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Volume 2/2010

# Comparative Legilinguistics

International Journal for Legal  
Communication

Institute of Linguistics  
Faculty of Modern Languages and Literature  
Adam Mickiewicz University  
Poznań, Poland

*Comparative Legilinguistics vol. 2/2010*

**INSTITUTE OF LINGUISTICS  
LABORATORY OF LEGILINGUISTICS**

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Wydanie publikacji dofinansował Instytut Językoznawstwa  
The issue has been published with financial grant from the Institute of Linguistics,  
Poland.

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Printed in Poland

ISSN 2080-5926

Nakład 100 Egz.

Redakcja i skład: Pracownia Legilingwistyki  
Druk: Zakład Graficzny Uniwersytetu im. A. Mickiewicza

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## LEGAL REASONABLENESS AND THE NEED FOR A LINGUISTIC APPROACH IN COMPARATIVE CONSTITUTIONAL LAW

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**Abstract:** The paper focuses on the concept of reasonableness in several countries, in particular, comparing common and civil law systems. More specifically, it refers to the use of this word in the discourse of the judiciary and especially in the context of constitutional law. In the latter context reasonableness plays a crucial role in conveying values and thus construing “different” constitutionalisms; in fact it enhances the dynamics of the constitutional framework, while leaving the Constitution unaltered. Up to now, constitutional scholarship has devoted attention to the issue of reasonableness as a tool of adjudication (i.e. by including it in the wider framework of scrutiny techniques, such as strict scrutiny versus proportionality). On the contrary, the underlying hypothesis of this paper is that a solid linguistic approach will enhance the understanding of the role reasonableness plays as the quest for *minima moralia* in constitutional law.

**Estratto:** L’Autore analizza il concetto di ragionevolezza così come utilizzato nei sistemi giuridici di paesi diversi tenendo particolarmente in conto il confronto tra i paesi di tradizione continentale e quelli di *common law*. Più specificamente si analizza l’utilizzo del concetto di ragionevolezza nel contesto giuridico e, specialmente, costituzionale. In quest’ultimo caso, infatti, la ragionevolezza gioca un ruolo cruciale nel veicolare diversi valori e, di conseguenza, dare vita a differenti “costituzionalismi”. Infatti, questo concetto favorisce il dinamismo della cornice costituzionale pur mantenendo la Costituzione inalterata. Fino a questo momento la dottrina costituzionalistica ha analizzato il concetto di ragionevolezza come strumento del controllo di costituzionalità (cioè come uno dei possibili strumenti concettuali utilizzati per vagliare la compatibilità di un atto con la costituzione, come per esempio lo *strict scrutiny* da un lato e la *proportionality* dall’altro). Al contrario, la tesi dell’autore è che un solido contributo da parte della scienza della linguistica favorirebbe la comprensione del ruolo svolto dal concetto di ragionevolezza come *minima moralia* nel Diritto costituzionale.

I. There are two reasons why as a lawyer, and more specifically as a comparative constitutional scholar, I should carefully define the object of this research. The first is that this paper is delivered in a conference of experts in legal translation, i.e. experts of linguistics, and since I am not one, I should specify in what terms I am concerned with linguistic aspects in the context of comparative constitutional law. Second, I am aware of the multiple connections that exist between language and law and the many standpoints that can be adopted to describe them, however I am exclusively interested in to those regarding public law in a comparative perspective. As a result, I believe that the easiest way to structure this premise is to list what this paper *will not* address.

First of all, this paper does not consist of philosophical research in other words language will not be taken under consideration to define what “law is” or “how a legal system should be defined”. Second, this is not a theoretical study devoted to criteria of interpretation, i.e. how a legal text should be read in order to avoid (or solve) contrasts between legal sources. Third, I have not opted for a strictly constitutional perspective in fact this paper does not focus on the techniques of interpretation of legal texts having constitutional relevance.

However, by limiting the scope to comparative law one should consider that there are numerous ways in which language plays a role in legal comparison that for brevity I will divide into two groups. The first group is concerned with the most obvious way language plays a role in legal comparison regards how to acquire the knowledge of foreign law, i.e. to access information concerning a specific foreign legal system. For example, Italian comparative private law scholarship (Grande, 2006, p. 117), notwithstanding its internal diversity, reveals a common interest especially regarding legal translation and legal language (Sacco 1986; Ajani 2003; Gambaro 2004; Pozzo, 2005) and this, according to certain authors, is partly due to the fact that Italian «is not a dominant language so that scholars have to be particularly careful when it comes to terminological issues» (Grande 2006, 121-2; in the context of public law Frosini, 31-56 and 183-210).

