

The Constitutional Foundations of Reasonableness Review: Artificial Reason and Wrongful Discrimination

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Abstract: Judicial review of the executive faces a constant threat of constitutional illegitimacy. Historically, this manifested in a conflict between the common law and the royal prerogative, with the judiciary needing to justify its authority to set legal limits on the powers of a divinely authorised monarch. This conflict has now transformed into a clash of political and legal conceptions of democratic governance: executive discretion to decide upon and efficiently pursue the common good conflicting with judicial enforcement of foundational constitutional norms designed to ensure that this pursuit is lawful. This paper will look to the founding of the law of judicial review and the writings of Sir Edward Coke to illuminate some of the dark corners of the modern law of reasonableness review. Coke's theory of the common law as a body of artificial reason will serve to place reasonableness review within its appropriate constitutional context, solidifying the connection between the rule of law and non-arbitrariness by elucidating the foundational role that constitutional principle plays in identifying unreasonable executive conduct. Once this is done, it will become clear that the value of legal equality, manifesting in a principle of non-discrimination, is vital to reasonableness review.

A. INTRODUCTION

Judicial review of the reasonableness of executive action raises two important questions, one constitutional and one doctrinal. Constitutionally we might ask what justifies substantive review where the court will look to the content of an executive decision, assessed by reference to standards such as reasonableness and proportionality.¹ Is substantive review appropriately respectful of the entitlement of democratically elected representatives to determine for themselves what is reasonable or what is in the public interest, particularly given the institutional expertise that administrative agencies possess and which courts lack? Doctrinally, we might ask what the appropriate standard for such review is. The precise test for assessing the

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¹ See; Hanna Wilberg and Mark Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing 2015); Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart Publishing 2001); TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993). The distinction between procedural and substantive review may not be as sharp as it seems, however. See; Michael Foran, 'The Rule of Good Law: Form, Substance and Fundamental Rights' (2019) 78 *The Cambridge Law Journal* 570.

reasonableness of executive decision-making has been the subject of long academic discussion, with scholars offering various explanations for when the court will adjudge an administrative decision to be unlawful by virtue of its unreasonableness.² In sum, how do we know when an administrative body has acted unreasonably and why should courts be the ones to decide this?

The answers to these questions are interrelated. Useful insights can be drawn from a theoretical understanding of reasonableness as a common law standard that is explicitly value laden and which captures an important constitutional function played by the courts. In this sense, a concept of legal reasonableness operates as both a standard of *legality*, setting “the legal standards that apply to public officials and inferior tribunals when making their decisions”, and as a standard of *review*, directed towards the courts, that dictates the degree of scrutiny or deference that they can give to decision-makers.³ The goal of this paper is to draw attention to an important distinction that may provide useful theoretical resources to draw from when describing and attempting to justify reasonableness review. This distinction – between natural reason and artificial reason – is essential for a full understanding of the constitutional basis of rationality review and the important connection between these two manifestations of reasonableness.

An analysis of the work of Sir Edward Coke may help to illuminate some of the dark corners of reasonableness review as it exists in its modern form. To be reasonable, in the artificial sense described by Coke, is to be institutionally justified in the distinctions which one draws between various cases, instantiating a public scheme of moral reason, capable of demanding the adherence of legal subject and public official alike. When viewed in this manner, judicial review of the reasonableness of the executive is both clarified and justified as an expression of fundamental value, suitably tailored to the individual circumstances of a given case and situated within an existing and evolving institutional history of past practice. Coke’s theory of the common law as a body of artificial reason will serve to place reasonableness review within its appropriate constitutional context, solidifying the connection between the rule of law and non-arbitrariness by elucidating the central role that constitutional principle and legal value play in identifying unreasonable executive conduct. Once this is done, it will become clear that the value of legal equality, manifesting in a

² See; Paul Craig, 'The Nature of Reasonableness Review' (2013) 66 Current Legal Problems 131; T. R. S. Allan, 'The rule of law as the rule of reason: consent and constitutionalism' (1999) 115 LQR 221; Paul Daly, 'Wednesbury's Reason and Structure' (2011) Public Law 237; Mark Walters, 'Legality as Reason: Dicey, Rand, and the Rule of Law' (2010) 55 McGill Law Journal 563; Hasan Dindjer, 'What Makes an Administrative Decision Unreasonable?' (2020) Modern Law Review (Early view); Timothy Endicott, 'Why Proportionality Is Not a General Ground of Judicial Review' (2020) 1 Keele Law Review 1.

³ T Hickman, *Public Law after the Human Rights Act* (Hart 2010), 99.

principle of non-discrimination, is one important way to substantiate what is often described as the ‘vagaries’ of *Wednesbury* unreasonableness.⁴ The comparative nature of much of the underlying values that have historically informed reasonableness review, coupled with the institutional and systematic nature of common law reasonableness review, manifest within reasonableness review a requirement of relativised justification that is sufficiently attuned to how legal subjects are treated in relation to how others have or would be treated. These comparative claims are essential for a full understanding of reasonableness review.

The reasonableness that courts expect from public officials is a substantive constitutional standard, informed by values such as liberty and equality, which demands that administrative decisions be justified as good faith attempts at the common good, appropriately respectful of the rule of law.⁵ The distinction between artificial and natural reason will help make sense of how reasonableness review has developed throughout time. It will also elucidate what this entails when it comes to doctrine and can flesh out the idea of *Wednesbury* unreasonableness, correcting the misconception that it refers to some test for lunacy or absurdity.⁶ The mistake that many have made when analysing reasonableness is to presume that the kind of reasonableness that is relevant for judicial review is that which a philosopher might describe when assessing human action. Legal unreasonableness or *Wednesbury* irrationality is different in kind to, not simply an extreme version of, natural unreasonableness.

B. NATURAL AND ARTIFICIAL REASON

“Reason is the life of the law” said Sir Edward Coke, “nay the Common Law itself is nothing else but Reason”.⁷ It might be tempting to view this statement as a creature of a bygone era, of little relevance to modern legal theory or doctrine. Coke jurisprudence is the product of a very specific historical and political context, the relevance of which is sometimes viewed as immaterial to our modern circumstances. In some ways this is true; lawyers in particular should be wary of drawing tenuous historical parallels or of claiming an unbroken chain of understanding stretching back

⁴ See; Lord Lester and Jeffrey Jowell, 'Beyond *Wednesbury*: Substantive Principles of Administrative Law' (1987) Public Law 368; Paul Craig, 'Unreasonableness and Proportionality in UK Law' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999).

⁵ See; T. R. S. Allan, 'Principle, Practice, and Precedent: Vindicating Justice, According to Law' (2018) 77 Cambridge Law Journal 269; T. R. S. Allan, 'The Moral Unity of Public Law' (2017) 67 University of Toronto Law Journal 1; T. R. S. Allan, 'Law as a Branch of Morality: The Unity of Practice and Principle' (2020) 65 American Journal of Jurisprudence 1-17; T. R. S. Allan, 'Why the Law is What it Ought to Be' (2020) Jurisprudence, forthcoming.

⁶ See; Carol Harlow and Richard Rawlings, *Law and Administration* (4th edn, Cambridge University Press 2022) 146.

⁷ Sir Edward Coke, I *Institutes*, sec 21. See also Blackstone, 1 *Comm.* 77.

through the mists of time. However, in another sense, the *theoretical* claims that jurists like Coke advanced can be very useful in clarifying our modern practice. An understanding of why Common Law theory conceived of law as perfect reason can shed light on how we ought to understand the concept of reasonableness as it appears in judicial review today.

