Wednesbury

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No judicial review case goes by without its being mentioned. Everybody knows its name. Nobody reads it any more. And nobody dare cite it to a judge: we know about grandmothers and egg-sucking. It is a case which contains *"the classic exposition of the principle of reasonableness"* (*Chetnik* [1988] AC 858, 873C), which *"everyone by now knows by heart and … no one now even opens the report"* (*Benwell* [1985] QB 554, 568).

The reasonableness principle for which it stands has endured the passing of decades of feverish administrative law flux and development. It has seen the competing conceptual language of "perversity", "anxious scrutiny", "proportionality" and "abuse of power". Alongside them, it endures. For it is still today the "reasonableness" test which serves as the hallmark for the ground on which a Court will interfere with the substance of a decision of a public authority, without simply substitute its own judgment for that of the authority entrusted with the primary decision-making role. *Wednesbury* [1948] 1 KB 223, take a bow.

As a leading case, this one is unpromising. Lord Greene would not have thought he was doing anything special, in repeating the reasonableness principle and placing it alongside the basic duties of lawful and informed decision-making. Moreover, the case is hardly an enduring beacon. After all, what was 'reasonable' about banning kids from going to the cinema on a Sunday?

In fact, the reasonableness test has a lot going for it. First, it gives us what we need: a conceptual label to distinguish intervention on substantive grounds from a procedural complaint, and at the same time distinguish substantive non-substitutionary review from the corrective approach to errors of law. Secondly, it carries the built-in latitude which reminds judges to pay decent respect to the judgment and discretion of front-line public decision-making bodies. Thirdly, its straightforward language of 'reasonableness' steers away from those overstated tests which threatened to remove accountability by suggesting only an 'unhinged' decision-maker is touchable: "outrageous defiance of logic" (*GCHQ* [1985] AC 374, 410G), "perverse" (*Brind* [1991] 1 AC 696, 751D), "taking leave of its senses" (*Nottinghamshire* [1986] AC 240, 247H). Fourthly, it is a flexible concept, well able coherently to accommodate a broad or narrow latitude, depending on the subject-matter. Fifthly, it is the password by which emergent principles can come to be vindicated and then directly recognised.

Reasonableness is a thriving principle and the Courts are not afraid to use it. A survey of 2006 cases makes the point. Examples include Courts holding that there has been: an unreasonable refusal of interim housing (*Paul-Coker* [2006] EWHC 497 (Admin)); an unreasonable Order in Council (*Bancoult* [2006] EWHC 1038 (Admin); an unreasonable decision against a residential care assessment (*LH* [2006] EWHC 1190 (Admin)); an

unreasonable removal of an asylum seeker (*Ahmadzai* [2006] EWHC 318 (Admin)); and an unreasonable refusal of a cancer drug (*Rogers* [2006] EWCA Civ 392).

Should reasonableness give way to proportionality? No. They should stand side by side. When the *ABCIFER* detainees challenged the unspeakably divisive 'bloodlink' compensation criterion for ex-POW compensation, the Court of Appeal [2003] QB 1397 set it up beautifully. The law should, they said, recognise proportionality as a ground for judicial review at common law, but it would need the House of Lords to say so. The Law Lords, failing to take the hint, refused permission to appeal, and put the development of the common law back a decade. Meanwhile, we all stayed fixated with human rights under our gleaming new constitutional statute, the Human Rights Act.

Proportionality too has great virtues. First, its variable standard of review can reach beyond 'anxious scrutiny' reasonableness, approaching – where appropriate – a test of necessity. Secondly, its disciplined template, the need for action to: (a) have a legitimate objective; (b) be suitable for achieving it; and (c) not be excessively burdensome in doing so. Thirdly, its willingness to place an onus on the public authority to justify its action and so explain itself.

In fact, with some digging, the principled template of proportionality can be found alive and well within the common law. The 'legitimate objective' is generally framed as the public law duty to exercise power for its intended purpose (*Magill* [2002] 2 AC 357 at [19(2)]). It has been held to be unreasonable to adopt a measure not 'suitable' in the sense of being reasonably capable of achieving the intended purpose (*Wandsworth* [2003] EWHC 2969 (Admin) at [73]). And it can also be unreasonable for a decision to be made in the face of a less 'burdensome' alternative (*Watford* [2003] EWHC 2480 (Admin) at [82]).

Certainly, the recognition of common law proportionality is long overdue. But proportionality principles will not always be helpful, nor universally applicable. There will always be the need for the reasonableness safety-net. Take an example: although it is possible to castigate administrative delay as *"disproportionate"*, there will be situations where governmental *inaction* can only really be impugned as *"unreasonable"*.

How should we approach reasonableness? Here are some golden rules. First, we must use the right language. The language of "perversity" and "irrationality" should be banned. We do not need it. The principle is one of "reasonableness". We should not be afraid to allege it, and apply it, in an appropriate case. It does not mean the decision-maker has become temporarily insane. As Lord Cooke explained (*ITF* [1999] 2 AC 418, 452E-F), the language of "reasonableness" provides *"unexaggerated criteria [which] give the administrator ample and rightful rein, consistently with the constitutional separation of powers"*.

Secondly, substantive judicial review for unreasonableness will always be needed. The reasonableness threshold should never be placed so high as to neuter the judges and place public decision-makers beyond the law. As the Courts have explained (*Manning* [2001] QB 330 at [23]: *"the standard of review should not be set too high, since judicial review is*

the only means by which the citizen can seek redress … and if the test were too exacting an effective remedy would be denied".

Thirdly, the principle must apply flexibly. Its precise application will always depend on the context, including the nature and purpose of the statutory framework (*Javed* [2002] QB 129 at [49]), and its intensity on the nature and gravity of what is at stake (*Begbie* [2000] 1 WLR 1115, 1130B).

Fourthly, 'unreasonableness' should continue as a broad label to accommodate new and emerging principles of review. We have learned that it is not possible for grounds like uncertainty, inequality, error of fact, substantive unfairness, illogicality, oppression or proportionality simply to appear as new bases for judicial supervision. The same will be true for other emergent themes in the future. For overnight recognition is not how the common law develops. The law evolves in two stages, the first of which is to use available and recognised concepts to address wrongs in need of rectification. Unreasonableness is perfect in that role: broad, open-textured and adjustable. In this way, half the job is done. But only half. The second stage is to analyse and recategorise existing case-law by identifying themes and introducing new coherence and order. Out of *Wednesbury*, new birth.

Finally, we should not forget that the built-in restraint which the reasonableness principle brings is needed. The judge is not the primary decision-maker, entrusted with judgment and discretion. It is worth remembering *Roberts v Hopwood* [1925] AC 578. In that case, the House of Lords overturned a local authority scheme for a minimum wage and equal pay for men and women. They regarded it as unreasonable, based on what they saw as *"eccentric principles of misguided philanthropy"*. Time has not been kind to that judicial activism. It carries an important warning: the unreasonableness principle serves to prevent abuse of power in the hands of the executive, but risks facilitating it in the hands of the judiciary.

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- This was an article for the Durham University law journal *Inter Alia*.