The second group mainly regards what has been defined as legal transplant. This definition can refer to a wide series of cases, for example many Latin American countries adopted their form of government (i.e. the frame of government) on the basis of the American presidential executive (Garcia Belaunde, et al. 2002; Frosini and Pegoraro 2008, 44-45). Another example could be the ombudsman. First created 200 years ago in Sweden, the *Justitieombudsman* was «initially envisaged as the trustee of Parliament, i.e. he was in charge of supervising whether the laws approved by Parliament (*Riksdag*) had actually been implemented by the executive» (Frosini and Spasić 2005, 337). His core activity was to limit the “absolute” power of the King thus granting a balance between the legislative and the executive power. However, nowadays in many European countries the ombudsman is seen as a body that protects citizens from potential abuses due to bureaucracy. It should be noted that the idea of *legal transplant* was elaborated in the context of private law, while there is still a debate as to whether this notion can be employed in public law. Recently, the metaphor of *migration* (Choudhry 2006) was identified as an alternative to *transplant* when referring to constitutional ideas. In fact, the latter are strictly related to the definition of the identities of national communities and they are more sensitive than any other legal tradition operating in business law or private law in general. In this perspective, the milder metaphor of a *migration* seems to better frame what is supposed to be a dialogue in equal terms among legal systems, rather than an import-export of legal solutions, that sometimes lead to a *rejection crisis*.

However, notwithstanding the diverse reasons why language is relevant to comparative law, one should note that the core activity, which precludes all the others, is legal translation. Indeed, whether it is written or spoken, the action of rendering the meaning of a word or text in another language represents one of the premises of legal comparison. However, this is not an exclusive of comparative law. For example, certain international and supranational legal systems (eg. ECHR and EU), due to the high level

of integration and development, adopt a multi-lingual approach. The latter, on the one hand, requires drafting laws in different languages, but on the other it requires national legal sources and supranational or international laws to be intelligible both at the domestic and international level. Similar considerations can be made regarding countries with more than one official language, such as Canada or Switzerland, where judges are sometimes obliged to cross reference translations of the same law in order to solve the case. For example, the Swiss Federal Constitutional Court when called upon to interpret art. 119 par. 1 of the criminal code concerning the number of physicians to be consulted before legally carrying out an abortion could not answer on the basis of the German version. German is the predominant language in the federal system, because laws are first drafted in German and then translated into the other official languages. However, in this case the Court could not use the expression contained in the German version of the criminal code («nach ärztlichem Urteil») because it did not clearly specify the number of medical opinions necessary to certify the risk of physical and psychological damages caused by the pregnancy. As a consequence the Court had to decide on the basis of the Italian («giudizio di *un* medico») and the French («*un* avis medical») translation which clarified that one medical opinion was sufficient (Gerotto 2004, 3651).

In the light of these examples of the possible relations between language and law, this paper will argue in favour of the necessity for comparative lawyers, and especially those interested in constitutional law, to open up their field of research and apply the techniques borrowed from other sciences and, in particular, linguistics. It should be underlined that the definition of what comparative law is itself has not yet been given, nor its correct methodology has been identified, therefore on the basis of the fact that «the classical technique of legal methodology» still is «reading texts of all kinds hoping for insight» (Örücü 2007, 43) the least one can advocate is the collaboration of comparative lawyers with other social scientists. This argument is particularly strong when it is used in relation to empirical sets of data, but it could fit the linguistic problem as well (Grosswald Curran 2006, 679). More specifically I agree with those who warn against the excessively abstract nature of certain analytic approaches to the study of the law, because they tend to transform a legal analysis into a terminological contest; on the other hand any «comparative work, particularly, if it is empirically based, will have to include a pragmatic dimension» (Harding, Leyland, 2007, 331) otherwise it is ineffective.

