the arguments against applying rationality as a ‘mega ground of judicial review’.

**5. Unravelling a conceptual mess: rationality in UK public law**

## A. Introduction

We now know that an unreasonable decision can only mean taking into account all the relevant considerations, and only the relevant considerations, while according an improper or distorted weight to these considerations – thus striking a distorted balance between them. This insight requires us to ask (a) whether it is conceptually accurate or helpful to continue seeing reasonableness and rationality as indistinguishable grounds of review, and (b) if rationality is a distinct ground of review – what could be its distinct content?

As noted above, in UK public law, ‘irrationality’ and ‘unreasonableness’ are often indistinguishable.[[43]](#footnote-44) Quite often the term ‘*Wedensebury* reasonableness’ is replaced by ‘*Wednesbury* irrationality’.[[44]](#footnote-45) Courts have repeatedly argued that a decision would be unreasonable if it disclosed an error in reasoning that robbed the decision of its ‘logical integrity’;[[45]](#footnote-46) or if it defies comprehension or is made by ‘flawed logic’.[[46]](#footnote-47) Thus, an unreasonable decision is logically flawed, which in turn makes it ‘irrational’. In some cases, this way of describing what an unreasonable decision is, is probably an attempt to soften *Wednesbury* reasonableness or the ‘reasonableness as insanity test’ without assuming what might be perceived as excessive power to apply strict scrutiny with regard to the merits of the administrative decision. Therefore, unreasonable public officials do not have to be insane. They may simply be ‘irrational’ or ‘illogical’. This test may be perceived as slightly more relaxed than the *Wednesbury* test but still stricter than the modified reasonableness test.

In the late 1990s doubts started to arise as to the accuracy of equating unreasonableness with irrationality.[[47]](#footnote-48) In 1999, for example, Lord Woolf MR rightly argued that ‘the label of irrationality often did not do justice to the decision-maker, who would often be the most rational of persons’.[[48]](#footnote-49) Lord Woolf’s statement is no doubt true, yet he did not elaborate on this point and did not explain how a rational decision of a rational decision-maker can still be unreasonable. This point was also not sufficiently developed in further judicial decisions and academic writings. As at 2019, ‘unreasonableness’ and ‘irrationality’ are being used to describe one particular head of judicial review – one that relates to scrutinizing administrative discretionary powers.

It is worth noting that the conceptual obscurity with regard to the term ‘reasonableness’ resulted in conceptual obscurity with regard to the term ‘rationality’ as well. Since 1947 and to a great extent up until now, UK courts have not clearly defined the nature of reasonableness as a ground of judicial review, nor what an unreasonable decision is. Similarly, and since reasonableness is still equated with rationality, few attempts have been made to define the meaning of an ‘irrational decision’ and to describe exactly when decisions become irrational or illogical.

Rationality is a complex concept. It has more than one meaning. We sometimes use different meanings of rationality for different purposes or within different contexts. Max Weber, for example, identified four types of rationality: practical, theoretical, substantive and formal.[[49]](#footnote-50) In short: practical rationality exits as a manifestation of one’s capacity for means-end rational action; Theoretical rationality is a matter of evidential and argumentative support; Substantive rationality is subject to values and ethical norms; and formal rationality is subject to impersonal calculation of an action using universally applied rules, law and regulations.

This is, of course, not an exhaustive list.[[50]](#footnote-51) But while we should appreciate that rationality can be used in different ways and have different meanings within different contexts, we should also appreciate the need for conceptual clarity and consistency when rationality is being used within one specific context – and in our case – as ground of judicial review in public law.

Currently in UK public law, rationality review is understood in the following ways: (1) as indistinguishable from reasonableness; (2) as a distinct ground of review that, compared to reasonableness, sets a lower hurdle for the administrative body; (3) as a ground of review that focuses on the decision-maker’s ‘mental process’ as opposed to reasonableness review that focuses on the outcome – i.e. the decision-maker’s decision; (4) as a mega ground of judicial review that covers more specific grounds of review such as acting in bad faith, acting capriciously or arbitrarily etc.; (5) as identical to fairness, consistency or equality; and (6) as ‘instrumental rationality’ – that is, as requiring logical or causal relation between means and end.

The first way of perceiving rationality review – seeing it as indistinguishable from reasonableness review – was discussed and criticised above. [[51]](#footnote-52) Ways 2-5 will be discussed and debunked below. It will then be argued that the best way of understanding rationality in public law is the sixth way described above, i.e. seeing it as ‘instrumental rationality’ that requires logical or causal relation between means and end.

## B. Rationality as a ‘lower hurdle’ ground of review

In some cases rationality was perceived as a somehow different standard of behaviour or decision-making. In *Evans v Attorney General*,[[52]](#footnote-53) for example, the law stated that the Attorney General had the authority to act in a certain way – only if they had ‘reasonable grounds’ to do so. In this case, the question was whether letters passing between HRH The Prince of Wales and ministers in various government departments should be disclosed (pursuant to a request made by Mr Evans, a Guardian journalist). The Attorney General stated that he had, on reasonable grounds, formed the opinion that the Departments had been entitled to refuse disclosure of the letters. Both Lady Hale and Lord Mance agreed that in this case ‘reasonable grounds’ is a higher hurdle than ‘mere rationality’.[[53]](#footnote-54) This means that an administrative body can act rationally yet unreasonably at the same time. The difference between the two concepts was not, however, explained in detail – and was limited to the specific context of the case. In *Evans*, the relevant law was section 53(2) of the Freedom of Information Act 2000 that authorises the administrative body to ignore a judicial decision to disclose information, if the relevant administrative officer states that he has ‘on reasonable grounds’ formed the opinion that the judicial decision to disclose information should be ignored. As Lady Hale explained, and within the context of section 53(2), it is not reasonable for an administrative officer to ignore a judicial decision simply because, ‘on the same facts and admittedly reasonably’, he takes a different view from that adopted by the court.[[54]](#footnote-55) Therefore, ignoring a judicial decision to disclose information just because the administrative body disagrees with that decision, and without taking into account facts and arguments which were not before the tribunal or court, may be ‘rational’ but not ‘reasonable’.

According to this reading of Lord Mance and Lady Hale’s opinions, there are indeed cases where reasonableness review will set a higher hurdle than rationality review. This reading, however, should be treated with caution, because of two reasons. First, both Lord Mance and Lady Hale did not fully explain what ‘mere rationality’ means (beyond the context of this case) – and how it differs from reasonableness. Second, it seems that both Lord Mance and Lady Hale differentiated between ‘mere rationality’ and ‘reasonableness’ – but also used the concepts ‘rationality’ and ‘reasonableness’ indistinguishably. A close reading of their opinions reveals that their reasoning was, at times, as follows: it is both irrational and unreasonable for the administrative body to ignore a judicial decision merely because the administrative body disagrees with that decision, even though the administrative body’s view, as a stand-alone view, may be both rational and reasonable.

