International Budget Partnership

Budget Brief

Neither Arbitrary nor Capricious:

Applying legal standards of "reasonableness" to government budget decisions

November 2020 | Jason Lakin Ph.D., International Budget Partnership

"Hence the idea of political legitimacy based on the criterion of reciprocity says: our exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions — were we to state them as government officials — are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons." – John Rawls, *Political Liberalism* (2005)

"The requirement that agency action not be arbitrary or capricious includes a requirement that the agency adequately explain its result[.]" – *Public Citizen, Inc., et al v. Federal Aviation Administration, (*1993)

"'Giving reasons' is very difficult to distinguish from acting reasonably and not just as a matter of semantics. Reasonable agency actions *are* explained and justified…" -David Zaring, *Reasonable Agencies* (2010)

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Government decisions, including choices about the budget, affect people's lives and should be reasonable, not arbitrary.[1] This notion is core to the liberal political tradition. Over time, this broad idea has evolved into firmer legal and regulatory standards requiring governments to provide reasons for their decisions. These standards require public reasons to meet a minimum threshold of being "neither arbitrary nor capricious."[2]

The democratic political tradition also emphasizes an "ideal of public reason." In the philosopher John Rawls's theory of constitutional democracy, there is a special duty for government officials, particularly judges, to embody the ideal of public justification by employing reasons that can be accepted by others.[3] Deliberative democratic theorists more broadly argue that democracy is essentially about reason-giving, including giving reasons for the whole range of policy decisions that governments make: "Most fundamentally, deliberative democracy affirms the need to justify decisions made by citizens and their representatives."[4]

[1] The author thanks the law firm of DLA Piper for their pro bono support in providing important insights into administrative law and judicial review from various countries around the world. In particular, Ramsey Beck and James Zeere helped to conceptualize the project, and James coordinated inputs from global offices.

[2] This famous phrase is used in the U.S. Administrative Procedures Act, discussed below.

[3] John Rawls, *Political Liberalism*, New York: Columbia University Press, 2005.

[4] Amy Gutmann & Dennis Thompson, Why Deliberative Democracy? Princeton: Princeton University Press, 2004.

Thus, both liberal and democratic traditions motivate a requirement that governments justify policy and budget decisions in terms that are reasonable (and not arbitrary). This idea is consistent with previous work by the International Budget Partnership (IBP) calling for governments to provide reasons or explanations for budget choices throughout the budget cycle.[5]

But what do public reasons for budget choices look like? How can we assess their reasonableness?

If we are seeking standards of reasoning, then the Rawlsian idea that reasons are reasonable if other reasonable people can accept them is a starting point. As a practical matter, however, this is too abstract to guide us in judging the quality or sufficiency of public reasons. And, it does not offer much guidance to policymakers on what is expected from them when, in the course of their duties, they must provide justifications for their actions.

This same conundrum has faced the judiciary in democracies around the world since at least the mid-twentieth century, as they grasped for standards with which to review government action by an increasingly sprawling bureaucracy. The rise of the bureaucratic state introduced a new problem for democracies: a tension between the notion that the government is by the people and the reality that it is often by agency mandate. Once created, bureaucracies are not always responsive to public views or protective of individual rights and interests. We need these agencies, but we also need some way of subjecting them to legitimate, democratic control.[6]

One way of exercising control over bureaucracies is to subject them to laws and regulations. However, this is insufficient, because such laws and regulations still require interpretation. Indeed, even when they are applied strictly, they may lead to unreasonable outcomes. But if agency discretion is allowed, the possibility of partiality and unfairness arises. There is a basic tension in how agencies manage to both be impartial and responsive, fair and flexible.[7]

Many countries manage these tensions through some form of judicial review of agency actions. This area of law is frequently referred to as administrative law, as it governs the administrative state. In order to undertake judicial review of agency action, courts have been faced with the same question we started with, that is: by what standard should we judge the arbitrariness or reasonableness of agency action? The judiciary has tried to work out an answer to this old question with particular enthusiasm since the end of World War II.