The people of most countries have a specific legal language whose peculiarities are the product of this country's history and culture; in particular, when legal systems belong to different legal families (such as civil law, common law, Sharia law, Hindu Law, etc.) they recognize different legal categories and conceptualizations. For example, among civil law systems one can distinguish the French and the German tradition based on the different level of abstraction of legal categories, and this is testified by the very well known example of *contract*. According to the French tradition a contract can be burdensome or gratuitous, on the contrary, German law identified a further category: the contract is part of another more general *genus*, i.e. *Rechtsgeschäft*, which can be both unilateral and multilateral (Galgano 2002) On the basis of these conceptual differences, how can *Rechtsgeschäft* be translated in English? E.J. Cohn or G. Danneman opted for «legal transaction» (Danneman 1993, 11; Cohn 1968.); unfortunately, this expression only corresponds to bilateral *Rechtsgeschäft* thus it needs to be accompanied by

explicatory notes. Cohn underlines that the «term *Rechtsgeschäft* is wider than the term contract or even agreement. It includes acts in which one party only becomes active... The conception of *Rechtsgeschäft* is one of those characteristically abstract conceptions which have become possible in German law...» or that of the legal category, typical of common law systems, of *torts* which is hard to find a parallel in civil law systems. According to some authors, these theoretical and conceptual differences are the ones that especially support the idea that to translate legal concepts is impossible because each language is too peculiar. Regardless of the fact that I agree with the idea that the context highly influences the meaning of legal terms, I believe that certain words pertain to the common core of the form of state, meant as the covenant between the ruled and the ruler. Nowadays, the concept of constitutional system embodies this covenant and it also requires a high degree of adaptability to different “constitutionalisms”. According to the theory of Pound (Pound 1923, 641-662), the legal system itself is composed of three elements: normative elements, philosophical elements and the concepts. In a historical perspective, the first two elements are very dynamic and change frequently, while concepts tend to be more stable. The reason for this difference is that these concepts act as swinging doors that allow different values to enter the legal system. As a result, these concepts lose their original meaning in order to play a dynamic function. Reasonableness, the specific object of this paper, is one of those very concepts.

II. The paper focuses on the concept of reasonableness in several countries, in particular, comparing common and civil law systems. More specifically, it refers to the use of this word in the discourse of the judiciary with the aim of highlighting its implications at a normative level and, in particular, from a constitutional standpoint. Indeed, in the context of constitutional law, the concept of reasonableness plays a crucial role in conveying values and thus construing different constitutionalisms. This concept enhances the dynamics of the constitutional framework, while leaving the Constitution unaltered. This also explains why reasonableness mainly pertains to the language of the courts and, especially, to the discourse typical of constitutional adjudication.

Up to now, constitutional scholarship has devoted attention to the issue of reasonableness as a tool of adjudication (i.e. by including it in the wider framework of scrutiny techniques, such as strict scrutiny *versus* proportionality). On the contrary, this paper analyses the concept of reasonableness starting from the meaning of the word and the cultural implications of its use in judicial interpretation in order to highlight its stratified meaning that comprises: its use in common language (strongly influenced by philosophical views); its legal (legal *stricto sensu*) meaning and the constitutional (legal *latu sensu*) meaning. Focus will be put on the third aspect so as to comprehend the complexity of the role played by reasonableness in the constitutional case law of common law and civil law systems. The underlying hypothesis is that a solid linguistic approach will enhance the understanding of the role reasonableness plays as the quest for *minima moralia* in constitutional law. The paper is consequently structured in three parts. The first is devoted to the etymology of the word, i.e. to the classical roots of reasonableness. The second part focuses on the propagation of reasonableness from private to public law. The third deals with constitutional case law while the final section is devoted to establish whether reasonableness can be identified as the core element of modern constitutional

law despite the different linguistic and legal meanings that the word may assume from country to country.

III. The roots of the word reasonableness are to be found in the Latin term *rationabilitas* that means, as the greek term *logos*, *calculus*, i.e. identifies the technical concept of “counting or calculus”. However, reasonableness as a concept also recalls Aristotle’s *Nicomachean Ethics* and its specific reference to the concept of *phrónēsis*. It is very well known that Aristotle’s philosophy can be classified, in very general terms, in two parts according to the existence of two basic types of intellectual virtues by which we live our lives. The two intellectual virtues Aristotle refers to are wisdom and *phrónēsis*. The first, wisdom, is used to discover and comprehend the external world, physical and metaphysical; in fact, it can be gained and increased throughout one’s life through experience and time. Aristotle’s wisdom is more similar to a scientific knowledge that potentially is a feature of any intellect. On the contrary, the second intellectual virtue, *phrónēsis*, cannot be acquired through education, i.e. cannot be drawn from books or any other form of codified source of information, because it is learned and built through the exercise of social interaction and everyday life experiences.