An interesting attempt to differentiate between rationality and reasonableness was made by Timothy Endicott who implied that irrationality indicates a more severe problem with the exercise of discretion. Endicott argues that ‘an irrational decision is one that has no intelligible purpose’ and that ‘irrational actions are just mad’[[55]](#footnote-56) – while unreasonable actions are not necessarily so. Perceiving irrationality in that way corresponds with Weber’s ‘practical rationality’ (a manifestation of one’s capacity for means-end rational action) but also his ‘theoretical rationality’ (as a matter of evidential and argumentative support). Perceiving rationality in that way does differentiate it from reasonableness and may correspond with the view in *Evans* that ‘reasonable grounds’ is a higher hurdle than ‘mere rationality’. Yet more work should be done here in order to explain the meaning of rationality and how exactly it differs from reasonableness. Seeing rationality as a test that refers to the relation between means and end, as will be suggested below, builds on the initial argument suggested by Lady Hale, Lord Mance, Timothy Endicott and others, according to which rationality and reasonableness are not quite the same thing.

## C. Rationality as ‘mental-process’ related ground of review

Another attempt to differentiate between rationality and reasonableness was made by Lord Sumption in *Hayes v Willoughby* (2013).[[56]](#footnote-57) In *Hayes* Lord Sumption held that ‘rationality is not the same as reasonableness. Reasonableness is an external, objective standard applied to the outcome of a person’s thoughts or intentions… A test of rationality, by comparison, applies a minimum objective standard to the relevant person’s mental processes’.[[57]](#footnote-58) Here, rationality is not only perceived as a distinct ground of review that sets a lower hurdle for the administrative body – as suggested by Lord Mance and Lady Hale in *Evans*. It is also perceived as a completely different ground of review in terms of its content. Lord Sumption asserts that whereas reasonableness is a standard that is applied to the outcome – i.e. the administrative decision, rationality is a standard that is applied to the decision-maker’s ‘mental process’ – i.e. their thoughts, intentions etc.

Three comments can be made here: first, Lord Sumption’s view about the nature of reasonableness as an outcome-based standard of review is not shared by all. Second, and within the context of reasonableness, a clearer distinction should be made between the reasons that the administrative body took into account – and the outcome of weighing and balancing these reasons. Third, Lord Sumption did not provide an accurate explanation as to the nature of rationality as a ‘mental-process’ based standard of review. And in more detail:

First, Lord Sumption’s view about the nature of reasonableness as an outcome-based standard of review does not necessarily reflect the common view on this point. It is interesting to note that Lord Sumption’s perception of reasonableness is utterly different than Lady Hale’s perception of the concept. Two years after *Hayes*, in the *Braganza* case from 2015, Lady Hale submitted that ‘it is of the essence of “*Wednesbury* reasonableness” (or “*GCHQ* rationality”) review to consider the rationality of the decision-making process rather than to concentrate upon the outcome’.[[58]](#footnote-59) It seems that by ‘decision-making process’ Lady Hale refers to the considerations that were taken into account (i.e. insisting that only relevant considerations will be considered) and that by ‘the outcome’ she refers to the result of weighing and balancing these relevant considerations. Either way, and in sharp contradiction to Lord Sumption’s view, according to Lady Hale ‘reasonableness’ does not focus on the outcome which is the decision that has been made, but rather on the decision-making process. Things then become slightly more confusing because when Lady Hale asserts that the purpose of reasonableness is to focus on the process, she in fact says that the purpose of reasonableness is ‘to consider the *rationality* of the decision-making process’. This is yet another example of using reasonableness and rationality indistinguishably – a confusing tendency that was discussed above.

Second, the claim made by Lord Sumption, that reasonableness is a standard applied to the outcome of a person’s thoughts or intentions – and not to these thoughts and intentions themselves – needs further clarification. It is perhaps better to replace the distinction between the outcome – and thoughts and intentions, with the distinction between the outcome and the reasons that led to this outcome.[[59]](#footnote-60) The distinction between outcome and reasons within the context of reasonableness will then echo a similar distinction between means, end and outcome within the context of rationality.

Reasonableness is indeed an ‘outcome-based’ standard of review. A decision is reasonable not because the decision-maker has ‘evident and intelligible’ justification for making that decision or because relevant considerations were accorded proper weight. A decision is reasonable only because of its content. According proper weight to relevant considerations helps in making reasonable decisions. But a decision-maker may make a reasonable decision by accident, following a completely misguided decision-making process or ‘mental process’. The decision-maker may provide utterly unintelligible reasons for their decision or accord completely distorted weight to the relevant considerations and still make a reasonable decision. As long as there are sufficiently weighty reasons for justifying a decision, the decision is reasonable regardless of whether these reasons were actually taken into account or given proper weight. A decision to wear a helmet while riding a motorcycle is reasonable, even if the motorcyclist wears the helmet mainly because he likes the way he looks wearing it, while according very little weight to the obvious health and safety reasons. Therefore, if a distorted weight is accorded to the relevant considerations, it will normally lead the decision-maker to make a decision that is unreasonable in terms of its content, but this does not have to be the case.

This is why reasonableness is an outcome-based standard of review. That part of Lord Sumption’s observation is true. The second part, however, the one that perceives rationality as ground of review that ‘applies a minimum objective standard to the relevant person’s mental processes’, is not quite accurate. This is so because rationality, properly understood, is also, in part, an outcome-based standard of review, that, much like reasonableness, ignores the decision-maker’s ‘thoughts and intentions’ or what Lord Sumption refers to as ‘mental-process’. Rationality, properly understood, reviews the relation between means and end. A decision is rational if it applies the proper means for achieving a certain end. But, rationality is a standard that is applied both to the decision-making process and to the decision itself. Consider the following example: let us assume that I wish to promote my general well-being. I stop a stranger on the street and ask her to give me an advice that will promote my well-being. The stranger says ‘never get married and you will be forever happy’. I follow her advice and live a full and joyful life as a result. The decision-making process was (ex-ante and in principle) utterly irrational. If the end is promoting my well-being, asking for an advice from a stranger is by far not the proper means to achieve that end. But the decision itself, the decision to never get married, turned out to be rational after all (ex-post facto). It did achieve its end (promoting my well-being) and was always likely to achieve that end because, as it turned out, I am not the marrying type.

Rationality is, therefore, not only about ‘thoughts and intentions’. And much like reasonableness – it does focus on the outcome, at least in part. The difference between rationality and reasonableness lies, therefore, elsewhere. In short: reasonableness review asks ‘whether there are sufficiently weighty reasons that can justify the decision’. The answer to this question is given after balancing the reasons for and against making that decision. Rationality review asks a completely different question: it asks ‘whether the means chosen are suitable for the end, or whether it is likely that the means will achieve that end’.

Third, Lord Sumption’s view that rationality ‘applies a minimum objective standard to the relevant person’s mental processes’ requires further clarification. As will be shown in the following section, the clarification provided by Lord Sumption reveals that for him, rationality is in fact a mega-ground of review as it includes multiple other grounds, all of which are already well-established distinct grounds of review in UK public law.