In its most basic form, reasoning is the process of drawing logical inferences. Within formal logic, this process has been characterised from Aristotle onwards as deductive (usually drawing inferences from general principles to particular cases), inductive (drawing inferences from particular cases to inform general principle), and abductive (drawing inferences as to the best explanation of particular cases without necessarily informing general principle or drawing upon a multitude of cases). Reason, in this sense, is quite familiar to any lawyer: it is the foundation of legal, analogical, reasoning, particularly in the common law world where the ratio of a given case is both informed by the application of general legal principle to the facts at hand and also informative of broader statements of legal principle that can then be applied to similar cases in the future. A key feature of legal reason is therefore a commitment to the consistent application of legal rules to similar cases, revealing a very basic commitment to something approximating the principle of equality before the law and the maxim that like cases should be treated alike.⁸

There is thus, even on this cursory glance, a deep and intimate connection between reason, law, and equality. The common law can be described as a scheme of public reason in the sense that it consists in a body of general principles which are derived from previous cases and applied to new ones where appropriate. It is no surprise, then, that the rule of law - governance in accordance with this body of general rules and principles - is often contrasted with arbitrariness. We could infer from this that unreasonableness is therefore a failure to properly engage in or adhere to the logical demands of this process. Public officials could be said to act unreasonably when they err in the process of reasoning, either by failing to adequately draw inferences when they should, or by drawing the wrong inferences when they do.⁹ However, this on its own would fail to recognise some of the broader features of

⁸ See; Jeffrey Jowell, 'Is Equality a Constitutional Principle?' (1994) 7 *Current Legal Problems* 1; Colm O'Connell, 'Equality: A Core Common Law Principle, or "Mere" Rationality?' in Mark Elliott and Kirsty Hughes (eds), *Common Law Constitutional Rights* (Hart Publishing 2020); Michael Foran, 'Equality Before the Law: A Substantive Constitutional Principle' [2020] *Public Law* 287. Cf. Peter Westen, 'The Empty Idea of Equality' (1982) 95 *Harvard Law Review* 537; Christopher J Peters, 'Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis' (1996) 105 *The Yale Law Journal* 2031; Frej Klem Thomsen, 'Concept, Principle, and Norm - Equality Before the Law Reconsidered' [2018] *Legal Theory* 1.

⁹ Indeed, this may well be an indicium of unreasonableness, prompting a question of justification. See; Daly, 'Wednesbury's Reason and Structure'.

common law reason and their connection to the limits of the judicial role. Importantly, it does not explain how we move from the reason inherent within the common law to the standard of reasonableness used within judicial review. In this regard, the writings of Sir Edward Coke are instructive.

When legal historians describe the dividing line between medieval and modern conceptions of law, it is to Coke that they often turn.¹⁰ Within his writings are found a distillation of English law as it existed in his time, as well as the seeds for the modern law of judicial review, grounded as it is in the conflict between Parliament and the Crown over the nature and limits of prerogative and the common law.¹¹ *The Case of Prohibitions*, decided by Coke before the Glorious Revolution of 1688 is of central importance to our discussion.¹² This case concerned a land dispute between two parties which was heard and decided by King James I, acting in the role of both monarch and judge. On appeal to Coke, the judgement of the King was repealed on the basis that it did not belong to the common law. In response to this, James put a challenge to the court, stating that he presumed the law to be founded upon reason and that he had reason as well as the judges. In fact, it seemed improper for the judiciary to repeal the judgement of the King, given that the monarch was an exemplar of reasonableness and rationality.

Similar arguments could be posited today, especially given the likelihood that a minister or administrative agency will not only be presumed to be just as reasonable as the judiciary but will often have far greater expertise in dealing with the issue at hand. How then can a court be justified in determining, based on incomplete knowledge and inadequate expertise that a decision-maker has erred in their judgement so much that they can be classed as having been unreasonable? This raises a challenge to judicial authority to enforce reasonableness as a standard of legality, but also demands explanation for the presence or lack of deference when determining the scope and intensity of review itself. The judgement of Sir Edward Coke in this case may provide answers. Coke, in response to this challenge that the monarch is eminently reasonable, agreed, noting that:

true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his

¹⁰ See; John Underwood Lewis, 'Sir Edward Coke (1552-1634): His Theory of "Artificial Reason" as a Context for Modern Basic Legal Theory' (1968) 84 *Law Quarterly Review* 330; William Holdsworth, *History of English Law*, vol V (Methuen 1924) p423; William Holdsworth, *Some Makers of English Law*, vol VI (Cambridge University Press 1966).

¹¹ Lewis, 'Sir Edward Coke (1552-1634): His Theory of "Artificial Reason" as a Context for Modern Basic Legal Theory' p330.

¹² *Prohibitions del Roy* (1607) 12 Co.Rep. 64, 77 ER, [1607] EWHC J23 (KB).

realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it.¹³

The court is no better placed than the executive to determine what reason demands in a natural sense, abstracted from any institutional context. The monarch or executive is no less capable of reasoning, or of providing reasoned explanations for their conduct or policies. But this is not the same as the artificial reason of the common law; the drawing of inference from legal material, including the fundamental principles which underpin the common law, and then applying them to new cases as they arise. This is not something that someone can do simply by virtue of natural reason. Yet, if governance is to proceed by law, the executive must act in a manner which is compatible with its duty to respect the legal rights of subjects. To resolve legal disputes concerning the nature of rights and obligations, natural reason is, on its own, insufficient.¹⁴ Proper cognisance of legal rights and duties requires artificial reason and so King James, unlearned in the laws of the land was not capable of resolving the dispute before him, even though he was plausibly the best placed to pursue the public interest.

The judiciary, in contrast, is bound to consider the artificial reason of the common law as the standard by which it determines the lawfulness of administrative action: it must look to principles and rules that have been tested through time by courts in their pursuit of justice. In this sense, we can see the separation of powers operating to ensure that executive pursuit of the common good does not unduly infringe upon the rights of legal subjects who are entitled to an impartial assessment of their claim. The role of the court is to bring these legal standards to bare in this assessment and to ensure that those standards are respected. It is for this reason that the inappropriateness of executive exercise of judicial power is not simply an epistemic failure. It is not merely the fact that the King or Prime Minister is not ordinarily a trained lawyer that renders executive use of judicial power suspect. Rather, it is the fact that the judicial role is bound to and restrained by the requirement to uphold the rule of law and thus to act as guardian of constitutional principle.¹⁵

¹³ *ibid.*

¹⁴ See; N. E. Simmonds, 'Constitutional Rights, Civility and Artifice' (2019) 78 *Cambridge Law Journal* 175, 177.

¹⁵ See; TRS Allan, 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry' [2002] *Cambridge Law Journal* 87; TRS Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1999) 115 *LQR* 221; John Laws, *The Common Law Constitution* (Cambridge University Press

To fully understand the nature of artificial reason as a common law concept, it is important to bear in mind that the modern understanding of law as the product of some authoritative commander was quite alien to those working with and thinking about law in the past.¹⁶ Even the idea that law could be consciously created was rare; rather, it was conceived as a body of declared custom and principle that has been authoritatively approved, once properly interpreted.¹⁷ Common Law theory draws upon natural law ideas that law is not something which is made either by monarchs or legislatures, or even judges, but rather is the expression of a deeper body of principles and customs which are discovered through the process of reasoning and recognition.¹⁸ On this account, law itself is the product of reason, not will. This is of central importance to any discussion of reasonableness review: to fully understand the demands of the rule of law, one must understand the Common Law conception of *law*. As such, the concept of unreasonableness is impoverished if not reflective of Common Law reason, a theory which is itself informed by a view of law *as* reason.