*Phrónēsis* «is concerned with human affairs...» and it therefore depends on time and experience in the context of every individual’s life and his/her social encounters thus granting to human beings the ability to make good judgements and decisions throughout life. However, *phrónēsis* does not only refer to the idea of taking good decision in one’s self interest only, but it also regards the human virtue of being able to take the best decision so as to grant the general welfare. This communal aspect of the intellectual virtue of *phrónēsis* is probably the most interesting to those investigating its legal implications; indeed, it identifies the capability of men and women to act according to a balance between its personal interest with that of mankind.

The contrast between wisdom and *phrónēsis* also lies in the different aim they have. One is finalised to find the true and only answer to describe a state of facts, or to solve an issue, and such an answer could not, as a necessity, be different; on the contrary, the second is functional to the practical philosophy which takes care of the *anthropeia philosophia* (the philosophy of human affairs). The latter does not have the aim of finding a single answer which corresponds to the truth, but rather it takes under consideration the specific differences and the unpredictable sides of life, i.e. *phrónēsis* refers to the margin of discretion belonging to individuals in deciding how to act, even in those cases where they lack freedom. In other words, *phrónēsis* is, according to Aristotle, that specific form of wisdom which allows men and women to decide, in all sorts of situations, what are the best means to reach a determinate goal. Notwithstanding the fact that this cannot be defined as anything close to scientific truth, *phrónēsis* should put individuals in the condition to identify a goal, indisputably good and correct. As a consequence of this worthiness such pragmatic truth will have some sort of universal value, as for example that human beings seek what is good and avoid what is bad.

Both intellectual virtues could be defined as dynamic because their development strongly depends on time (education in the case of wisdom and experience in the case of *phrónēsis*), however in the perspective of the result of the application of these virtues wisdom is definitely more static. *Phrónēsis*, in fact, operates according to the

contingency typical of real life experiences; as a consequence it implies that the same “indisputably good and correct goal” cannot be reached with the same means and the same behaviours at any time and in all places.

To better clarify these concepts Aristotle refers to two concrete examples: Pericles and Socrates. The former was a model of wisdom, but certainly not a philosopher. In fact, while pursuing what he believed to be a correct and good goal, i.e. the welfare of the people of Athens, he keenly adopted the best solutions to realize this. Socrates, instead, was an authentic practical philosopher who sought human welfare regardless of the factual circumstances and contingencies.

*Phrōnēsis*, as the virtue capable of granting individuals a degree of certainty compatible with the uncertainty of human vicissitudes, was then adopted and reinterpreted by the Christian culture.

For example, the translation of the Greek version of the Letter of St. Paul to the Romans, 12,1, New Testament, into Latin makes reference to a «rationable obsequium vestrum» which can be translated in «spiritual creed». This translation, which involved the concept of an immanent spirit, most probably inspired Locke to (controversially) entitle one of his works “Reasonableness of Christianity” where he also argued against a sharp-cut separation between faith and reason which would lead to the incapability of individual worshippers from having access to revelation by merely reading the Bible.

Partly this is also connected with Saint Augustine’s distinction between *rationalis* and *rationabilis* where the first refers to rationality as a (potential) human feature, while the second is rather to be used to value the quality of actions and statements, thus qualifying reason with a divine connotation.

*Rationabilis* is probably the bridge that best explains how the concept of reasonableness was first conveyed into the English legal vocabulary where it is first used to define the parameter of a negligent conduct.

At this point, most probably the original Roman concept of reasonableness and that of negligent conduct take different paths. In fact, civil law systems will not adopt reasonableness as a legal criterion to achieve compensation for injuries and the same function will be carried out through the introduction of the concept of *buon padre di famiglia* (wise man) that has little to spare, from an etymological standpoint, with the idea of reasonableness.