## D. Rationality as a mega-ground of judicial review

While acknowledging that there are differences between rationality and reasonableness is a step in the right direction, perceiving rationality as mega-ground of review raises significant concerns. This perception of rationality can be found in its clearest and most lucid way in two recent judgments that were handed down by Lord Sumption in *Hayes* (2013)[[60]](#footnote-61) and more recently in *Gallaher v. The Competition and Markets Authority* (2018).[[61]](#footnote-62)

In *Hayes*, Lord Sumption held that ‘a test of rationality… applies a minimum objective standard to the relevant person’s mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse’.[[62]](#footnote-63) Lord Sumption’s approach assigns the rationality test to at least three different grounds of review.

First, rationality requires ‘good faith’. But, acting in bad faith means either taking into account irrelevant considerations – while being aware of that – or aiming to achieve an improper purpose – while being aware of that as well. These are already existing grounds of review in public law. Perceiving them as part of the rationality test adds nothing to our understanding of these grounds – and is conceptually confusing. Acting in bad faith entails dishonesty and ill-will. It has nothing to do with any common understanding of rationality. It has nothing to do with the way in which rationality is being perceived as part of the proportionality test, i.e. with rationality as a test that refers to a logical or causal connection between means and end. A public official can act in bad faith yet apply the most suitable means, or just a suitable means for achieving her (improper) purpose. If the Prime Minister, for example, wishes to gain her daughter’s love, she could grant her daughter her wish and appoint her as the Minister of State for Health, even though the daughter has no qualifications for the job. Many things can be said about the Prime Minister in this case. It can be argued that she is biased; that she took into account an irrelevant consideration; and that she acted in bad-faith as she knew very well she was biased and that gaining her daughter’s love was in fact irrelevant consideration. Yet the Prime Minister acted rationally as she did apply a suitable means for achieving her purpose.

Second, and according to Lord Sumption, rationality requires ‘an absence of arbitrariness or capriciousness’.[[63]](#footnote-64) This view is partly accurate – and it is partly accurate only when we use rationality as ground of review that applies to the decision–making process (and as indicated above, rationality review goes beyond the decision-making process. It is applied to the content of the decision itself). Decisions are arbitrary and capricious not because of their content but because of the decision-making process. Arbitrary and capricious decisions may not be grounded in reason (ex-ante) but they may be proven to be rational (ex-post). The problem with these decisions is not their irrational content but rather the fact that the decision-making process (gathering relevant information, evaluating the information and reasoning a conclusion) is flawed or indeed irrational. An extreme example can illustrate this point. Let us assume that a public official is granted ‘unlimited authority’ to apply whatever measures he deems necessary in times of flooding in order to secure the safety of residents in flooded areas. A certain area is heavily affected by a flood. The public official immediately decides to flip a coin. Heads – he will make a human sacrifice to the many-faced God in order to stop the flood. Tails – he will forcibly evacuate all residents. This decision-making process is arbitrary and capricious as the public official did not gather relevant information, did not evaluate it and cannot reason his conclusion. We could also argue that the decision-making process is not only arbitrary and capricious – but irrational as well. This is so because if the end is making the right decision, then flipping a coin is probably not the most appropriate means to that end. And yet, the fact that the decision-making process is irrational does not make the decision itself irrational as well. In our case, only the first decision (making human sacrifice) is irrational as it lacks logical or causal connection between means and end (it is obviously also illegal for other reasons). Making a human sacrifice to stop the flood is irrational, not because it results from an arbitrary, capricious and irrational decision-making process, but because the decision itself lacks a logical connection between means and end. As to the second decision (forcibly evacuating all residents) – even though it results from arbitrary, capricious and irrational decision-making process, it is rational after all. It may not be reasonable or proportional, as there may be other efficient and less intrusive ways to respond to floods apart from forcibly evacuating all residents, but it is still rational as it demonstrates at least some logical or causal connection between means (evacuating all residents) and end (securing the safety of residents in flooded areas). Thus, capricious and arbitrary decision-making process and irrational decisions are both illegal, but for different reasons.

Third, Lord Sumption states that irrationality refers to ‘reasoning so outrageous in its defiance of logic’. This brings us fairly close to *Wednesbury* unreasonableness or to ‘unreasonableness as insanity’. I have already discussed the shortcomings of this test and the need to differentiate between any type of reasonableness test and the rationality test.[[64]](#footnote-65)

Lord Sumption’s view, which (and this must be emphasized) reflects the common view in UK public law, not only equates rationality with reasonableness but also uses ‘rationality’ in the umbrella sense (or as mega-ground of review). This is troubling for three reasons.

First, much like ‘reasonableness in the umbrella sense’, ‘rationality in the umbrella sense’ adds nothing to already existing, more specific grounds of judicial review. Second, using rationality in the umbrella sense releases the courts from the need to explain what rationality in fact means, thus resulting in ongoing conceptual inaccuracies and inconsistencies. And third, using rationality both as a synonym for reasonableness and as a mega-ground of review further increases the conceptual mess within UK public law.

## E. Rationality as fairness, consistency or equality

In some cases, rationality was perceived as a requirement for fairness, consistency or equality. In *Matedeen v Pointu* (1999) Lord Hoffmann stated that ‘treating like cases alike and unlike cases differently is a general axiom of rational behaviour.’[[65]](#footnote-66) Lord Hoffmann did not explain, however, why that would be the case. In the *Belmarsh* case (2005)[[66]](#footnote-67) Lord Hope concluded that ‘the distinction which the government seeks to draw between these two groups - British nationals and foreign nationals - raises an issue of discrimination. But, as the distinction is irrational, it goes to the heart of the issue about proportionality also.’[[67]](#footnote-68) Here, again, no explicit explanation was given as to why it is irrational to treat like cases differently. The link between rationality, fairness and equality lies at the heart of the recent and important *Gallaher* case (2018).[[68]](#footnote-69) In that case, the appellants were under investigation for tobacco price-fixing. They reached a settlement with the authorities for discounted fines. Another price-fixer (TMR), which also reached a settlement, got an assurance from the authorities that if there were a successful appeal by others against the authorities’ investigation findings, the authorities would apply the outcome of any appeal to TMR as well. Such an appeal was indeed successful and TMR got their money back. The appellants asked the authorities to get their money back as well – but were denied. The Supreme Court unanimously decided that the authorities did not breach the duty of fairness and of equal treatment and therefore acted rationally.