Rather than the product of legislative or even judicial creation, “Common Law is seen to be the *expression* or manifestation of commonly shared values and conceptions of reasonableness and the common good”.¹⁹ To be lawful, on this view, was to be reasonable: “In the common law system no very clear distinction exists between saying that a particular solution to a problem is in accordance with the law, and saying that it is the rational, or fair, or just solution”.²⁰ Postema is right to urge caution when reading statements such as this, however.²¹ Common Law theory did not claim that all rules or principles of the common law conformed to some independent standard of reasonableness that a philosopher might theorise, nor one which was confined to adducing a comprehensible reason for acting. Rather, concepts such as reason, justice, and fairness, when used in this context, took on an institutionalised character, grounded in an appeal to Common Law as a shared body of principles, equally applicable to all. A solution is only fair or reasonable if it is in

2014). Cf. Leslie Green, ‘Law and the Role of a Judge’ in Ferzan and Morse (eds), *Legal, Moral, and Metaphysical Truths: The Philosophy of Michael S. Moore* (Oxford University Press 2016); N.W. Barber, ‘Prelude to the Separation of Powers’ (2001) 60 *Cambridge Law Journal* 59; N.W. Barber and Adrian Vermeule, ‘The Exceptional Role of the Courts in the Constitutional Order’ (2016) *Notre Dame Law Review*, 817.

¹⁶ See; Lewis, ‘Sir Edward Coke (1552-1634): His Theory of “Artificial Reason” as a Context for Modern Basic Legal Theory’, 109.

¹⁷ See; Arthur von Mehren, ‘The Judicial Conception of Legislation in Tudor England’ in Paul Sayre (ed), *Interpretations of Modern Legal Philosophies: Essays in Honour of Roscoe Pound* (Oxford University Press 1947), 751.

¹⁸ See; Gerald Postema, *Bentham and the Common Law Tradition* (Oxford University Press 2019), 4; Friedrich A. von Hayek, *The Constitution of Liberty* (Routledge & Kegan Paul 1960), 163.

¹⁹ Gerald Postema, *Bentham and the Common Law Tradition* (Oxford University Press 1986) 7.

²⁰ See; AWB Simpson, ‘The Common Law and Legal Theory’ [1973] *Oxford Essays in Jurisprudence*, 2nd Series 77, 79.

²¹ Postema (n 19) 7.

conformity with the principles of justice that have been applied to fellow members of a political community throughout time, interpreted and tailored to suit the case at hand.

Following Postema, we can say that “The principles of Common Law are not themselves validated by reason” in the sense that they commend themselves as being in conformity with some independent standard of justice or rationality, rather “they are the products of a process of *reasoning*, fashioned by the exercise of the special, professional intellectual skills of Common Lawyers over time refining and coordinating the social habits of people into a coherent body of rules”.²² The role of the judge is not to create law but to apply it, acting as “the personification of justice”.²³ In this manner, the judge becomes the mouthpiece of a law which transcends any organ of state, speaking for shared principles of justice held by the community, simply articulated or interpreted by the judiciary – *judex est lex loquens*.²⁴

The distinction between natural and artificial reason explains not just why courts are exclusively empowered to adjudicate legal disputes, but also why their determinations ought to be confined to the legality and not the merits of administrative decision-making. The artificial reason of the common law requires and manifests a particular kind of reasoning, one that is institutionally bounded to comparative analysis within a rule- or duty-based outlook. It is what Laws describes as a Kantian or deontic morality: “rights and duties are necessarily and honourably the moral language of justice and therefore law”.²⁵ Justice, being a common good, is intimately concerned with “the adjustment of claims between a multiplicity of persons”, demanding a fair distribution of legal burdens and benefits that proceeds by reference to rules and principles.²⁶ This is the morality of law, encapsulated in the administrative principle that courts assess the lawfulness of administrative action, where lawfulness is confined to conformity with these principles, duties, and rules.

An understanding of law as a body of artificial reason – a collection of principles and rules tested through time – helps us to map the contours of substantive review without it collapsing into the all-things-considered moral/political analysis that Coke described as natural reason and which Laws sees as the distinct morality of government. To Laws, “Politicians, governments, are by necessity utilitarians ... their

²² Postema, *Bentham and the Common Law Tradition*, 7.

²³ St Thomas Aquinas, *Summa Theologiae*, II-II, q. 58, art. 1.

²⁴ *Calvin's Case* (1608) 77 ER 377, 381.

²⁵ John Laws, *The Constitutional Balance* (Hart Publishing 2021) 41.

²⁶ HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press 1968) 21; cf. Nigel Simmonds, *Law as a Moral Idea* (Oxford University Press 2008) 69ff; John Gardner, ‘Hart on Legality, Justice, and Morality’ (2010) 1 *Jurisprudence* 253.

primary focus in on outcomes”.²⁷ While this description of political morality as utilitarian ought to be replaced with a more general teleological or goal-orientated moral reasoning,²⁸ it nicely echoes the distinction between natural and artificial reasoning described by Coke. The distinct morality of government embraces, although is not confined to, a goal-orientated moral outlook that uses natural reason to identify valuable social ends and the appropriate means of pursuing them.

The coming together of these two moral viewpoints occurs within judicial review. Fundamental principles of (artificial) reason set limits on but do not supplant the choice of legitimate governmental ends or the means for their achievement.²⁹ This compromise instantiates what Laws calls ‘The Constitutional Balance’.³⁰ This is done both in the development of doctrinal principles derived from the rule of law and in the process of statutory construction: “The meeting of Parliament and the common law, in the crucible of statutory interpretation, is close to the core of [the constitutional balance]”.³¹ While there is now wide acceptance that law, in the form of statute, is the product of sovereign will, the common law, that body of coherent legal principles and past practice, is nevertheless essential for the proper understanding of statutory meaning and thus the demands of the principle of legality. As Laws notes, “[a]n Act of Parliament is words on a page. Only the common law gives it life ... The construction of statutes, just as surely as the development of common law principles not touched by legislation, is the product of the common law’s reason matured over time”.³²

It is here where we see the coming together of the artificial reason of the common law, informed by institutional history, accepted value and principle, to inform the doctrinal standard of legality that we call reasonableness review. Once reasonableness is understood to reference a requirement that decision-makers act in accordance with the demands of artificial reason, the constitutional explanation and justification of judicial enforcement of this standard becomes easier to comprehend. In particular, we can now see the connection between reasonableness as a standard of legality applied by courts and common law reason as a principle of review that empowers courts to scrutinise administrative action for its compatibility with fundamental principle but prevents them from engaging in what we might call full-

²⁷ Laws, *The Constitutional Balance* (n 25) 41.

²⁸ See; Michael Foran, ‘Review: Laws, *The Constitutional Balance* (Hart 2021)’ (2022) 26 *Edinburgh Law Review* 144.

²⁹ On the rule of law setting limits on the ends of law see; Foran, ‘The Rule of Good Law’ (n 1).

³⁰ Laws (n 4), 41.

