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Reasonableness and Law

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While this expression betrays the French reluctance to accept a legal precept without a specific textual basis (a reluctance owed to a strict legal positivism), it points out not only the feature that distinguishes such principles from legislation but also their function as a limitation on majority rule. In France, this function proved to be particularly important after 1944, when the Conseil d'État, absent any kind of constitutional court, undertook the task of repealing the legislation introduced under the Vichy Regime that was deemed politically and even morally unacceptable. As Réné Cassin wrote some years later, such general principles made it possible for French public life to come under a new ethic.[23]

Unlike reasonableness, however, proportionality is frequently enounced in positive law, especially in the context of the EU. Aside from the general provision on proportionality as a corollary of subsidiarity, there is also a plurality of provisions concerning public utility companies. Reasonableness is instead for the most part an unwritten principle, for which reason the courts invoke it under the heading of broader constitutional principles, one of them being equality. An example of this way of conceiving reasonableness may be found in the Italian Constitutional Court's judgment on fiscal exemptions: the court found that a retroactive rule is in itself an anomaly, and is even less compatible with the principle of reasonableness when internally incoherent and contradictory.

But while reasonableness is *mainly* an unwritten principle, it is not *just* that. Thus, Article 6 ECHR, a written constitutional document, goes beyond the requisite of a fair process by requiring Member States to also ensure a "reasonable time" for any judicial process. Moreover, the trend is for this requisite to be constructed more and more broadly, so as to also include adversary administrative procedures, like the ones that give rise to the adoption of penalties.

What really matters, in sum, is not the textual basis of reasonableness, or the lack thereof, but its actual influence on public action. Nor is it particularly important that the courts or similar other bodies should use the term *principle* or *general rule*, as the ECJ did in the first case in which it dealt with the principle of proportionality.[24] What matters is instead that reasonableness, understood as a legal precept, be counted among the general principles of law. This gives way to important legal consequences.

4.2 Reasonableness as a Requisite of Validity

As was observed earlier, there is empirical evidence showing that the courts will not hesitate to recognize reasonableness as a principle in its own right, as an autonomous principle, one carrying its own legal import or status. This means that reasonableness

[23] See Cassin (1951, 3 n. 5): "Grace à ces principes généraux l'ensemble de la vie publique française est soumise à une éthique" (Thanks to these general principles, the whole of French public life is subject to an ethic).

[24] European Court of Justice, Case 8/55, *Fédération Charbonnière de Belgique v. High Authority*.

is not just a subsidiary element of sorts, one that only bears relevance in connection with other elements. Quite the contrary, reasonableness is *in itself* a requisite of validity. It figures among the legal norms whose respect on the part of public authorities the courts must ensure. Accordingly, a failure to observe the principle of reasonableness does not signal a mere irregularity but instead resolves itself into the invalidity of the acts, legislative and administrative alike, that public authorities adopt. It may even give rise to the right to money damages for losses or injuries deriving from such acts.

That said, there are two important respects in which reasonableness, seen as a general principle of law, differs from other legal precepts, and especially from rules governing the conduct of private individuals and public authorities: first, the vagueness of the principle of reasonableness is such that its scope of application is not confined to a specific class of behaviours; second, and more important, the principle differs from other rules in the sense that it escapes any all-or-nothing logic. It instead makes it necessary to carefully weigh and balance all the circumstances in a case and all matters of fact and law. Which means that the kind of judicial review the principle involves goes well beyond the traditional review by which to determine legality.

An interesting example is offered, once again, by Article 6 ECHR. The ECHR only sets forth a general requirement of "reasonable length" of time without specifying its content. It thus fell to the organs in Strasbourg, and in particular to European Court of Human Rights, to work out a more definite standard. This standard was set at six years for a judicial process, after which time national governments must award compensatory damages. Of course, this standard is questionable in many respects: why six years and not five or seven? Shouldn't the number of individuals involved be taken into account, especially in criminal proceedings, where several witnesses may be asked to give testimony? On the other hand, precisely because the ECHR does not specify what is reasonable, the term is flexible and is therefore meant to be gauged by the court depending on circumstance.

4.3 Implications for the Protection of Fundamental Rights

The observations thus far made show that the ECHR is having an increasing influence on national legal orders, in that legislative provisions are being reinterpreted—and sometimes even amended—to ensure their compliance with Article 6. The question thus arises whether traditional doctrines, such as reasonableness, are compatible with a supranational bill of rights and the supervision of a supranational court.