In 1947, courts in the United Kingdom established the concept of "Wednesbury reasonableness" as the cornerstone of judicial review of administrative action by government agencies. This standard was articulated as: "*It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere"* (Associated v. Wednesbury Corporation, 1947). Over time, legal

[5] https://www.internationalbudget.org/publications/assessing-reasons-in-government-budget-documents/

[6] See Judith Gruber, *Controlling Bureaucracies*: *Dilemmas in Democratic Governance*, Berkeley: University of California Press, 1987, p. 5.

[7] Eugene Bardach & Robert A. Kagan, *Going By the Book: the problem of regulatory unreasonableness*, Philadelphia: Temple University Press, 1982.

scholars and judges would argue that this principle was not only inadequate, but nearly circular: how is a reasonable authority to be defined except with reference to the reasonableness of the actions it takes? And yet those actions were defined by the *Wednesbury* standard as unreasonable only when an unreasonable agency took them (Jowell & Lester, 1988).

Confronting this challenge, courts have been forced to develop piecemeal but increasingly convergent standards for assessing the quality and adequacy, or "reasonableness," of government action, and by extension, the public reasons that agencies provide for their actions. These standards have emerged particularly (though not exclusively) within the domain of administrative law.[8]

The argument of this paper is that, drawing on these ideas and practices, we can derive content to apply to the notion of public reason and what it requires for policymaking. This guidance can help policymakers to formulate better reasons and citizens to evaluate them. Drawing on legislation and case law from the United States, Hong Kong, South Africa, Kenya and Germany, this brief points to the types of standards that emerge from administrative law that I believe are relevant for evaluating public reasons for policy choice, and specifically for budget decisions. These principles are summarized in Table 2 below.[9]

Principles of "reasonableness review" from around the world

The United States. American administrative law standards have their origins in the Administrative Procedures Act (APA) of 1946. Over time, the standards for reasonableness review have evolved through case law interpretation. As of the 1980s, it was clear that agencies should:

- Offer detailed explanations for decisions
- Consider adequately relevant factors, and ignore impermissible factors
- Justify deviations from established (past) practices
- Allow effective participation by a wide range of interested parties
- Consider plausible/reasonable alternatives[10]

Three recent court cases involving the APA shed further light on the nature and terms of reasonableness review in practice: one concerned the environment ("Keystone pipeline"), another the census ("Census citizenship

[8] The rules and regulations discussed here are sometimes referred to as those concerning "judicial review" as opposed to "administrative law," as some countries do not use the latter term.

[9] This sample of countries is limited and cannot be taken to capture the entire universe of administrative law, but it does provide a window into influential cases that bring together the Commonwealth legal tradition with global agenda-setters in defining and deepening legal concepts like reasonableness and proportionality. However, it clearly does reflect a bias toward legal systems with English language resources available.

[10] Cass Sunstein, "Deregulation and the Hard-Look Doctrine," *The Supreme Court Review*, 1983.

question"), and a third involved access to health insurance ("Kentucky Medicaid"). The rulings in these cases highlight key principles of U.S. administrative law, deepening our understanding of the criteria above:

- Keystone pipeline: The finding in this case, involving an agency decision to approve construction of an oil pipeline it had previously blocked, illuminates two requirements of reasonableness: **meaningful response to public comments received before taking a decision, and the need to adequately justify major changes in policy**. Meaningful consideration of comments requires that differences of opinion are clearly highlighted and responded to. "Discarding prior factual findings" when an agency changes course requires a robust justification (which was found to be lacking in this case for the new position on the pipeline construction).

- Census citizenship question: The decision in this case, which was about whether the government could add a specific question about a respondent's citizenship to the U.S. census, sheds light on the requirement for governments to present genuine reasons for their actions. It was found that **reasons for government action must be given in good faith and must be based on the evidence in the administrative record**, rather than "contrived" reasons without an evidentiary basis (in this case, there was found to be no evidence to support the stated reason given for adding the question, which was to help enforce another law).[11]