As far as the first use of reasonableness in the field of public law is concerned, again one must look to the English common law system. Up to this very day, the principle of *reasonableness* is applied in British administrative law, where it is used as the parameter and the remedy against the abuse of discretion of public authorities (Wade and Forsyth 2004, p. 351; Leyland and Woods 2002, 256-321). More specifically, the activity of administrative bodies in the UK is bound by the doctrine of *ultra vires* of which an unreasonable conduct constitutes a violation. It should be also noted that reasonableness is the concept on the basis of which the judge decides on the substantial aspects of the administrative act. In other words this is not a procedural type of review, but rather a review of the content of the administrative decision.

The first use in administrative law of the concept of reasonableness in the British legal system is usually found to be at the end of the 16<sup>th</sup> century in the so called *Rooke’s case*. In this case the Court had to decide whether the decision of the

Commissioners of Sewers (administrative body) to assess Mr Carter a fee of 8s for every acre he had adjoining the River Thames, to pay for maintaining the bank from collapsing and causing floods. They assessed him because there was an ancient prescriptive obligation of the holder of his lands to maintain the bank, but there were many landowners whose lands would be flooded, from whom the commissioners did not assess any fees at all. The Court asserted that even though the prescription existed, the statute required that the commissioners should have assessed the costs to everyone who benefited from the flood prevention, not just the bank-owner. This case is one of the earliest examples of judicial review of an administrative act and often thought to be a foundation of modern administrative law.

Reasonableness plays in this case the function underlined by the Court in the premise to the judgment: «Notwithstanding the words of the commission 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» (Wade and Forsyth, 2004, 351), i.e. it is called to be the parameter for the review carried out by the judiciary on the discretionary exercise of power by public authorities. From this moment on the echo of this new doctrine will be found more and more frequently, not only in similar cases, such as the *Keighley's Case* or in *Estwick v. City of London*, but also in different times and context, as for example in *Leader v. Moxon*.

However, regardless of the fact that reasonableness has been used in English administrative law since ancient times, it will be redefined after World War II in a case, which is currently considered to be the cornerstone of administrative judicial review, i.e. *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* delivered in 1948. In this judgment, Lord Greene confirms that an unreasonable administrative decision has to be reviewed because it represents an illegitimate exercise of discretionary power, but he also adds that «It is true to say that if a decision on a competent matter is so unreasonable that no reasonable authority could have ever come to it, then the courts can interfere», i.e. he introduced the so called substantive sense of unreasonableness.

IV. From this moment on the concept of reasonableness consolidated its legal function of acting as a limit to the exercise of discretionary powers and, in the case of judicial review of administrative decisions it even incorporated the name of the *Wednesbury* case so as to qualify a specific doctrine, i.e. the *Wednesbury* reasonableness. The habit of coupling reasonableness with case titles implies strong legal consequences. For example, the fact that in *Council of Civil Service Unions v. Minister for the Civil Service* of 1985 Lord Diplock used *irrationality* as a synonym of *Wednesbury* reasonableness raised a wide debate among English legal scholars. In fact, other judges have underlined that overlapping irrationality to *Wednesbury* reasonableness is inadequate because the first means «devoid of reasons» while the other rather means «devoid of satisfactory reasons» (See for example Lord Scarman in *R. v. Secretary of State for the Environment ex p. Nottinghamshire CC* and also the opinions in *R. v. Home Secretary ex p. Brind*).

U.S. Administrative law as well provides for instruments to limit administrative discretion however it did not “import” the concept of reasonableness as a word with a specific legal meaning referring to a peculiar doctrine. On the contrary, the *Administrative Procedure Act* of 1946 rather refers to arbitrariness or capriciousness. The

arbitrary and capricious test is one of the possible schemes to follow when judicial administrative review is carried out. The structure of this test is very similar to the so-called loose rational relation test, which is one of the three tiers of scrutiny applied by the U.S. Supreme Court to constitutional adjudication, however the word reasonableness does not substantially qualify this doctrine. On the contrary, the word reasonableness is used elsewhere in the U.S. legal vocabulary, and more specifically in the case of the reasonable doubt doctrine, which is the basis for the trial by jury.