The question emerged clearly in the UK. It is not something that can simply be set down to English insularity, but is owed instead to the traditional concern not to interfere with complex discretionary choices and policy decisions. We have seen this at work in the previously discussed *Wednesbury* unreasonableness doctrine. This doctrine is consistent with the idea of integrity and neutrality underlying the courts' activity and distinguishing them from political bodies. This implies that judges cannot intervene whenever they believe a different way of balancing interests would be

more rational than that chosen by a political or administrative body, even though it may well be known that these latter decisions proceed on a variety of social and moral assumptions.

What is controversial about this UK legal doctrine is its reliance on the idea of unreasonableness, with its view that only in rare and extreme cases—where no reasonable person could possibly find the decision reasonable—can the courts intervene.[25] This makes for a serious risk that discretionary powers are exercised arbitrarily. For this reason the ECHR Court has urged English courts to bring administrative decisions under closer scrutiny when reviewing measures that seem to contravene the ECHR. In other words, where the matter at issue is a decision that may have violated fundamental rights, a finding of unreasonableness should not be equated with one of absurdity: a lower threshold should be used. This, however, would yield broader consequences, for it would introduce a double standard of judicial review. But while abandoning such a double standard is doubtless a viable option, the test of unreasonableness so introduced (where something need not reach the absurd to count as unreasonable) may simply cease to operate as an independent instrument by which to keep decision-making discretion in check: it may become one of the texts used to comply with EC and ECHR norms.

The ECHR's impact on the Italian legal system is different but not any less relevant. The courts' reluctance to interfere with administrative discretion has traditionally been channelled through the use of the concept of legitimate interests (*interessi legittimi*) as distinct from rights. Only rights could limit administrative discretion and entitle one to claim compensatory damages: if the applicant instead failed to show a right, but could only show a legitimate interest, the administrative court could at best annul the contested decision, without also awarding compensation. This sharp distinction came apart at the end of the 20th century owing to a number of factors, including the impact of EC law. And the distinction has come under further pressure by the increasing number of ECHR Court rulings awarding compensation for judicial proceedings that breach the ECHR by dragging on beyond a reasonable time. That this change is systemic has emerged in a recent judgment where the ECHR Court found that budgetary resources must be reasonable: their effects in this case were judged to be "manifestly unreasonable."[26]

4.4 Toward Universal Principles of Public Law

It was not so obvious in the past, not only when Dicey emphasized the diversity between public law on the two sides of the Channel, that English and Italian administrative law were susceptible of being compared: the basis of comparison—or rather, the reason why a comparison was possible to begin with—lay in the two

[25] Paul Craig (2003, 553) mentions the opinion of Lord Green, for whom something that would qualify as an extreme case in this sense is where a teacher is dismissed because he or she is red-headed.

[26] ECHR Court, Case n. 65075/01, *Procaccini v. Italy* (2006), § 105 and § 143.

countries' common roots. A comparative exercise along these lines is even more justified today if we consider that both the UK's common-law system and Italy's civil-law system come under the influence of international and supranational organizations such as the Council of Europe and the European Union. Drawing on common constitutional traditions and on the ECHR, the ECJ has worked out a set of general principles of public law, including procedural due process requirements such as the right to have a hearing and the giving-reasons requirement, as well as proportionality and reasonableness.

It may be asked whether such principles are common not only to the legal systems of EU member states but to other systems too, and in fact whether they are universal. One may adduce in support of this view Benjamin Constant's argument (as captured at the outset in epigraph) that arbitrariness is incompatible with any form of government. It is interesting to note in this regard that the argument so stated cannot be made to square with the Enlightenment view—a widely held one during the period, in the lead of Montesquieu—positing a "natural" tendency toward despotism among other systems of government, especially those of the empires, owing their wide scope and heterogeneity.

The question is at once empirical and normative. It is relatively easy to point out that the previously discussed general principles of procedural due process, proportionality, and reasonableness are being increasingly recognized and upheld by regional and global regulatory regimes. But then the significance one may ascribe to this trend is a controversial matter: some observers (see Harlow 2006, 187) argue that procedural principles are simply and exclusively Western constructs; others take this line of criticism one step further, arguing that global administrative law reveals its deepest flaw precisely through its concern with procedural considerations, a concern that, as the argument goes, needs to be matched by a parallel concern with substantive considerations, such as social justice. This latter argument contains a bias in favour of substance, a bias opposite to (and at least as strong as) the procedural bias found in the former argument, which for its part requires a careful empirical inquiry.