³¹ *ibid*, 57.

³² John Laws, *The Common Law Constitution* (Cambridge University Press 2014), 6. See also; John Laws, ‘Law and Democracy’ (1995) *Public Law* 72.

blown merits review where the court will simply retake the decision in question because the judge disagrees on the basis of natural reason, unconnected to legal principle or doctrine.

C. CONTEXTUALISING *WEDNESBURY* UNREASONABLENESS

The common law has long been contrasted with unreasonableness. For example, in *Rowles v Mason*, Coke noted that the common law “corrects, allows, and disallows both Statute Law and Custom, for if there be repugnance in a statute or unreasonableness in Custom, the Common Law disallows and rejects it”.³³ This sentiment echoes the modern principle of legality, where statute will be interpreted to include unwritten constitutional principles and standards.³⁴ The same is true of the scope of discretionary power delegated through statute. In *Rooke v Withers*, Coke, noted that “Notwithstanding the words ... give authority to the Commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law”.³⁵ This connection between legality and a common law conception of reasonableness is thus central to the law of judicial review in its totality. Our analysis of reasonableness should bear this in mind and reject the temptation to neatly cabin it off from our understanding and justification for judicial review in general.

While the rule of law is often contrasted with unreasonableness, the presumption is usually that reasonableness is simply one ground of review among others, capturing a discrete kind of behaviour that forms one part of a broader collection of unlawful acts. On closer inspection, however, it is not clear that this was what Lord Greene had in mind when he wrote in the leading *Wednesbury* case:

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does

³³ (1612) 2 Brownl 198 (CB).

³⁴ See; T. R. S. Allan, ‘Legislative Supremacy and the Rule of Law’, *The Sovereignty of Law* (Oxford University Press 2013). Cf. Jason N. E. Varuhas, ‘The Principle of Legality’ (2020) 79(3) *Cambridge Law Journal*, 578-614.

³⁵ (1597) 5 Co Rep 99, 100a.

not obey those rules, he may truly be said, and is often said, to be acting “unreasonably”. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in *Short v Poole Corporation* [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.³⁶

It is clear that Lord Greene did not consider there to be a sharp distinction between reasonableness and the other grounds of review. Indeed, what he suggested was rather that the concept of unreasonableness is often used as a marker for any instance of illegality, covering anything that must not be done. This would make sense if we understood reasonableness in its artificial, common-law sense, where decisions which fail to conform to constitutional principle are deemed to be unreasonable precisely because common law theory equates law with reason. Even where there are comprehensible reasons for action, if it is unlawful it is unreasonable. For example, accepting a bribe is a perfectly intelligible thing for a public official to do in the sense that we can clearly see the reasons motivating the decision and the connection between those reasons and the decision itself. The same is true of decisions motivated by a partisan political desire, such as was the case in *Porter v Magill*, where a scheme to sell off council housing for the purpose of electoral advantage in marginal wards was deemed to be unlawful, partially because this improper political motive was a legally (but clearly not politically) irrelevant consideration.³⁷ Thus, while there may be comprehensible reasons for a public body to disregard their legal obligations, there are none compatible with the artificial reason of the common law, because to do so is no longer to act in a public role.

This is not to say that the demands of natural reason are met simply because one’s conduct is intelligible; the requirements of natural reason are different from those of artificial reason but not necessarily less demanding.³⁸ The legal standard of reasonableness is of a different kind - not degree - to the more abstract moral standard of natural reasonableness. There will of course be considerable similarities between these two kinds of reasonableness, but they should be viewed as overlapping magisteria, rather than one being a subset of the other.

³⁶ *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 229.

³⁷ [2001] UKHL 67.

³⁸ See; St Thomas Aquinas, *Summa contra Gentiles*.

Lord Greene also spoke of another standard, not collapsible into the existing grounds of review: what has come to be known as *Wednesbury* unreasonableness or *Wednesbury* irrationality. This standard, “something so absurd that no sensible person could ever dream that it lay within the powers of the authority” has been the subject of much commentary and criticism.³⁹ One such critique presumes that only the most extreme degree of unreasonable conduct, understood in the natural sense, will be deemed unlawful.⁴⁰ For example, Lord Cooke in *Daly* described *Wednesbury* as “an unfortunately retrograde decision” in so far as it suggested that only a very extreme degree of unreasonableness can bring a decision within the scope of judicial invalidation.⁴¹ The presumption here is that administrative unreasonableness is simply a subset of natural unreasonableness, located on the extreme end of the spectrum. Indeed, Harlow and Rawlings call this a lunacy test.⁴²

It is often claimed that the *Wednesbury* standard is vague and unclear, providing little guidance as to what will be covered by the rule.⁴³ But the mistake here is to assume that this standard is itself a rule or test. It would be equally difficult to identify what counts as an irrelevant consideration or what constitutes bad faith if we focused solely on the standard and not the case-law through which it is solidified and elucidated. The example of the firing of a red-haired teacher shows us that the *Wednesbury* standard need not be entirely separate from the other grounds of review. But, while *Wednesbury* unreasonableness is clearly connected to existing grounds of review, it is not exhausted by them.

When Lord Diplock described *Wednesbury* unreasonableness as applying 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 to be decided could have arrived at it”,⁴⁴ he was clear that this standard is a legal one and thus properly within the realm of judicial, artificial, reasoning: “Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial

³⁹ See eg; Lord Cooke in *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26; *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473, [2003] QB 1397, [34]-[35]; Daly, 'Wednesbury's Reason and Structure'; Craig, 'The Nature of Reasonableness Review'; Carnwath, *From judicial outrage to sliding scales – where next for Wednesbury?* (2013); M. Elliott, 'Where next for the Wednesbury principle? A brief response to Lord Carnwath', *UK Constitutional Law Association blog* (Nov 2013).

⁴⁰ *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

⁴¹ *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26.

⁴² Harlow and Rawlings (n 6) 146.

⁴³ See; Jowell, 'Beyond Wednesbury: Substantive Principles of Administrative Law'; Craig, 'Unreasonableness and Proportionality in UK Law'.

⁴⁴ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374,

system".⁴⁵ Yet, if this standard referred to natural reason, a sincere challenge could be put to Lord Diplock that judges are no better placed to understand its demands, nor the demands of public morality, than elected representatives of the people. The sentiment of King James echoes through time, reappearing here to question the strength of Lord Diplock's assertion. In response, we must call back to Lord Coke to reaffirm that the accepted moral standards and questions to be decided are themselves legal; they reference the moral standards and principles of the common law and the legal background of rights and duties against which all administrative questions must be decided. Only then can we conclude, as Lord Diplock does, that the question of the reasonableness of the executive is a legal one, capable of being decided by judges by virtue of their training and experience. Of course, this is not to say that judicial analysis is divorced from morality. Rather it is to stress that any appeal to justice or morality must be one that is appropriately filtered through the practice of the common law. Artificial reason is thus the mechanism by which the demands of justice and morality become juridical, capable of carrying legal normativity and thus not simply an expression of the personal views of the judge in question.⁴⁶

Understood in this way, the standard accepted by the court in *R v Minister of Defence, ex p Smith*,⁴⁷ that a reasonable decision is one which is within the range of lawful options open to a reasonable public official, that range being limited and informed by the rights of legal subjects, is entirely consistent with the *Wednesbury* standard, once it is placed within its appropriate constitutional context. There is nothing "sub-*Wednesbury*" about a rights-sensitive reasonableness review. The requirement of reasonableness is and has always a demand for reasoned justification of administrative policies, with stronger justification needed in circumstances where constitutional rights and duties are implicated. However, there is more to be said about the *Wednesbury* standard than this. An examination of the historic foundations of judicial review will elucidate the important role that constitutional values such as fairness and equality play in assessing the parameters of lawful administrative decision-making. Contrary to Harlow and Rawlings, we must not conclude that *Wednesbury* unreasonableness has evolved from a test for lunacy into a requirement of constitutional justification.⁴⁸ Rather, it has always been a test for artificial reasonableness, informed by constitutional principles such as the rule of law and the separation of powers.