It is not quite clear from the court’s reasoning why and how a discriminatory or unfair behaviour is also irrational. It has been said in *Gallaher* that what may be seen as discriminatory or unfair behaviour – will be rational after all, if there is an ‘objective justification’ for that behaviour. The court in *Gallaher*, and especially Lord Carnwath and Lord Sumption asserted that it is irrational to treat like cases differently – if there is no ‘objective justification’ for the different treatment. [[69]](#footnote-70) Unfortunately, the vague term ‘objective justification’ does not really clarify the meaning of rationality and the way it relates to fairness and equality. To add to the confusion, Lord Briggs in *Gallaher* referred to rationality and ‘objective justification’ as separate concepts when he concluded that the administrative decision in that case ‘was both objectively justified and a rational response to the predicament which it faced.’[[70]](#footnote-71)

It is understandable why UK courts would classify discriminatory or unfair behaviour as irrational when they exercise their judicial review powers. In UK public law, there is no general, distinct duty to not discriminate and treat people equally – or indeed – like cases alike. Similarly, fairness itself (outside the context of procedural fairness) is a not an independent, distinct ground of judicial review. Rationality, however, is. UK courts, therefore, use the well-established ground of rationality to review discriminatory and unfair administrative decisions. As much as this judicial practice is understandable, it is also unnecessary and results in conceptual inaccuracies and misconceptions. It is true that rationality may relate to fairness and equal treatment. What Weber called ‘substantive rationality’ is a behaviour that is subject to values and ethical norms – which may include equality and fairness. But within the context of rationality as ground of judicial review, this perception of rationality is not satisfactory – for two reasons. First, ‘substantive rationality’ is, by far, not the common understating of the concept. It is also different from the way rationality is being used within the context of the proportionality test. Therefore, using ‘substantive rationality’ as a ground of review would require clear explanation as to why this less common understanding is being used. Second, ‘substantive rationality’ is clearly too broad to be used within the legal context. It would mean that every immoral or unethical behaviour is also irrational and therefore illegal. It is doubtful whether this approach accurately describes the principles and scope of judicial review in UK public law.

The tendency to perceive rationality as a concept that covers equality-based or fairness-based claims, raises further difficulties. As noted above, in *Hayes*, Lord Sumption used rationality as a general ground of judicial review that refers to the merits of administrative decisions or the reasoning of such decisions. Rationality, according to Lord Sumption, includes more specific grounds of judicial review such as acting in bad faith, taking into consideration irrelevant considerations, aiming to achieve improper purposes, acting arbitrarily and capriciously and acting unreasonably in the *Wednesbury* sense. In *Gallaher*, Lord Sumption also referred to discrimination and unfairness as aspects of irrationality.[[71]](#footnote-72) Also in *Gallaher*, Lord Sumption made it clear that perceiving rationality as mega-ground of review was in fact the result of a well-thought out and calculated judicial policy. Lord Sumption said that:

‘In public law, as in most other areas of law, it is important not unnecessarily to multiply categories. It tends to undermine the coherence of the law by generating a mass of disparate special rules distinct from those applying in public law generally or those which apply to neighbouring categories. To say that a decision-maker must treat persons equally unless there is a reason for treating them differently begs the question what counts as a valid reason for treating them differently. And likewise, to say that the result of the decision must be substantively fair, or at least not “conspicuously” unfair, begs the question by what legal standard the fairness of the decision is to be assessed. Absent a legitimate expectation of a different result arising from the decision-maker’s statements or conduct, a decision which is rationally based on relevant considerations is most unlikely to be unfair in any legally cognisable sense’.[[72]](#footnote-73)

With respect, this view – against using equality as a general, distinct ground of review, and for using rationality review instead – does not survive scrutiny. Surely there is no need to ‘unnecessarily multiply categories’, i.e. to unnecessarily multiply grounds of judicial review, but in our case, the principle of equality already exists in UK public law. Equality is a distinct political, moral and legal concept. Equality law is a well-established, distinct legal and academic discipline. There are good reasons why the Equality Act 2010 was not called the Rationality Act 2010. The vast academic writing about equality almost never refers to rationality as a relevant, related concept.

Lord Sumption is worried that treating equality as an independent ground of judicial review in public law will ‘undermine the coherence of the law by generating a mass of disparate special rules distinct from those applying in public law generally’. This concern is, however, ill-founded. First, it is hard to understand why having more distinct grounds of judicial review would ‘undermine the coherence of the law’ – and no persuasive explanation is provided in order to establish this argument. Second, the coherence of the law depends on and results from the existence of general principles from which specific rules are derived. The coherence of public law depends *inter alia* on general principles of judicial review that give rise to specific grounds of review. It does not depend on having no more than a few general grounds of review that cover all possible cases. Third, forcing distinct cases and circumstances into one ‘mega ground of review’ will in fact undermine the coherence of law. Equality-based claims were not first introduced to UK public law in 2018 in *Gallaher*. As noted above, equality law is a distinct discipline, with distinct doctrines, concepts and reasoning. The Equality Act 2010, which is an inherent part of UK public law, led to case-law that uses these doctrines, concepts and reasoning. Treating equality-based claims in public law that are not covered by the Equality Act 2010 (or Article 14 of the ECHR) as claims that are external to the general idea of equality and have no independent existence but under the realm of ‘rationality’, will inevitably lead to undermining the coherence of both public law – and equality law.[[73]](#footnote-74) Fourth, and within the special context of equality, Lord Sumption was right when he said that ‘to say that a decision-maker must treat persons equally unless there is a reason for treating them differently begs the question what counts as a valid reason for treating them differently’. This is why equality had been described as an ‘empty principle’ and why its definition is often described as circular or tautological. We cannot simply assume that a certain difference between cases justifies treating them differently. We need to morally justify this assertion. This is where disagreements arise and this is where the principle or the definition of equality does not provide answers. All of these criticisms of equality as a ground of review are true and well-known. However, it is not clear how subjecting the principle of equality to rationality review solves any of these difficulties. In *Gallaher*, Lord Sumption argued that it is irrational to treat like cases differently – if there is no ‘objective justification’ for the different treatment.[[74]](#footnote-75) If we use Lord Sumption’s terminology and criticism of equality, we could say that ‘to say that a decision-maker must treat persons equally unless there is objective justification for treating them differently begs the question what counts as an objective justification for treating them differently’ – or – ‘to say that a decision-maker must treat persons equally unless it is rational to treat them differently begs the question what counts as rational when we treat them differently’. Refusing to apply equality as an independent ground of review and replacing the ‘language of equality’ with that of ‘rationality’ contributes nothing to the coherence of the law. It merely describes a legal problem – which is clearly a problem that relates to equality – by using other words. These words do not promote coherence, certainty or consistency in law. They merely create conceptual confusion.

## F. Instrumental rationality

Thus far it has been argued that the following ways of perceiving rationality as ground of judicial review are far from satisfactory: (1) rationality as indistinguishable from reasonableness; (2) rationality as a distinct ground of review that, compare to reasonableness, sets lower hurdle for the administrative body; (3) rationality as ground of review that focuses on the decision-maker ‘mental process’ as opposed to reasonableness that focuses on the outcome – the decision-maker’s decision; (4) rationality as a mega ground of judicial review that covers more specific grounds of review; and (5) rationality as identical to fairness, consistency or equality.

In light of the shortcomings of the above approaches to rationality, there is a need in UK public law for conceptual clarity and consistency. This can be achieved by applying ‘instrumental rationality’ as a distinct ground of review.