A methodological device that may prove useful in this regard is the distinction between principles and rules: we might hypothesize that while different cultures have different rules—which they use as means to different goals—they nonetheless have a shared principle or set of principles (della Cananea 2009). At which point we might ask: What if this hypothesis turns out to be valid? That is, what if it could in fact be established that a given principle or set of principles is shared, if not universally, at least by most legal systems, and not just the most relevant ones? In that case, *if* such a principle or set of principles can be found, *then* a further possibility could be explored: it consists in looking to see whether the principle or principles in question can be considered in light of Article 38 of the Statute of the International Court of Justice, an article requiring the same court to apply international conventions, international custom, and the "general principles of law recognized by civilized nations." Now, whatever one may make of the distinction implied here between civilized nations and non-civilized ones, it remains a fact that this article has been applied by international judges and arbitral bodies and is still in force; and it consequently becomes the task of lawyers to inquire whether the

provision is still suited to solving the new problems emerging in the global arena. Even if it turns out that the provision *isn't* suited for this job, we will have achieved a result, in that we will know that new concepts and ideas will be needed, either to supplement the old ones or to replace them.

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Reasonableness in Administrative Law: A Comparative Reflection on Functional Equivalence

Michal Bobek

To a Czech, or perhaps more broadly to a Civilian lawyer, the number of references to the notion of reasonableness in the Anglo-American legal tradition appears somewhat singular. In a number of areas, various "reasonableness" tests have been developed: standards like that one of a "reasonable man," "reasonable notice," "reasonable use," "reasonable force," "reasonable expectation," "reasonable care," etc. There is also the standard for action of a "reasonable administrative authority," which forms the jurisdictional test for the review of administrative action.

The perhaps premature conclusion from this reasonableness spree, which has only very limited parallel in say Czech, German or French law, might be that the English or other English-speaking people are indeed very reasonable. However, while having no ambition to utter an opinion on this question, a different exercise is effectuated in this short piece: a functional comparison of the use of reasonableness in the area of judicial review of administrative discretion. This comparison allows us to conclude that the fact that there are no self standing tests of "reasonableness" in the judicial review of administrative discretion either in Czech, German or French law, does not mean that in these legal systems, the judicial control of administrative discretion would be "less reasonable." It is only that functionally similar results, i.e., the review of administrative discretion, are, for historical purposes, achieved by different means and labelled differently.

1 Reasonableness in Administrative Law

There are at least three areas in which the yardstick of reasonableness might play a role in administrative law.

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1.1 Reasonableness as Legitimacy

On a deeper philosophical plane, reasonableness of the law or a particular statute in the area of public administration is, as in other areas of law, a legitimising argument. A reasonable law has fewer problems in securing its general acceptance and obedience; "Law is the perfection of reason" (Colt 1903, 657). In the area of administrative law, practising legal philosophers tend to come in limited supply; public administration generally does not have a strong reputation for questioning law and administrative regulations or circulars in terms of their reasonableness. Reflections on reasonableness as legitimacy thus remain floating in the space and are often left to rather constitutional than administrative deliberations.

1.2 Reasonableness in Statutory Interpretation

All rules of statutory interpretation are about arriving at a "reasonable" reading of a statute. There are, however, perhaps two instances in which the category of reasonableness surfaces more strongly than in others: the avoidance of unreasonable (absurd) results and contextual reasoning.

A generally shared principle going well beyond the English rules[1] of constructing statutes is the rule against absurdity, i.e., the presumption of a reasonable legislator, who did not wish to achieve absurd results. This approach is a kind of "consequentialist" reasoning, i.e., the reasoning out of a negative consequence one does not wish to enter. In the more modern continental guise, the call for accepting reasonableness in the statutory interpretation was connected with the struggle against the distended legal formalism. In this context, G. Calabresi[2] mentions the famous example of the medieval Italian law against shedding blood in the streets of Bologna. The object of the law was to ban duelling and fights in the streets. However, the question which later arose was whether or not the same prohibition, which was in itself clear and unconditional, applies also in the case of a doctor who, wanting to help a man who was sick and collapsed in the street, bled him, thus shedding blood in the street. Similar example (see Colt 1903, 670) would be the provision of a statute by Edward II., who decreed that every prisoner who breaks the prison shall be guilty of felony and hanged. Does this, again a very categorical statement, apply also to prisoners who break out because the prison is on fire?

Today, the reasonableness argument, contained in the avoidance of absurd results rule, has been largely superseded by purposive (teleological) reasoning. Purposive reasoning per se is just a consequentialist argument, which does not say much about the reasonableness of the consequence itself. However, there appears to be an implicit evaluative stage of the quality of purpose itself; one does not normally advocate achieving absurd results. The advantage of purposive approach instead

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[1] See the classical account in Cross, Bell and Engle (1995).