During 20<sup>th</sup> century the principle of reasonableness, as applied in Administrative law, and the idea of it being linked to the review of the exercise of discretionary power of public bodies certainly constitutes a common feature of European administrative law and, nowadays, also of global administrative law. However this same idea developed in different ways in systems that do not belong to common law.

In France, notwithstanding the fact that the word *rationalité*, and some kind of consequent principle of *rationalité*, is often mentioned in administrative law, the common law criterion of reasonableness is more often translated with the doctrine of the *erreur manifeste d'appréciation*. The latter appeared for the first time applied in relation to the *fonction publique* in 1961 in a case regarding the equivalence between jobs and school degrees; on that occasion the Council of State found *une absence manifeste d'équivalence*, in other words it found that notwithstanding the legitimacy of the discretionary power of the public administration the Court believed it was entitled to review all decisions biased by *erreurs très graves* and *évidentes*. Also in German and Spanish administrative law a similar the concept of *Zumutbarkeit* and in the Spanish legal system that of *razonabilidad* are used.

Generally speaking, in most civil law systems the administrative concept of unreasonableness is usually more related to the idea of rationality so as to mean one of the possible declinations of the abuse of power in terms of cogency of administrative bodies' decisions. In Italy, an independent type of scrutiny based on reasonableness has been developed through case law on the impulse of scholarly works that argued its autonomous relevance in respect to the doctrine of abuse of power. It should however be underlined that the Constitutional Court first introduced reasonableness in Italy as a test to review legislation by highlighting its independence from the administrative scheme of the abuse of (legislative) power by construing it on the basis of the principle of equality. This pro-activeness of the Italian Constitutional Court could be read as one of the reasons that pushed the Administrative courts to elaborate a reasonable test aimed at weighing the balance struck by the public administration between two competing values in terms of proportionality.

In conclusion, reasonableness, although extremely diverse when analysed in a wider perspective, is functional in public law to the idea of the ultimate constraint for discretion and, therefore, it is extremely adaptable as an instrument of constitutional adjudication.

V. It was just recalled how reasonableness made its appearance in the Italian legal system in the Constitutional Court case law. This doctrine puts reasonableness relation to art. 3 of the Constitution that embodies the principle of equality. This example

helps to highlight how the concept of reasonableness changed its function when it was finally adopted in constitutional law.

Before moving to the core of this section it should be noted that post WWII constitutionalism has changed the very idea of rule of law (legality) because it now implies the implementation of constitutionally entrenched values, thus requiring laws to pass not only a test of abstract compatibility with a superior and external system of rules, but also one of reasonableness. The first aims at ensuring that rules are not contradictory, while the second requires the legislator to be persuasive.

Regardless of the above-mentioned development of 20<sup>th</sup> century constitutional doctrine, the U.S. Supreme Court has carried out reasonableness tests throughout the 19<sup>th</sup> and the beginning of 20<sup>th</sup> centuries. Actually the reasonableness test was the very core of constitutional adjudication. An extensive analysis of the judgments delivered during that period of time shows how recurrent the concept of reasonable, and unreasonable, was. The Court has no doubt in affirming its exclusive competence in deciding what is and what is not reasonable, as specified by Justice Waite in *Munn v. Illinois* of 1877 «the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question». Up until 1915, with very few exceptions, the Court has very clear in mind what reasonable means: *laissez faire*. Liberalism as an ideology provides for a clear hierarchy of values and individual property stands fierce at the apex of the pyramid. In the 1915 case *Lochner v. New York* the «question of which of two powers or rights shall prevail the power of the State to legislate or the right of the individual to liberty of person and freedom of contract» is answered by the majority of the Court in accordance with the consolidated doctrine of *laissez faire*. The Court found that «There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker». However the dissenting opinion of Justice Holmes, which became very popular in the history of U.S. Constitutional law, stated that «a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*». Justice Holmes thus put an end to the rigid attitude towards the protection of the right to property.

Justice Holmes was certainly a liberal judge, in the sense that he belonged to the generation of those who were educated and believed in the liberal state, however he had a less intransigent position compared to other more conservative members of the bench. In the context of the U.S. liberal state the concept of reasonableness served so as to grant the chance for new values to be introduced in the constitutional framework. This instrument was able to cope with changes up until the ideology of the liberal state ended to leave pace to the New Deal and, after that, to a new hierarchy of constitutional values. This also led to the introduction of a new system of scrutiny and a setting aside the reasonableness test based on the due process of law clause; the first explicit sign of this change was *footnote four* Justice Stone in *United States v. Carolene Products Co* of 1938: «There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider

now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry».