‘Instrumental rationality’ is perhaps the most common perception of rationality. It is often applied in the legal world and especially in public law – as part of the proportionality test. It describes rationality as deploying the appropriate means in order to achieve certain ends (whatever these ends may be). For Weber, ‘instrumental rationality’ – is in fact part of what was described above as ‘practical rationality’.[[75]](#footnote-76)

Rationality in this narrow sense is all about the logical or causal connection between means and ends. It does not involve any moral or other evaluation of the ends themselves. For example, if one wishes to get drunk, a rational decision would be to drink alcoholic beverages. An irrational decision would be to drink orange juice. When we evaluate the rationality of the decision to drink alcoholic beverages, we do not make any moral judgment with regard to the purpose of getting drunk. We only ask whether drinking alcoholic beverages would or could achieve that purpose.

Instrumental rationality (or ‘suitability’) is in fact part of the proportionality test.[[76]](#footnote-77) It requires the authorities to prove that the means applied (i.e. interfering with a protected right or interest) can achieve the legitimate end of the law or of the administrative decision.[[77]](#footnote-78) It is not a balancing test. It is a logical or causal test. It does not require the administrative body or the court to accord proper weight to relevant considerations and to strike a proper balance between these considerations. It merely requires the establishing of a logical or causal relation between means and end.

Lord Mance indirectly acknowledged this perception of rationality when he explained that ‘both reasonableness review and proportionality involve considerations of weight and balance… the advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages.’[[78]](#footnote-79) By differentiating between ‘suitability’ (which is often referred to as ‘rationality’) – and ‘the balance or imbalance of benefits and disadvantageous’ – Lord Mance acknowledges that there is a difference between suitability (i.e. instrumental rationality) and the balancing test of reasonableness or proportionality *stricto sensu*.

After years of applying the proportionality test in UK public law (in cases involving the ECHR or EU law) we now know what the rationality test means within the context of public law – and we know that it is not a balancing and weighing test. Perceiving rationality as ground of review that only focuses on the relation between means and end is the most helpful and accurate way to understand the distinctiveness of this ground of review. This perception of rationality is sufficiently specific – but not too narrow. It avoids vagueness and uncertainties. It does not apply to cases that are better described by other grounds of review. It is the only concept, together with ‘suitability’, that describes the necessity to have some relation between means and end – and it is already being applied in that way within the framework of proportionality review. All that we need to do is to apply this concept in the same way, clearly and consistently, also outside the context of proportionality review.

The perception of rationality review as ‘instrumental rationality’ explains why it is confusing and misleading to equate rationality with reasonableness, as only the latter is a balancing test. We should acknowledge that we have in UK public law two completely different grounds of judicial review: rationality and reasonableness. The only similarity between the two is that they allow the court to scrutinize the content of the administrative decision (much like other grounds of review such as irrelevant considerations and improper purposes). But this is where the similarity ends as the nature of these ground of review, the requirements that they set for the administrative body and the levels of scrutiny they allow the court to apply are completely different.

The suggested distinction between rationality and reasonableness can also mark the distinction between judicial activism and judicial deference. In public law, the common (and accurate) view is that the nature of judicial review and the level of scrutiny applied in every case depend on the context.[[79]](#footnote-80) Some argue that there is a spectrum of judicial review on the merits of administrative decisions (in terms of levels of scrutiny) where at one end we find *Wednesbury* reasonableness that equates reasonableness as sanity and at the other end we find the proportionality test. Between these ends we find ‘modified/variable reasonableness’ and ‘anxious/strict scrutiny’ (in cases concerning rights).[[80]](#footnote-81) The distinction suggested here between reasonableness and rationality may mean that rationality, properly understood, is placed at the ‘deference end’ of the spectrum, next to *Wednesbury* reasonableness or perhaps beyond it. Rationality may also be placed beyond the spectrum of judicial review on the merits of administrative decisions precisely because rationality, unlike *Wednesbury* reasonableness, modified reasonableness, ‘anxious scrutiny’ and proportionality (*stricto sensu*), is not a balancing test. Also, ‘rationality’, as a stand-alone ground of review, allows lower, almost minimal scrutiny. If judicial intervention should only exist if the decision is irrational in a strict sense of that term, such that the public body’s action lacks logical or causal connection between means and end, it would lead to extreme judicial deference and would radically curtail judicial review as very few decisions could ever be successfully challenged on this basis. As the purpose of this paper is not to critically evaluate judicial activism or judicial deference but only to clarify conceptual misconceptions within the context of grounds of judicial review, I will not elaborate on this point here.[[81]](#footnote-82)

The advantages in perceiving rationality review as ‘instrumental rationality review’ do not mean, of course, that applying rationality review, properly understood, is free from difficulties. Some aspects of rationality review are quite straightforward. The content and meaning of rationality as ground of review is quite clear: reviewing the logical and causal connection between means and end. The scope of this ground of review is also clear. It applies to each and every branch of public law. It is not limited to right-related cases, to EU law or to exceptionally important interests. Rationality review applies to all discretionary powers in cases where the administrative authority acts in order to achieve a certain end. Other aspects of rationality review, however, may not be that straightforward. One question that could be asked is whether the means must be suitable of achieving the end at least to a small extent – or perhaps a stronger connection between means and end is necessary. Another question could be about the nature and strength of the connection between means and end: does it only have to be a logical connection – i.e. means that, in principle, could achieve the end; or does it have to be a causal connection – i.e. means that is likely to achieve the end - or perhaps means that is highly likely to achieve the end. We could also ask whether the connection between means and end should be reviewed ex-post or ex-ante. Lastly, courts will have to decide the appropriate level of scrutiny (or deference) that needs to be applied when disputes arise as to whether there is logical or causal connection between the means and the end. These questions will not be answered here as the possible answers to them do not affect the main argument made here with regard to the conceptual and practical need to perceive rationality as a distinct ground of review – and to perceive it as ‘instrumental rationality’. An in-depth discussion about the exact way of applying ‘instrumental rationality review’ is very much needed, and will have to build on the arguments made in this paper.

**6. Conclusion**

Ever since the *Wednesbury* decision in 1947, UK public law has been struggling to comprehend the meaning of ‘rationality’ and its relation to the allegedly related concept of ‘reasonableness’ – as well as to other grounds of judicial review.

The main purpose of this paper was to promote conceptual clarity in UK public law by indicating the nature of reasonableness and rationality as grounds of judicial review; highlighting the often overlooked differences between the two; and explaining the difficulties in perceiving rationality in the umbrella sense or as a mega ground of review.

It was argued that reasonableness is in its essence a balancing and weighing test – and that this understanding of reasonableness review applies both to the ‘original’ *Wednesbury* reasonableness and to the modified reasonableness review; that the most accurate, helpful and consistent way of understanding rationality review in public law is to perceive it as instrumental rationality - as a ‘suitability test’ that reviews the logical and causal connection between means and end (and that this perception of what rationality means is in fact applied as part of the proportionality test); and that rationality, unlike reasonableness, is not a weighing and balancing test, thus it is wrong to use the concepts reasonableness review and rationality review indistinguishably.