[2] See Calabresi (2000, 481). The origin of the example itself is attributed to S. von Puffendorf.

of just an argument out of an unreasonable consequence is that the reasoning can openly argue out of a negative as well as positive consequence.[3]

Reasonableness plays an additional role in the area of contextual reasoning. It may serve as a codename for an emerging or already emerged societal consensus, which allows for interpretation "updates" of existing laws. Lord Devlin once made, in this respect, the distinction between "activist" and "dynamic" lawmaking (see Devlin 1976). The key is the consensus: *activist* lawmaking means taking up an already emerged and consensus-driven idea and turning it into law. *Dynamic* lawmaking means taking up an idea created outside the consensus, i.e., one not (yet) supported by the society as a whole, turning it into law and then propagating it. Devlin admits that there are instances, in which judges should be activist. But they should never be dynamic (ibid., 5).[4] In both instances, however, the word "reasonable" tends to be often used. The typical argument of this type would argue that it is no longer reasonable, in view of the changing habits, moods and fashion in the society or even abroad, to interpret (any longer) the law X in the manner Y.

1.3 Reasonableness in the Judicial Review

The most intriguing use of the notion of reasonableness, which will be examined in this contribution, is the use of "reasonableness" as the standard for judicial review of administrative decisions. The use of reasonableness in this context essentially means that if the action of an administrative authority is deemed not to be reasonable, it can be annulled.

2 Reasonableness in Judicial Review of Administrative Discretion

There is a difference in the use of concept of reasonableness in, on the one hand, the Anglo-American common law and, on the other hand, in, for instance, the Czech, German or French legal systems. The first former system uses the reasonableness standard as a sort of "enforceable" law, the latter ones do not mention it but rarely.

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[3] The style of reasoning employed by the Court of Justice of the European Communities provides ample examples of both. For the reasoning out of positive consequence see e.g., Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, ECR English special edition, p.1 ("The Community is a new legal order of international and it thus must have the following characteristics"), for the example of reasoning out of a negative consequence, see e.g., Case C-453/99, *Courage Ltd and Others v. Bernard Crehan* (2001) ECR I-6297 ("If we do not allow for damages for private breaches of Community competition rules, the effective enforcement of EC competition rules on the national level will be compromised").

[4] In Devlin's eyes, dynamic lawmaking needs enthusiasm. As he adds, "Enthusiasm is not and cannot be a judicial virtue. It means taking sides" ibid.

If they do, "reason" or "reasonableness" tend to be used as a judicial argument of last resort or an ancillary argument. Let us first examine the various contexts in which the standard of "reasonableness" appears in the various common law systems.

2.1 The Many Faces of Reason: England, Australia, Canada and the United States

In England, "reasonableness" as the criterion for judicial review of administrative action is mostly associated with the so-called "Wednesbury reasonableness test." The case,[5] which gave the name to the test itself, arose out of a dispute which opposed a local authority and a picture theatre. The authority has granted a licence to the theatre for cinematographic performances, with one condition attached thereto: no children under 15 years of age shall be admitted to any entertainment on Sunday, whether accompanied by an adult or not. In attaching the condition to the licence, the authority was within the sphere of free discretion assigned to it by the Section 1, Subsection 1 of the Sunday Entertainments Act 1932, which simply provided that the licensing authority may make the use of the licence "subject to such conditions as the authority thinks fit to impose."

When reviewing and eventually dismissing the action for judicial review, Lord Greene, M.R. stated, that the courts will not interfere with the discretion assigned to public authorities, provided that:

(i) the authority took into account all the things it ought to have taken into account,
(ii) the authority did not take into account things they should not take into account (improper purposes) and
(iii) the decision is not unreasonable, i.e., it is not a decision that no reasonable authority could ever have come to.[6]

The doctrine (see Craig 2003, 553; Delany 2001, 70; Künnecke 2007, 93) generally interpreted the notion of reasonableness contained in this decision as having a twofold meaning: firstly, the reasonableness in narrow (or substantive) sense, which corresponds to the third prong of the above described test: no reasonable authority would have adopted such a decision. Secondly, reasonableness in the broader (or umbrella) sense, which contains the entire test and all the three prongs: a reasonable authority will not only adopt a substantively reasonable decision, it will also take into consideration all the things it should take into account and not take any of those it ought not.