⁴⁵ *ibid.*

⁴⁶ See; Allan, 'Why the Law is What it Ought to be'.

⁴⁷ [1996] 1 All ER 356.

⁴⁸ Harlow and Rawlings (n 6) 147.

The artificial nature of legal reasoning may seem to be relatively mundane; it is well established that judges cannot simply impose their own moral views, abstracted from institutional history, when tasked with interpreting and applying the law. Yet this is exactly the charge that is often levied against reasonableness review: that the standard is so vague and indeterminate that it requires a judge to step beyond the law and simply ask what they think is reasonable or justifiable in a given context.⁴⁹ Focusing on the nature of artificial reason and the necessary implication that this has for the role of constitutional values and principles within judicial review is essential to properly understand what the reasonableness standard actually requires, both constitutionally and as a matter of doctrine. It has a long history within the common law, stretching back far beyond the *Wednesbury* decision and manifesting within the law a comparative standard of justice that reflects the comparative nature of legal reasoning itself.

D. CONSTITUTIONAL VALUE AND ADMINISTRATIVE PRINCIPLE

Once our analysis of the *Wednesbury* standard is approached as any other common law standard is, by looking to analogous case law to elucidate its requirements, the seeming vagueness of reasonableness review begins to solidify into a locus of identifiable, albeit abstract, norms. This does not mean that one can determine the demands of *Wednesbury* unreasonableness free from interpretation; but it does mean that a court is not required to *simply* ask whether it thinks that a decision maker has acted so unreasonably that no reasonable decision maker would have acted the same. As Allan argues, this standard “expresses the *conclusion* of legal analysis, which encompasses all the relevant rule-of-law criteria as they apply to the facts or circumstances in view”.⁵⁰

Lord Greene gave us some of these criteria in the paragraph quoted above: the other enumerated grounds of review such as the doctrine of relevant considerations or the requirement to act in good faith. While these claims can be, and usually are, made as stand-alone grounds of review, what Lord Greene was telling us is that they could just as readily be used to ground, or assist in the establishment, of a finding of unreasonableness. What the *Wednesbury* case did not elucidate particularly clearly were the other rule-of-law criteria that may be relevant for a conclusion that a decision

⁴⁹ See; *ibid* 158; J Jowell and A Lester, ‘Proportionality: Neither Novel nor Dangerous’ in J Jowell and D Oliver (eds), *New Directions in Judicial Review* (Stevens 1988); Christopher Forsyth, ‘The Rock and the Sand: Jurisdiction and Remedial Discretion’ (2013) 18 *Judicial Review* 360.

⁵⁰ T. R. S. Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford University Press 2013), 113, emphasis in the original.

or policy is so unreasonable that no reasonable public official could have come to it. In this regard, recourse can be made to long-held constitutional values and the historic and contemporary case law that has called back to these values in explaining the artificial requirements of common law reason.

Take *Slattery v Naylor* for example.⁵¹ A byelaw prohibited the burial of bodies in cemeteries within 100 yards of any public building or dwelling. This byelaw was challenged by the appellant, who contended (*inter alia*) that the byelaw was unreasonable. The Privy Council dismissed the appeal, and in so doing, Lord Hobhouse suggested that ‘a merely fantastic and capricious bye-law, such as reasonable men could not make in good faith’ or a byelaw which is ‘capricious or oppressive’ may be set aside as unreasonable.⁵² Otherwise, even though the judges may consider that the byelaw ought to have been framed in different terms, it was not invalid as unreasonable. A byelaw cannot be quashed ‘merely because it does not contain qualifications which commend themselves to the minds of the judges’.⁵³ Here we see that the demand of reasonableness is not just a requirement that the policy be one that reasonable decision makers could reasonably adopt, but one that could be adopted in good faith, calling to an enumerated ground of review. But it also makes reference to capriciousness and oppression, the rejection of which is central to artificial reason. We see here an underlying presumption that reasonableness is assessed by reference to the standards appropriate for *public* officials, who are expected to act in good faith as custodians of the common good.

In *Kruse v Johnson*, a challenge was put to a county council byelaw prohibiting singing in any public place within 50 yards of any dwelling-house, after being requested to stop by the inhabitants or a police officer.⁵⁴ The Court upheld the validity of the byelaw, with Lord Russell indicating that there may be cases in which the court ought to rule a byelaw as invalid because unreasonable, but ‘unreasonable’ has a narrow meaning for this purpose. ‘A byelaw is not unreasonable just because judges think it goes further than is prudent or because it does not have some desirable qualification’.⁵⁵ Once more we see the reluctance of the court to interfere merely because it disagrees with the decision based on their natural, non-artificial reason. But where the decision or regulation conflicts with constitutional value and principle, it cannot be said to be lawful. It is for this reason that Lord Russell CJ concluded that decisions or regulations may be quashed as unreasonable where they are

⁵¹ (1888) 13 App Cas 446, 452-3

⁵² *ibid*, 453.

⁵³ *ibid*, 452.

⁵⁴ [1898] 2 QB 91.

⁵⁵ *ibid*, 100.

partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*". But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded.⁵⁶

Again, we can see reference to some of the existing grounds of review, reaffirming that an unlawful decision is, by definition, unreasonable in this artificial sense. We can also see clear reference to core constitutional values of equality and natural justice, as well as reference to fundamental principles such as the requirement to act in good faith, to respect the rights of legal subjects and the rejection of oppression or unjustified inequality in treatment. Placed in its appropriate context, this standard is one which provides the basis for quashing decisions which are partial and unequal, manifestly unjust, or which involve such oppressive or gratuitous interference with the rights of legal subjects *such that* there could be no reasonable justification for them. It is the failure of an administrative body to adhere to the rule of law and to respect fundamental common law rights and principles that gives rise to the conclusion that it could not be countenanced in the minds of reasonable decision-makers.

E. LEGAL EQUALITY AND WRONGFUL DISCRIMINATION

Drawing all this together, we can conclude that *Wednesbury* 'irrationality' – the aspect of unreasonableness that cannot be collapsed into the other grounds of review, but which might still render a decision unlawful - is not a standard which sets an inordinately high bar on review. It does not seek to review only for lunacy or absurdity. Rather, the *Wednesbury* standard is best conceived as a constitutional fail-safe, designed to capture those instances of unlawfulness which do not fit neatly or perfectly into the existing grounds, or where the severity of constitutional impropriety cannot be adequately explained by reference to one ground alone.