The new ideology breaks through the new apical role demanded to the I amendment of the Constitution and, more in general, on the idea that the presumption of legitimacy of any law entering the scope of any part of the Bill of Rights should be decreased or even abolished, thus imposing a reversal of the burden of proof on the legislator.

Nowadays the reasonableness test can be associated to what is currently defined as loose rational relation test, a blunt scrutiny which is applied to matters regarding economic and social rights, that does not imply a reversal of the burden of proof. On the contrary, in matters such as the I amendment, due process of law, racial discrimination, etc. the Court now applies the so-called strict scrutiny.

In Europe, on the contrary, the German and Italian Constitutional Courts developed a precise doctrine of reasonableness rooted in the principle of equality. At the beginning of its activity the German Constitutional Court used the concept of *Willkürverbot* which embodied the doctrine of non arbitrariness (arbitrary classification) and required laws to have a *vernünftig* reason. However, during the 80s, the Court integrated the *Willkürverbot* thus judging not only the arbitrariness of the law, but also the concrete way it was implemented. In case of a different treatment granted to different addressees of the same law will be considered in the light of the reasonableness test. However it should be noted that the German Constitutional Court has also elaborated the proportionality test (*Verhältnismäßigkeit*) based on three conditions: *Erforderlichkeit* or *Notwendigkeit* (necessity), *Geeignetheit* (suitability) and the *Gebot des mildesten Mittels*.

The *Conseil constitutionnel*, notwithstanding the peculiarities of the French *a priori* review of legislation, has introduced both a test on suspect classifications based on public interest and one of proportionality. More specifically the latter was introduced on the basis of the limitation clauses contained in articles 8, 9, 13, 14, 17 of the 1789 Declaration of rights and as a transplant from the Administrative law doctrine of the *erreur manifeste de appreciation*.

As far as Italy is concerned, one could easily state that the *giudizio di ragionevolezza delle leggi* represents the most extensively used test by the Constitutional Court and it applies to all types of review carried out by the Constitutional Court (i.e. the review of statute law, the resolution of disputes between branches of government and between Regional and Central bodies). Reasonableness, when applied to disputes between the State, the Regions and local government translates into the well-known case law on interests and when applied to disputes between branches of government, it translates into the principle of loyal cooperation. Moreover, reasonableness is also invoked in judgments on the admissibility of abrogative referendums, which is the least

concrete of all types of review. Italian constitutional scholars have devoted a lot of effort in analysing in abstract terms the *giudizio di ragionevolezza* as a technique, trying to decide whether proportionality is one of the steps of the reasonableness test or rather an independent test. Many argue over the balancing test in the same terms. However, on the basis of these analyses the role of the word reasonableness in the constitutional context almost loses all its relevance. On the contrary, a pragmatic approach oriented to what courts decided through the application of the reasonableness test reveals that it functioned exactly as it did in the U.S. liberal state context.

An emblematic example can help clarify this point. In Italy procedures of expropriation of private property for the general interest has never resulted in a full compensation for those deprived of their property. In many decisions the Constitutional Court has argued that compensation did not necessarily had to be equivalent to the market value of the property (no. 5 of 1980 and previously no. 61 of 1957). This was justified for many years on the basis of the necessity for Italy to develop its infrastructures and the simultaneous critical financial situation of the State. However in 2006 the ECtHR decided the case *Scordino v. Italia (I)* and it clearly stated that although member states do have discretion in matter of economic rights, an extreme sacrifice of private property can be considered reasonable only as long as the state is undergoing a radical political change or structural economic reform. Italy did not comply with any of the listed conditions and was therefore declared liable. Soon after this ECtHR judgment was delivered, two similar claims were filed before the Italian Constitutional Court. Two separate decisions (348 and 349 of 2007) were delivered and both declared illegitimate any compensation in case of expropriation of private property not equivalent to the market value; however the first was based on the “Convention argument” (i.e. Italian laws cannot be in contrast with the ECHR) while the second was based on mere unreasonableness.