The suggested understanding of the concept of rationality will not only promote a better understanding of UK public law but will also improve the quality of judicial reasoning and will lay out a common ground for normative arguments about the scope and intensity of judicial review in administrative law. Perceiving rationality review as one that focuses on instrumental rationality will allow judges to better differentiate between possible legal flaws in administrative decisions. It will enable a more analytical approach to scrutinizing administrative decisions. Such an approach will then be more effective in guiding administrative authorities and preventing potential illegal decisions. Guiding administrative authorities by saying that their decisions should ‘rational’ is not quite as helpful as guiding them by clarifying that their decisions must show a logical or causal connection between means and ends. The latter, more precise perception of rationality review distinguishes it from other ground of review and prevents misusing it as a vague, mega ground of review. This perception of rationality review will therefore promote both more precise judicial reasoning – and more thoughtful administrative decision-making. Lastly, the important normative question about the proper scope and intensity of judicial review in UK public law cannot be answered before we lay out a common ground with regard to the meaning of the grounds of judicial review. More specifically, and within the context of this paper, without agreeing on what reasonableness and rationality mean we cannot have meaningful discussion about the proper judicial use of these grounds of review. Perceiving reasonableness review as a balancing test and rationality review as instrumental rationality promotes certainty and clarity – and sets the starting point for a discussion about the exact ways in which these ground of review should be used by courts.

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 P Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) 641; P Craig, ‘The Nature of Reasonableness Review’ *Current Legal Problems* (2013) 1, 3; M Taggart, ‘Proportionality, Deference, *Wednesbury*’(2008) *New Zealand Law Review* 423, 425; Lord Carnwath, ‘From Rationality to Proportionality in the Modern Law’, paper given at the joint UCL-HKU conference on ‘Judicial Review in a Changing Society’, Hong Kong University, 14 April 2014 (p 4); *Clark v Nomura International Plc* [2000] IRLR 766, para 40; *Braganza v BP Shipping Limited and another* [2015] UKSC 17,para 29; *Council of Civil Service Unions v Minister for the Civil Service* [[1985] AC 374](http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKHL/1984/9.html), 410 (hereinafter *GCHQ*); In Australia see: *Minister for Immigration and Citizenship v Li* [[2013] HCA 18](http://www.austlii.edu.au/au/cases/cth/HCA/2013/18.html); [(2013) 249 CLR 332](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%282013%29%20249%20CLR%20332), 365-366, but see French CJ very brief, undeveloped assertion that ‘distinction may arguably be drawn between rationality and reasonableness on the basis that not every rational decision is reasonable’: page 351. For equating rationality with reasonableness in Canadian public law see P Daly, ‘Wednesbury’s Reason and Structure’ *Public Law* (2011) 238, 242. [↑](#footnote-ref-2)
2. See below in the main text to footnote 60. [↑](#footnote-ref-3)
3. *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 (CA). In that case a cinema company was granted a license by the Wednesbury Corporation, the local authority of the market town of Wednesbury, to operate a cinema on condition that no children under 15 were admitted to the cinema on Sundays. The cinema company argued that such a condition was unacceptable, and outside the power of Wednesbury Corporation to impose. The court held that the condition was not so unreasonable that no reasonable authority would ever consider imposing it. The concept of reasonableness was applied in UK public law previous to the *Wednesbury* decision. See, for example, *Kruse v Johnson* [1898] 2 QB 91, where Lord Russell referred to ‘the reasonable man’ and classified unreasonable decisions as decisions made *ultra vires*. Yet, *Wednesbury* is widely perceived as a beginning of a new era in UK public law. [↑](#footnote-ref-4)
4. *Wednesbury* (n 3) 234. [↑](#footnote-ref-5)
5. The need for this conceptual clarity was nicely expressed by Michael Taggart who noted that ‘it is obvious that the very language that we administrative lawyers take for granted and use can be part of the problem, rather than part of the solution. In this area, words like *Wednesbury* unreasonableness… operate as symbols and their symbolism (and significance) is a product of time, place, and perspective. Anglo-Australasian administrative lawyers, it seems to me, are often divided by a common legal language. This makes it very difficult to communicate…’: Taggart (n 1) 425. [↑](#footnote-ref-6)
6. For a more detailed discussion of these points, see: Y Nehushtan ‘The Non-Identical Twins in UK Public Law: Reasonableness and Proportionality’ (2017) 50(1) *Israel Law Review* 69. [↑](#footnote-ref-7)
7. As termed by P Craig (2012) (n 1) 562. [↑](#footnote-ref-8)
8. Kruse (n 3); Craig (2012) (n 1) 646. In many pre-Wednesbury cases the court intervened simply on the grounds of relevancy or propriety of purpose, without making any formal linkage to reasonableness, thus perhaps implicitly acknowledging the unhelpfulness of ‘reasonableness in the umbrella sense’ – or the unhelpfulness of ‘reasonableness’ generally. See, for example, *R. v Minister of Transport Ex p. HC Motor Works Ltd* [[1927] 2 K.B. 401](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=57&crumb-action=replace&docguid=I5A555EE0E42811DA8FC2A0F0355337E9). [↑](#footnote-ref-9)
9. Lord Greene stated that in administrative law an unreasonable decision ‘is so unreasonable that it might almost be described as being done in bad faith’: *Wednesbury* (n 3) 229. Acting in bad faith is in fact taking into consideration irrelevant considerations or acting for improper purposes, while being aware of that. Taking into consideration irrelevant considerations or acting for improper purposes are obviously independent and different grounds of judicial review. See also Craig 2012 (n 1) 562, 646. [↑](#footnote-ref-10)
10. *Braganza* (n 1). In this private law case, the Supreme Court reviewed the reasonableness of a decision made by an employer according to which an employee committed suicide and not died in an accident. According to the employment contract, the employee’s widow was not entitled to receive any compensation in a case of suicide. The court stated that the standard required when reviewing a contractual decision is akin to that adopted for judicial review of administrative action. The court then ruled that the decision that the employee did commit suicide was unreasonable in the public law sense of having been formed without taking relevant matters into account. [↑](#footnote-ref-11)