It should be clear by this point, however, that this does not mean that a judge has no guidance that she can avail of in her interpretation of this requirement. Taking the standards elucidated in some of this historic case law together, we can see that a

⁵⁶ *ibid*, 99-100.

decision or policy will be unreasonable in the *Wednesbury* sense if it is capricious, oppressive, unequal, or unjust. These are all comparative standards. They require the court to examine how the claimant has been treated in relation to how others have or would be treated and assess whether this difference is one that can be justified given the duty that public officials owe to legal subjects to treat them with equal dignity and respect.⁵⁷ The *Wednesbury* standard, is partially an appeal to fundamental legal equality and the prohibition of wrongful and unjustified discrimination between legal subjects.⁵⁸ It must not be forgotten that the example chosen by Lord Greene was one of wrongful and unjustified discrimination against a schoolteacher.⁵⁹ Daly references differential treatment as one indicium of unreasonableness.⁶⁰ However, I suggest that wrongful discrimination occupies a more prominent role in *Wednesbury* review which can serve as an illustrative example of the common law's distinctive method of artificial reason at work.⁶¹

This understanding of discrimination is distinct from that which is used within human rights scholarship. It is not bound to a list of protected characteristics but instead focuses on whether differences in treatment are constitutionally justified. In this sense it evokes the the requirement that like cases be treated alike and that differences in treatment ought to be justified by reference to core legal values and principles.⁶² Policies which are wrongfully unequal or unjust evidently manifest comparative claims in that the wrong that they engender is not simply an isolated instance of harsh treatment. Rather the wrong-making feature of the treatment in question is grounded in the fact that you have been treated unfairly in comparison to others who, although in a similar situation to you, have been treated better. It is the

⁵⁷ See; Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge University Press 2016); Allan, 'The Moral Unity of Public Law'. Cf. Arthur Chaskalson, 'Human Dignity as a Foundational Value of Our Constitutional Order' (2000) 16 South African Journal of Human Rights 193; Jeremy Waldron, *Dignity, Rank, and Rights* (Oxford University Press 2012); Jeremy Waldron, 'How Law Protects Dignity' (2012) 71 The Cambridge Law Journal 200; J. Raz, 'The Rule of Law and its Virtue', *The Authority of Law: Essays on Law and Morality* (2nd edn, Oxford University Press 2009).

⁵⁸ See; Jeffrey Jowell, 'Is Equality a Constitutional Principle?' (1994) 7 Current Legal Problems 1; Colm O'Cinneide, 'Equality: A Core Common Law Principle, or 'Mere' Rationality?' in Mark Elliott and Kirsty Hughes (eds), *Common Law Constitutional Rights* (Hart Publishing 2020); Foran, 'Equality Before the Law: A Substantive Constitutional Principle'; T. R. S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993), ch 7. Cf. John Stanton-Ife, 'Should Equality be a Constitutional Principle?' (2000) 11 King's Law Journal 133; Frej Klem Thomsen, 'Concept, Principle, and Norm - Equality Before the Law Reconsidered' (2018) Legal Theory 1.

⁵⁹ *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 229; *Short v Poole Corporation* [1926] Ch. 66, 90, 91.

⁶⁰ Daly, 'Wednesbury's Reason and Structure', 245.

⁶¹ See; Laws, *The Common Law Constitution* (n 15) ch 1; Laws, *The Constitutional Balance* (n 25) ch 4.

⁶² See; Michael Foran, 'The Cornerstone of Our Law: Equality, Consistency, and Judicial Review' The Cambridge Law Journal (forthcoming); Jowell (n 8); Foran, 'Equality Before the Law: A Substantive Constitutional Principle' (n 8); Gowder, Paul, 'The Rule of Law and Equality' (2013) 32 Law and Philosophy 565.

presumption of legal equality that grounds and renders comprehensible the mechanisms of common law reasoning itself: we do not simply compare our treatment to how others are currently treated, we also compare our treatment to those similarly situated persons who have been treated differently in the past. Equality before the law is not a principle which is temporally locked to the present: if it was, the connection between legal equality and *stare decisis* would be incomprehensible. This is a key feature of common law claims: they always contain some comparative element to them even if other, non-comparative claims are present or more prominent. Common law reason is thus inherently comparative in nature and so too is the standard of reasonableness applicable to administrative decision-making.

This connection between the requirement of common law reason and the value of legal equality can be traced back to the time of Coke. In *Rooke v Withers*, Coke relied explicitly on the connection between common law reason and the value of equality to determine both the correct interpretation of statute and the scope of administrative discretion.⁶³ The case concerned a statutory scheme authorising an administrative agency to survey banks and ditches and other flood defences that needed repair, to repair or build according to their discretion and then to charge landowners the cost of doing so as seemed most convenient to them. The agency repaired a bank on Mr Rooke's land and charged him the cost. Rooke was not the only landowner who benefited from these repairs, however: he owned less than 1% of the land benefited but was required to cover 100% of the cost. He challenged this decision as unreasonable. Lord Coke agreed, holding that the commissioners were bound to exercise their discretion in accordance with law and the common law prohibited this policy, not because it was radically unfair (as Endicott paraphrases),⁶⁴ but because the common law requires respect for legal equality and so in this case, requires the commissioners to have taxed all who were in danger of flooding equally. Coke concluded that "the said statutes require equality" making reference to "cases of equality grounded on reason".⁶⁵

In its most basic form, reason demands that decision makers act in accordance with a consistent set of principles and thus not capriciously.⁶⁶ A claimant who has suffered because of a failure to act in accordance with the demands of the common law can refer to those legal subjects who have been afforded the protection of law and demand that they be treated similarly. This is the bare minimum requirement of

⁶³ (1597) 5 Co Rep 99, 100a.

⁶⁴ Timothy Endicott, *Administrative Law* (4th edn, Oxford University Press 2018), 235.

⁶⁵ (1597) 5 Co Rep 99, 100a.

⁶⁶ In one sense, we could see this as a call towards what Dworkin described as integrity, that the state speaks with one voice. See; Ronald Dworkin, *Law's Empire* (Harvard University Press 1986)

equality before the law, what Dicey described as the principle that all be equally subject to the same laws of justice and which was championed by Coke in his consistent rejection of special courts.⁶⁷ Yet, the demands of artificial reason do not necessarily require equal treatment in all cases. While in *Rooke's* case, the court ultimately concluded that the commissioners ought to tax all those who were in danger of flooding equally, to spread the cost amongst them, it would be a mistake to assume that respect for legal equality as a component of reasonableness demands equal treatment in all instances.

It is an essential aspect of justice that similarly situated persons should be treated similarly and that differences in treatment should be adequately justified. The presumption of equality is a bedrock feature of legal reasoning, central to the prohibition of capricious administrative action and necessary for the rule of law. Indeed, this principle of equality has been described as “the cornerstone of our law”.⁶⁸ As Lord Hoffmann noted in *Matadeen v Pointu*, “treating like cases alike and unlike cases differently is a general axiom of rational behaviour ... frequently invoked by the court in proceedings for judicial review as a ground for holding some administrative acts to be irrational”.⁶⁹ Nevertheless, the demand for equalisation of treatment, purely for the sake of equalisation, has been consistently rejected by common law courts as unnecessary and undesirable in all instances. Public authorities are not required to replicate their previous mistakes, even if a claimant demands to be treated equally to those similarly situated.⁷⁰ Not all comparative claims will be accepted by the court.