This very example shows how the word reasonableness, in the constitutional context, does not have a specific meaning but acts as that swinging door, mentioned in the premise, which allows new values to enter the legal system. In other words a partial compensation that had always been defined as reasonable suddenly becomes unreasonable due to the change of the position of values in the Constitutional hierarchy.

VI. Although constitutional adjudication is a common feature of the great majority of legal systems, the third section of this paper demonstrated that the word reasonableness is used in very different ways from country to country. However, differences do not only regard the formula which is used, but also what level and quality of scrutiny is required according to what area of the legal system is taken into consideration. Moreover, among the various differences, certain also regard which sectors of the law can actually be scrutinized through a reasonableness test. Even a quantitative analysis of how recurrent reasonableness is in constitutional case law reveals all sorts of different scenarios. In fact, certain legal systems seem to prefer (in quantitative terms) defining what is reasonable on the basis of the principle of equality, while others do the same according to the proportionality of the limitation imposed on individual rights.

However, all these national differences did not stop the European Court of Justice from declaring both equality and proportionality as “common principles” of the European Union.

From a strictly legal stand point this has enormous consequences in particular in legal systems that do not carry out a judicial review of legislation, such as the UK. The latter represents a perfect example of how a word that did not have a specific legal meaning, proportionality, has integrated the notion of *Wednesbury* reasonableness as a consequence of the incorporation of the ECHR at a domestic level. The incorporation of an international codified charter of rights implies that national laws ought to be compatible with it, as confirmed by Lady Hale in *R. (Jackson) v. Attorney- General*: «Parliament has also, for the time being at least, limited its own powers by the European Communities Act 1972 and, in a different way, by the Human Rights Act 1998. It is possible that other qualifications may emerge in due course. In general, however, the constraints upon what Parliament can do are political and diplomatic rather than constitutional» (par. 159). In this quotation the adjective “constitutional” is used in a way very far from the usual British tradition (Bradley 2007, 41 and particularly footnote 90).

The British case leads us to a series of concluding remarks.

«The point to stress here is that all nations have a constitution of some kind, but constitutionalism is only established in the true sense where political behaviour is actually contained within certain boundaries» (Harding and Leyland 2007, 324). In the light of this statement reasonableness is the word that best represents the *minima moralia* of constitutional law, i.e. the constraint of state powers.

On the other hand, it has been argued that reasonableness pertains to the domain of those concepts that, according to Pound’s theory (supra § I), allow constitutionalism to evolve through interpretation. This has a practical consequence from the perspective of legal translation. Words such as reasonableness have been part of the legal vocabulary for a long time and applied in very different area of the legal systems (private law, administrative law, constitutional law, and so forth), moreover they also have a common meaning that derives from its everyday use, thus implicating a series of critical issues related to the stratification of meanings. In fact, reasonableness is not simply a *false friend*, i.e. a word changing its meaning depending on the context (eg. *acuerdo* which in Spanish can mean agreement, but also opinion), nor it is a legal term that has no correspondence (eg. *loi de abilitation* or *loi de orientation* as compared to the Spanish *ley de base*) but rather a multi-layered and at the same time meaningless word in the legal context.

I believe reasonableness is a good example of a word and a concept that requires a close collaboration among researchers in different fields of science. A lawyer can provide for a legal framework, for example in this paper I attempted to elaborate the legal concept of reasonableness as a swinging door to convey values through constitutional interpretation; however an expert in linguistics could give a significant contribution in terms of investigating the interactions between common language, popular culture and legal vocabulary.

In conclusion, I believe that a closer collaboration among legal experts and translators is auspicious for the same reasons, especially since, as a consequence of the deconstruction of old legal categories (particularly in the field of public law), new

concepts are introduced especially at a European level. Words such as governance, devolution, subsidiarity, proportionality appear in Italian legal texts more and more often and may times they also enter the everyday language. For example, the secessionist Italian party Northern League has campaigned in favour of “devolution”, using the same word of the British laws on decentralization, but what they really meant was federalism. Where do words come from? How is this heritage to be considered when they acquire a specific sector based meaning? And how important is the type of discourse (political, legal, etc.) in which they are more often used? These questions may sound naive to experts of legal translation, but the answers could be very useful to Comparative constitutional law scholars.

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