11. For a general observation that the *Wednesbury* test still governs UK public law see A Le Sueur, ‘The Rise and Ruin of Unreasonableness [2005] *Judicial Review* 32; Daly (n 1). [↑](#footnote-ref-12)
12. *Braganza* (n 1) para 42. All five judges in fact agreed that ‘it is difficult to treat as rational the product of a process of reasoning if that process is flawed by the taking into consideration of an irrelevant matter or the failure to consider a relevant matter’ (paras 53 and 103). [↑](#footnote-ref-13)
13. See, for example, *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [1995] 1 WLR 386; *Bromley LBC v Greater London Council* [1983] 1 AC 768. [↑](#footnote-ref-14)
14. *Wednesbury* (n 3) 233–234. [↑](#footnote-ref-15)
15. *Wednesbury* (n 3) 234. [↑](#footnote-ref-16)
16. Lord Greene stated that ‘it is true to say that, if a decision … is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere … but to prove a case of that kind would require something overwhelming’: *Wednesbury* (n 3) 230. [↑](#footnote-ref-17)
17. GCHQ (n 1) 410. This case saw the court (the House of Lords) deciding, for the first time, that prerogative powers are also subject to judicial review, including reasonableness review. The administrative decision in that case was to ban employees of the Government Communications Headquarters (GCHQ) from joining any trade union. [↑](#footnote-ref-18)
18. *R v Secretary of State for the Environment, ex parte Nottingham City Council* [1986] A.C. 240, 247 (H.L.). [↑](#footnote-ref-19)
19. Timothy Endicott also argues that *Wednesbury* rationality, if taken seriously, means that an administrative authority must be mad if it made an irrational decision: Timothy Endicott, *Administrative Law* (3rd edition, OUP, 2015) 241. Endicott is right on this point – and as far as within the *Wednesbury* context ‘rationality’ is equated with reasonableness. [↑](#footnote-ref-20)
20. Craig 2012 (n 1) 646. And in Australia see: *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31, 42, where it was emphasised that reasonableness, as ground of review, ‘must not be allowed to open the gate to judicial review of the merits of a decision or action taken within power’. [↑](#footnote-ref-21)
21. P Craig, ‘Proportionality, Rationality and Review’ (2010) *N.Z. L. Rev.* 265, 273. See also J Jowell and Lord Lester, ‘Beyond Wednesbury: Substantive Principles of Administrative Law’ [1987] Public Law 368, 372. [↑](#footnote-ref-22)
22. For an in-depth analysis of the doctrine of deference in UK public law see: P Daly, *A Theory of Deference in Administrative Law: Bias, Application and Scope*(CUP 2012). [↑](#footnote-ref-23)
23. Jowell and Lester (n 21) 372. [↑](#footnote-ref-24)
24. Craig (n 1) 647; P Craig, ‘The Nature of Reasonableness Review’ *Current Legal Problems* (2013) 1, 32; *R v Secretary of State for the Home Department, Ex p Daly* [2001] 2 AC 532, 549. [↑](#footnote-ref-25)
25. *Braganza* (n 1) para 24. [↑](#footnote-ref-26)
26. Lord Cooke, for example, one of the prominent critics of *Wednesbury* reasonableness, suggested that an unreasonable decision is one that is ‘beyond the limits of reason’: Cooke, ‘The Struggle for Simplicity in Administrative Law’, in Taggart (ed), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (1986) 1, 13-16; See also *New Zealand Fishing Industry Association Inc v Minister of Agriculture & Fisheries* [1988] 1 NZLR 544 (CA) 554. [↑](#footnote-ref-27)
27. Craig (2010) (n 21) 284–285. [↑](#footnote-ref-28)
28. This is not to say that there were no previous attempts to reconstruct *Wednesbury* reasonableness. Within these attempts some authors also referred to reasonableness as a balancing test but always very briefly or implicitly. Daly, for example, in his helpful and complex analysis of what reasonableness means, suggested that ‘review of an impugned decision for unreasonableness inevitably involves a reviewing court in a consideration of the merits of the impugned decision’ and that disproportionality is in fact one of the indicia unreasonableness: Daly (n 1) 243, 258. Mark Elliott also briefly referred to reasonableness as a balancing test and indicated that recent judicial decisions did the same: M Elliott, ‘The Human Rights Act 1998 and the Standard of Substantive Review’ (2001) *Cambridge Law Journal* 301. [↑](#footnote-ref-29)
29. Craig 2013 (n 24) 2. [↑](#footnote-ref-30)
30. Craig 2013 (n 24) 2, 6. [↑](#footnote-ref-31)
31. *Wednesbury* (n 3) 233–234. [↑](#footnote-ref-32)
32. Craig (2013) (n 24) 6. [↑](#footnote-ref-33)
33. Craig (2013) (n 24) 12–18. [↑](#footnote-ref-34)
34. Daly (n 1) 240. [↑](#footnote-ref-35)
35. *Pham v Secretary of State for the Home Department* [2015] UKSC 19, para 114 (Lord Reed). [↑](#footnote-ref-36)
36. For a recent and helpful description of reasonableness in UK public law, which refers to only few cases in which reasonableness was explicitly understood as a balancing test, see Jeffrey Jowell, ‘Proportionality and Unreasonableness: Neither Merger nor Takeover’ in Hanna Wilberg & Mark Elliott (eds), *The Scope and Intensity of Substantive Judicial Review: Traversing Taggart’s Rainbow* (Hart Publishing 2015) 41, 52-53. [↑](#footnote-ref-37)
37. For a more detailed argument about reasonableness as a balancing test, see: Craig (n 24) 8–12. [↑](#footnote-ref-38)
38. See also in (n 40). For the reasons of why the assumption that proportionality prescribes inappropriate judicial activism is misguided, see: Nehushtan (n 6). The reluctance to apply proportionality as a general head of review is part of a broader approach of judicial deference which is often applied by UK courts when they review the legality of administrative acts and decisions. For an in-depth analysis of the doctrine of deference in UK public law see: Daly (n 22). [↑](#footnote-ref-39)
39. For offering a different classification which focuses on the importance of either rights or interests see: M Elliott, ‘From Bifurcation to Calibration: Twin-Track Deference and the Culture of Justification’ in Wilberg & Elliott (eds), *The Scope and Intensity of Substantive Judicial Review: Traversing Taggart’s Rainbow* (Hart Publishing 2015) 61. [↑](#footnote-ref-40)
40. For the arguments for having proportionality as a general ground of review see: Craig (n 18); M Hunt, ‘Against Bifurcation’ in D Dyzenhaus, M Hunt and G Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Oxford, Hart Publishing 2009).