It is for this reason that the court in *Gallaher* rejected a strict requirement of equal treatment.⁷¹ Contrary to what Varuhas suggests, a court's refusal to recognise a right to identical treatment does not amount to a rejection of a principle of anti-discrimination at common law.⁷² Under the common law, each case should be decided on its merits, with institutional history being relevant but not ultimately determinative. In the final analysis, legitimate expectations must be balanced against the need not to replicate previously wrongful conduct. According to the precepts of artificial reason, equal treatment is not valued simply because treatment is equalised. Rather it has value because departures from consistency in treatment, given the

⁶⁷ See; A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (Oxford University Press 2013), 119; Foran, 'Equality Before the Law: A Substantive Constitutional Principle'; Harold J Cook, 'Against Common Right and Reason: *The College of Physicians v Dr Thomas Bonham*' (1985) 29 *American Journal of Legal History* 301-22.

⁶⁸ *Gurung v Ministry of Defence* [2002] EWHC 2463 (Admin), [55].

⁶⁹ [1998] 1 AC 98, [8].

⁷⁰ Lord Bingham was thus correct to stress that a decision maker is “not bound, and ... not entitled, to follow a previous decision which he consider[s] erroneous and which would yield what he judges to be an excessive award”; *R (O'Brien) v Independent Assessor* [2007] UKHL 10, [30].

⁷¹ *R (On the application of Gallaher Group Ltd and others) v The Competition and Markets Authority* [2018] UKSC 25, [24].

⁷² Varuhas, 'The Principle of Legality', 583.

background presumption of equality inherent within the rule of law, give rise to normative concerns which must be addressed before departure can be justified. This justification is assessed through reasonableness review by reference to constitutional principle and value, instantiated and manifested in the existing common law. What is doing the work here is not the inconsistency but rather what the inconsistency is manifesting which is wrongful and unjustified discrimination between persons.

Lord Nicholls is thus entirely correct to stress that “[d]iscriminatory law undermines the rule of law because it is the antithesis of fairness. It brings the law into disrepute. It breeds resentment. It fosters an inequality of outlook which is demeaning alike to those unfairly benefited and those unfairly prejudiced”.⁷³ Indeed, McCombe J’s description of the principle of equality as the cornerstone of our law referred, in that instance, to the determination of unjust racial or ethnic distinctions as irrational and unreasonable.⁷⁴ Such discrimination is incapable of constitutional justification notwithstanding the presences of strong reasons to engage in it. Once more, the distinction between natural and artificial reason is pertinent. A decision maker may have perfectly good reasons for engaging in wrongful and oppressive discrimination, there may be legitimate goals that are rationally connected to the means used by the public authority in question, and yet if it is not capable of constitutional justification because it fails to respect the principle of equality before the law, then the decision will be unreasonable. As Lord Sumption noted in *Bank Mellat v Her Majesty’s Treasury (Nos. 1 and 2)*, “A measure may respond to a real problem but nevertheless be irrational or disproportionate by reason of its being discriminatory in some respect that is incapable of objective justification”.⁷⁵

For example, in *R (On the Application of Adath Yisrole Burial Society) v HM Senior Coroner for Inner North London*, the High Court held that a religiously discriminatory policy was incapable of rational justification.⁷⁶ The defendant had adopted a policy which stated that “No death will be prioritised in any way over any other because of the religion of the deceased or family, either by the coroner’s office or coroners”.⁷⁷ The policy was defended as “an equality protocol” or “cab rank rule”⁷⁸ designed to “ensure that the bereaved whose loved ones fall within the remit of HM coroner for Inner North London are treated fairly, and the best use is made of ... inadequate

⁷³ *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [9]. Note that, although this case was decided post the coming into force of the Human Rights Act, this statement clearly concerned the rule of law and is therefore not particular to any statutory or international law regime.

⁷⁴ *Gurung v Ministry of Defence* [2004] EWHC 2463 (Admin), [55].

⁷⁵ [2013] UKSC 38 and UKSC 39, [25].

⁷⁶ [2018] EWHC 969 (Admin).

⁷⁷ *ibid*, [2].

⁷⁸ *ibid*.

resources”.⁷⁹ Previous policies allowed members of certain religious groups to engage in “queue jumping”, placing “those who are pushed back further in the queue at a material disadvantage”.⁸⁰ The concern here was that these policies were creating an unjustified inequality between different groups in the community and that a rule prohibiting consideration of religious bases for prioritisation would be fairer.⁸¹

So, we have cogent measures, grounded in concern for fairness and equality, designed to respond to a real problem, given the lack of resources available to the coroner’s office. Against this, we have the claimant’s argument that “for certain faith groups, in particular the Jewish faith and the Muslim faith, it is very important that a funeral should take place as soon as possible, ideally in the day of death itself”.⁸² They claimed that the failure to adopt a more flexible and nuanced policy was wrongfully discriminatory and thus unreasonable. If reasonableness review only consisted of an assessment of whether the decision-maker could adduce some rational account to explain their conduct, then it is difficult to see how this policy would be unlawful. Yet, attuned to constitutional principle as the court must be, it concluded that the policy:

Precludes taking into account representations which have a religious basis and it thereby singles out religious beliefs for exclusion from consideration. There is no good reason for this exclusion. It is discriminatory and incapable of rational justification.⁸³

Note how the court concluded that the relevant question is whether this policy is “capable of rational justification” but came to answer this question by examining whether the policy is grounded in *good* reason. We can only square this circle if we understand references to both rational justification and good reason as meaning constitutionally acceptable reasons and justifications. Clearly there were some reasons that could be offered to justify this policy, some of which would be grounded in the desire for equal treatment. Yet, the court is not assessing whether there are *any* reasons that might justify the policy; it is concerned with reasons which are themselves compatible with constitutional principle. A rigid, blanket ban on any considerations arising from religious belief may treat people equally, but it does not treat them as equals. On this view, to refuse to even consider religiously based requests for priority is manifestly oppressive and unjust.

⁷⁹ *ibid*, [45].

⁸⁰ *ibid*, [50].

⁸¹ *ibid*.

⁸² *ibid*, [58].

⁸³ *ibid*, [91].

Wrongful discrimination is thus an important aspect of reasonableness review. However, this does not mean that reasonableness review, even in the *Wednesbury* sense is only concerned with wrongful discrimination, it can also cover instances where decisions fail to adequately conform to other constitutional principles, to adequately respect other fundamental constitutional rights, or those cases where the decision maker was so mistaken in their assessment of the weight and balance of considerations that it would amount to a decision which was manifestly unjust.⁸⁴ An important aspect of reasonableness review is the fact that many of the claims made under it are comparative in nature, demanding constitutional justification for the distinctions drawn by public bodies. However, even where the primary ground of unreasonableness is not comparative, any demand to be treated lawfully is a claim to be treated in accordance with the legal standards that others have been afforded the protection of. In this sense all legal claims have some comparative element, grounded in the principle of equality before the law.⁸⁵

Legal equality, as a central aspect of the rule of law, is a key feature of legal reasoning and an important value that informs reasonableness review. Yet, reasonableness review maintains a pluralism, where diverse values and principles may influence a determination that a given change in policy is constitutionally unjustified. As such, a policy may be said to be wrongfully discriminatory because of the comparative nature of the wrong, even while the wrong itself may amount to a violation of liberty or dignity and not equality.⁸⁶ For example, a policy may treat Catholics less favourably than Protestants and be wrongful because it violates principles of religious liberty while also manifesting wrongful discrimination that, by virtue of the comparative nature of the wrong, constitutes a breach of legal equality.