It should, however, be stressed that in the English law, reasonableness as the yardstick for the exercise of administrative discretion does not start with *Wednesbury*. Quite to the contrary: not only has reasonableness been the yardstick for the

[5] *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* (1948) 1 K.B. 223.
[6] Ibid., 233–4.

administrative review before the WWII,[7] it goes back to the 17th century and even before. An excellent overview of the reasonableness review of delegated legislation, adopted by the administrative authorities, provides A. Wharan (1973, 615). He gives examples of courts striking down local regulation banning the play of musical instruments in the streets on Sundays,[8] or the prohibition to bury corpse in any existing cemetery within the distance of one hundred yards from any public building,[9] etc.

The reasonableness test in administrative review was "successfully" exported from England to the countries of the British Commonwealth. In Australia, the reasonableness standard has been incorporated directly into the text of the Administrative Decisions (Judicial Review) Act 1977 as one of the demonstration of improper exercise of administrative power.[10]

The test of reasonableness for the review of administrative action is also accepted in Canada (see, e.g., Sossin 2002; Casgrain and Grey 1987). An elucidating summary of this principle in Canadian federal law was given by Justice L'Heureux-Dubé in *Baker v. Canada (Minister of Citizenship and Immigration)*[11]:

> Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of the decisions-makers, the exercise of discretion from an improper purpose, and the use of irrelevant considerations [. . . citations, including Wednesbury, omitted . . .]. In my opinion, these doctrines incorporate two central ideas — that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute [. . .]. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature.[12]

The honourable justice highlights two general aspects of the use of the standard of reasonableness in reviewing administrative discretion: firstly, whether the authority is within its sphere of competence, i.e., whether it has the power to act and, secondly, once found that it indeed has the power, in what way does it exercise the given power. Both of these aspects may be covered by the judicial review of reasonableness.

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[7] Famously e.g., *Roberts v. Hopwood* (1925) A. C. 578, where at p. 613 Lord Wrendbury observed: "A person to whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower to do what he likes [. . .] He must by the use of his reason ascertain and follow the course which reason directs."

[8] *Johnson v. Croydon Corporation* 16 Q. B. D. 708 (1886).

[9] *Slattery v. Naylor* 13 App. Cas. 446 (1888).

[10] Section 5.2 (g) and Section 6.2 (g) which gives demonstrative listing as to when the exercise of public power in adopting a decision (Section 5) or in the conduct related to making the decision (Section 6) will be improper: "exercise of a power that is so unreasonable that no reasonable person could have exercised the power."

[11] (1999) 2 S.C.R. 817.

[12] Ibid., 853. See also *Canada (Director of Investigation and Research) v. Southam Inc.* (1997) S.C.R. 748.

The federal law of the United States recognises a number of reasonableness tests.[13] Only a passing remark will be made on the use of reasonableness in the context of the fourth amendment to the U.S. Constitution. The Fourth Amendment protects the individual, *inter alia*, against "warrantless searches and seizures."[14] When is a search or seizure warrantless is to be considered under a two-part test, which was suggested by Justice Harlan in *Katz v. United States*[15]: "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation of privacy be one that society is prepared to recognise as "reasonable."[16] It is interesting to note that in such context, the reasonableness criteria is used not only to state how can discretion be exercised, but also in order to ascertain the existence of the power to search and seizure of the federal authorities.

2.2 Intermezzo: The Functions of the Reasonableness Standards

What may one understand as being the function of the use of reasonableness in the above sketched English common law and its offspring? Arguably, the broader perception of the reasonableness standard is twofold. Firstly, it is about limiting the exercise of administrative discretion, i.e., somehow mapping the legal space in which the criteria, according to which the public authority is supposed to decide, are not clearly laid down in the empowering law itself. The Canadian and U.S. examples provide, however, an even broader understanding of reasonableness: it may not be only about the mode in which existing competence is exercised. It may also be about the existence of the competence itself.

If the broader understanding of "reasonableness" is accepted, then its function in administrative and constitutional review can be said to be twofold:

(i) It demarcates the scope of the competence of a public authority ("Can they do it at all?");
(ii) If the authority is competent, in what way can it exercise the discretion assigned to it within the existing competence ("How can they do it"?)

2.3 The Austrian-Germanic and the French Traditions

When looking into the German, Czech or French case law of administrative courts or the standard doctrinal commentaries, one would be quite struck by the absence

[13] To the intellectual discomfort of some authors. See, critically e.g., Freund 1991.

[14] "The right of the people to be secure in their persons, houses, papers, and effects, *against unreasonable searches and seizures*, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Emphasis added by the author.

[15] 389 U.S. 347 (1967).

[16] Ibid., 361.