For the argument against see: M Taggart, ‘Reinventing Administrative Law’, in N Bamforth and P Leyland (eds), *Public Law in a Multi-layered Constitution* (Hart, 2003) Chapter 12; M Taggart, ‘Proportionality, Deference, Wednesbury [2008] *New Zealand Law Review* 423; T Hickman, *Public Law after the Human Rights Act* (Hart Publishing, 2010) Chapter 9; T Hickman, ‘Problems for Proportionality’ [2010] *New Zealand Law Review* 303; J King, ‘Proportionality: a Halfway House’ [2010] *New Zealand Law Review* 327; D Knight, ‘Calibrating the Rainbow of Judicial Review: Recognizing Variable Intensity’ [2010] *New Zealand Law Review* 393; P Sales, ‘Rationality, proportionality and the development of the law’ (2013) 129 *Law Quarterly Review* 223. [↑](#footnote-ref-41)
41. This four-stage test was adopted and applied in *Bank Mellat v HM Treasury* [2011] EWCA Civ 1; [2011] 2 All E.R. 802,paras 68–76 (Lord Reed). For recent, excellent and in-depth discussion of proportionality in public law see A Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge, Cambridge University Press 2012); M. Cohen-Eliya and I Porat, *Proportionality and Constitutional Culture* (Cambridge, Cambridge University Press 2013); G Huscroft, BW Miller and G Webber (eds), *Proportionality and the Rule of Law* (Cambridge University Press 2014). [↑](#footnote-ref-42)
42. J Jowell (n 36) 51. See also *R v Parliamentary Commissioner for Administration, exp Balchin (No 1)* [1997] COD 146 (QB), para 27; *R v North and East Devon Health Authority, exp Coughlan* [2001] QB 213, para 65. [↑](#footnote-ref-43)
43. See also in ‘A Brief Guide to the Grounds of Judicial Review’ written by The Public Law Project – an NGO which aims to improve access to public law remedies and to educate the general public regarding matters of public law in the UK, where it is said that a decision must be demonstrably unreasonable as to constitute irrationality or perversity: <http://www.publiclawproject.org.uk/data/resources/113/PLP_2006_Guide_Grounds_JR.pdf> [↑](#footnote-ref-44)
44. GCHQ (n 1) 401-411; R Masterman and C Murray, *Exploring Constitutional and Administrative Law* (Pearson, Harlow, 2013) 528; AW Bradley and KD Ewing, *Constitutional and Administrative Law* (15 ed, Pearson, Harlow, 2011) 679. [↑](#footnote-ref-45)
45. Craig (n 1) 648 at footnote 26; *R v Parliamentary Commissioner for Administration, exp Balchin (No 1)* [1997] COD 146 (QB), para 27; *R v North and East Devon Health Authority, exp Coughlan* [2001] QB 213, para 65. [↑](#footnote-ref-46)
46. Craig (n 1) 648 at footnote 28. [↑](#footnote-ref-47)
47. Craig 2013 (n 24) 10. [↑](#footnote-ref-48)
48. *R v Lord Saville of Newdigate, exp A* [1999] 4 All ER 860, para 33; *R (Butler) v HM Coroner for the Black Country District* [2010] EWHC 43 (Admin), para 35. [↑](#footnote-ref-49)
49. S Kalberg, *Max Weber’s Types of Rationality: Cornerstones for the Analysis of Rationalization Processes in History* (The University of Chicago Press, 1980) 1151 – 1159. [↑](#footnote-ref-50)
50. For a recent and helpful discussion about the meaning of rationality, see: B Kiesewetter, *The Normativity of Rationality* (OUP, 2017). [↑](#footnote-ref-51)
51. (n 1). [↑](#footnote-ref-52)
52. *R (on the application of Evans) and another v Attorney General* [2015] UKSC 21. [↑](#footnote-ref-53)
53. Evans (n 52) para 91 (Lady Hale) and 129 (Lord Mance). [↑](#footnote-ref-54)
54. Evans (n 52) para 88. [↑](#footnote-ref-55)
55. Endicott (n 19) 241. [↑](#footnote-ref-56)
56. *Hayes v Willoughby* [2013] 1 WLR 935. [↑](#footnote-ref-57)
57. *Hayes* (n 56) para 14. [↑](#footnote-ref-58)
58. *Braganza* (n 1) para 29. [↑](#footnote-ref-59)
59. For a more detailed discussion of this argument, see: Y Nehushtan ‘The Unreasonable Perception of Reasonableness in UK and Australian Public Law’ 3 *Indian Journal of Constitutional and Administrative Law* 83 (2019). [↑](#footnote-ref-60)
60. *Hayes* (n 56). [↑](#footnote-ref-61)
61. *R (Gallaher Group LTD) v The Competition and Markets Authority* [2018] UKSC 25. [↑](#footnote-ref-62)
62. *Hayes* (n 56) para 14. [↑](#footnote-ref-63)
63. For equating irrationality with capriciousness see also *Clark v Nomura International Plc* [2000] IRLR 766, para 40. [↑](#footnote-ref-64)
64. It must be noted that Lord Sumption did not mean to equate rationality with reasonableness. On the contrary, before describing what rationality is (as described above), Lord Sumption stated that ‘rationality is not the same as reasonableness. Reasonableness is an external, objective standard applied to the outcome of a person’s thoughts or intentions… A test of rationality, by comparison, applies a minimum objective standard to the relevant person’s mentalprocesses’: *Hayes* (n 59) para 14. Yet, even if Lord Sumption did not mean to apply the *Wednesbury* test here, the problem of not defining what ‘defiance of logic’ means still remains. [↑](#footnote-ref-65)
65. Matedeen v Pointu (1999) 1 AC 98, para 9. [↑](#footnote-ref-66)
66. A v Secretary of State for the Home Department [2005] 2 AC 68. [↑](#footnote-ref-67)
67. Belmarsh (n 66) para 132. [↑](#footnote-ref-68)
68. Gallaher (61). [↑](#footnote-ref-69)
69. Gallaher (n 61) para 27, 43, 44, 55 (Lord Carnwath) and para 55 (Lord Sumption). [↑](#footnote-ref-70)
70. Gallaher (n 61) para 58. [↑](#footnote-ref-71)
71. Gallaher (n 61) para 55. [↑](#footnote-ref-72)
72. Gallaher (n 61) para 51. [↑](#footnote-ref-73)
73. It is interesting to note that a few weeks after *Gallaher* was decided by the Supreme Court, the Court handed down an important decision within the context of Article 14 to the ECHR: *McLaughlin, Re Judicial Review*[[2018] UKSC 48](http://www.bailii.org/uk/cases/UKSC/2018/48.html). In this equality-related case, the term ‘rationality’ was mentioned only once, was not developed or applied to the circumstances of the case, and did not form any part of the court’s decision. [↑](#footnote-ref-74)
74. Gallaher (n 61) para 55. [↑](#footnote-ref-75)
75. For in-depth of this type of rationality, see N Kolodny & J Brunero, *Instrumental Rationality* ([Stanford Encyclopedia of Philosophy](https://plato.stanford.edu/index.html), <https://plato.stanford.edu/entries/rationality-instrumental/>) [↑](#footnote-ref-76)
76. *Bank Mellat* (n 41) paras 68–76 (Lord Reed). [↑](#footnote-ref-77)
77. See for example in Reiner v Bulgaria (2006) ECtHR, para 122: ‘It follows from the principle of proportionality that a restriction on the right to leave one’s country on grounds of unpaid debt can only be justified as long as it serves its aim – recovering the debt’. [↑](#footnote-ref-78)
78. *Kennedy v Charity Commission* [2014] UKSC 20, para 54. [↑](#footnote-ref-79)
79. *Pham* (n 35) paras 60, 94, 109. [↑](#footnote-ref-80)
80. R v Education Secretary, ex parte Begbie [2000] 1 WLR 1115; Craig (n 1) 643; Andrew Le Sueur, ‘The Rise and Ruin of Unreasonableness?’ (2005) 10 *Judicial Review* 32, 39–40. For a slightly different way of describing the ‘rainbow of judicial review’ see Taggart (n 1) 452. [↑](#footnote-ref-81)
81. For a helpful discussion about these normative issues see: Hanna Wilberg and Mark Elliott (eds) *The Scope and Intensity of Substantive Review – Traversing Taggart’s Rainbow* (Hart Publishing, 2015). [↑](#footnote-ref-82)