In one sense, this means that the impact of legal equality is sometimes hard to appreciate; because comparative claims are present in all areas of law and are central to legal reasoning itself, it becomes difficult to explain what is unique or important about them manifesting within reasonableness review or any other area of law. Yet the reason this matters is precisely to confirm that reasonableness review, the *Wednesbury* standard, does not constitute a 'gap' in the law where legal standards have run out and the court must simply exercise its judgement as to whether a decision maker has acted appropriately or weighed relevant considerations properly, appealing to conceptions of reason that are themselves unconnected from the

⁸⁴ On the importance of weight in reasonableness review, see; Craig, 'The Nature of Reasonableness Review'. Cf. Paul Daly, 'Wednesbury's Reason and Structure' [2011] Public Law 237.

⁸⁵ See; Foran, 'The Cornerstone of Our Law'.

⁸⁶ See; Benjamin Eidelson, *Discrimination and Disrespect* (Oxford University Press 2015), ch 5.

principles of the common law. Reasonableness review draws on core legal principles and values to ensure that distinctions in treatment are adequately justified by reference to standards of justice immanent within the law. Yet, if that were the only way that equality manifested within reasonableness review, it would indeed be best described as a secondary or background value, present but only in the way that legal equality is always present. That would still be important in dispelling the myth that reasonableness review is such a broad standard that it fails to provide any guidance at all. Yet equality also plays an important role in grounding particular doctrinal manifestations of the reasonableness standard through related standards of capriciousness, oppressiveness, inconsistency, and injustice. A failure to treat legal subjects as equals by violating these core comparative claims is a prime way to act unreasonably and it should accordingly not be a surprise that this was the go-to analogy to explain the difference between a judge simply disagreeing with a decision and a judge identifying a decision that is so unreasonable that it cannot be lawful. Indeed, wrongful discrimination remains the example even today with racial discrimination or the firing of a red-haired teacher simply because they have red hair being emblematic of a decision that no public official, acting impartially and fairly would make.

F. CONCLUSION: THE COMMON LAW AS A BODY OF PUBLIC REASON

Proper understanding of the artificial nature of common law reason is essential to any account of reasonableness review and proper understanding of artificial reason requires recourse to constitutional values and standards. These values and standards are distilled over time through the common law method into the doctrinal rules of judicial review as we know them today, including standards of due process, fairness, and legal equality. The standards remain abstract but find clarification in individual cases as guided by judicial interpretation, sufficiently attuned to the principles of the rule of law and the rights which must necessarily flow from public duties.⁸⁷ It is thus vitally important to recognise that reasonableness review is informed by a public conception of moral reason, demanding that administrative decisions can be justified as plausible, good faith attempts at the common good. Common law reason is thus

⁸⁷ See; Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (n 15); TRS Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' (2006) 65 *The Cambridge Law Journal* 671; Foran, 'The Rule of Good Law' (n 1).

bounded; constrained by fundamental principle and constitutional value as well as the institutional history through which those principles and values find expression.⁸⁸

The requirement to justify differences in treatment in accordance with standards of fairness and legal equality manifest as a principle of non-discrimination which is immanent within reasonableness review. This demand is fundamentally one which requires public officials to exercise their discretion impartially and in accordance with public reason. Private motives or justifications, incompatible with the public nature of judicial review, or tainted with animus or prejudice, cannot establish the reasonableness of a public decision. Private individuals are generally free to operate in a biased and partial manner, focusing only on the interests of themselves or of a small subset of their community. But public officials, tasked with exercising public powers in the public interest, must operate in an impartial manner, treating all those in their charge as moral equals by affording equal consideration to their interests and concerns.⁸⁹ This does not mean that these officials must treat all those in their charge equally, but it does mean that they must offer reasoned justification, acceptable as good faith, plausible attempts at the common good, for any differentiation in treatment. The constitutional role of the court is not to decide how best to achieve the common good; but it is under an obligation to ensure that executive pursuit of its own conception of the common good is genuinely common and thus non-discriminatory. Some decisions are unreasonable because they contravene aspects of the rule of law such as the demands of simple legality or the doctrine of relevant considerations, the rule against bias, or the principles of natural justice. Yet even these standards reflect the requirement that administrative agencies treat people in a comparatively fair manner, given the background of lawful conduct that legal subjects are entitled to be included within when dealing with public officials.

The assessment of the legality of administrative action cannot be separated from political principle or practice;

What is fair and reasonable – or what is *unfair* and *unreasonable* – can hardly be determined in deliberate disregard of political practice, and the settled expectations which may have arisen on the basis of it. Nor can such judgements be made in abstraction from the wider constitutional landscape within which public agency and individual citizen interact.⁹⁰

⁸⁸ See; John Laws, 'Wednesbury' in Forsyth and Hare (eds), *The Golden Metwand and the Crooked Cord* (Oxford University Press 1998).

⁸⁹ Raz describes this as the rule of law requiring that public officials act in a position of custodian of the public interest; Joseph Raz, 'The Law's Own Virtue' (2019) 39 *Oxford Journal of Legal Studies* 1.

⁹⁰ Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism*, 2.

The principles of judicial review, when taken as a whole, reveal the values which are latent within common law reason; the principle of legal equality being chief among them. Understood in this manner, *Wednesbury* is an endorsement of both the claim that any instance of unlawfulness is unreasonable and the method by which the court may appeal to these underlying values to determine the lawfulness of administrative action. A decision may meet the requirements of procedural fairness or relevant considerations and yet be so unjust and oppressive in its operation that it is not capable of public, constitutional justification. Where this occurs, reasonableness review operates as a fail-safe to ensure that such conduct is not given the legitimacy of lawfulness. In this sense, the sanctity of the principles of judicial review are rightly conceived as essential for the rule of law to obtain.

It will sometimes be very easy for a court to conclude that a given policy is unreasonable. Often, however, it is a contested, highly contentious process which involves striking the right balance between all the constitutional considerations in view, including the separation of powers. Ultimately though, the court must come to some conclusions concerning the constitutional boundaries within which the executive must operate. Within those boundaries however, the discretion of elected representatives to pursue their vision of the public good is preserved. To use Dworkin's analogy, "discretion, like the hole in a donut, [is] an area left open by a surrounding belt of restriction".⁹¹ Those restrictions are set by artificial reason, informed by institutional history and fundamental principle, breach of which cannot be countenanced. Yet the reverse is also true; the hole of discretion, of natural reason reserved for the elected branches of state and those they choose to delegate discretionary power to, is one into which the judiciary cannot venture. The court maintains its own legitimacy by confining its analysis to questions of legality, drawing upon artificial reason and constitutional principle. It loses its legitimacy when it begins to step into the realm of natural reason and assess questions of policy without any reference to the rule of law or the intention of Parliament. Where the court abandons artificial reasoning to engage in a full-blown assessment of government policy in a manner more reflected in all-things considered natural reason, the distinction between appeal and review is lost. Should this occur or should the perception that it has occurred become widespread, we are likely to see executive backlash against the courts. In such instances, we must ask whether an attempt to assert control over the judiciary is legitimate because judges have indeed stepped

⁹¹ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977), 31

beyond their constitutional role or whether this backlash is more reflective of the actions of James I, presuming that a member of the executive is permitted to assume the role of judge and assess legal questions, simply because they have political legitimacy to pursue their conception of the common good. It is only when we account for the distinction between natural and artificial reason that we can begin to make sense of the intricacies of these debates and the nuances of the rule of law which is necessary for their resolution.