- Kentucky Medicaid: The decision in this case, involving Kentucky's attempt to introduce work requirements into a government health program, draws our attention to **the need for agencies to consider all relevant factors** (here, for example, whether or not the policy would cause people to lose health insurance, something that the government did not demonstrate it had adequately considered). In addition, the court clarified **the need for agencies to establish a rational connection between their policies and the goals of the legislature in passing the law to which this policy responds**. In this case, it was determined that work requirements were not rationally connected to the goal of providing health insurance (and the government's claim that work was good for health and was therefore consistent with Congress's desire to provide health insurance unreasonably substituted agency goals for those of Congress).[12]

  It is worth reflecting on one other part of the court's Medicaid ruling here, since it has direct bearing on the budget. The court considers, but discards, the idea that the waiver might have been justified on the grounds of cost savings necessary to preserve the financial sustainability of the program. But it makes clear that such an argument would be subject to considerable scrutiny. First, the court argues, for such a defense to be rational, "basic questions remain to assess whether the state's Medicaid program is actually at risk: What are Kentucky's current state revenues? What is its budget generally? Is the state running a

[11] *Department of Commerce v. New York, et al 2019*
[12] *Stewart v. Azar 2018*

de□cit?" Without answers to such questions, the justification would not pass muster. Further, the court makes clear that it would interrogate the proposed cost savings against alternative measures, and would ask the agency to defend a claim that this was "the best remedy for any budget woes." This is quite similar to a proportionality review, which is an essential part of European review, and is described in more detail in the next section.

Germany. Like the US, Germany has an Administrative Procedures Act and certain general legal requirements against arbitrary action rooted in the German constitution that provide scope for judicial review of agency action.[13] The German administrative courts are governed by the Code of Administrative Court Procedure, which permits review where "the statutory limits of discretion have been overstepped or discretion has been used in a manner not corresponding to the purpose of the empowerment."[14] The German courts have also developed the principle of proportionality, which requires that an agency consider whether there are alternative, less onerous means to achieving the same end, meaning less financially costly, or less burdensome to rights. Proportionality balancing requires that "if two equally important principles are at stake, the degree of failure to achieve one must be related to the degree of importance of realizing the other."[15] In addition, German courts have developed the concept of legitimate expectations, which requires government to respect the expectations of citizens regarding the continuation of policy, by justifying any changes in policy and providing for transitional arrangements.[16]

As in Hong Kong, Germany does not have a general participation requirement for administrative action, but such requirements are found in specific statutes. Similar to Hong Kong, one such case is the Federal Building Code. Currently, the code requires the public to be informed about plans for building and development, including the set of alternatives under consideration, and to be given opportunities for "comment and discussion." Draft land-use plans must be displayed publicly for one month along with the reasons for the approach proposed. The public is to be given one week's advance notice of the publication. During the month of display, the public may submit comments and the government must respond to each comment received. If changes are made to the draft plan, it must be displayed for another month with the relevant revisions.[17]

Hong Kong. As a starting point, Hong Kong follows British standards of review. In addition, the Hong Kong Ombudsman utilizes a specific concept of "maladministration" as a condition for review. This elaborates various additional and overlapping concepts, such as delay, discourtesy, abuse of power, discrimination, and action based on a mistake of law. Hong Kong does not recognize a general requirement to give reasons for administrative action, but reasons are required where the action affects an interest "highly regarded" by the law, or where a

[13]Michal Bobek, "Reasonableness in Administrative Law: A Comparative Reflection on Functional Equivalence," Eric Stein Working Paper No. 2/2008. Available at SSRN: https://ssrn.com/abstract=1140750 or http://dx.doi.org/10.2139/ssrn.1140750

[14] Code of Administrative Court Procedure (Verwaltungsgerichtsordnung, VwGO), Section 114

[15] Robert Alexy, "Proportionality and Rationality," In V. C. Jackson & M. Tushnet (Eds.), *Proportionality* (pp. 13–29). Cambridge: Cambridge University Press, 2017. https://doi.org/10.1017/9781316691724.002

[16] Robert Thomas, *Legitimate Expectations and Proportionality in Administrative Law*, Portland, Oregon: Hart Publishing, 2000.

[17] See section 3 of the Federal Building Code, available in English here: https://germanlawarchive.iuscomp.org/?p=649#3

decision is considered "aberrant." The latter would be the case when a decision "was markedly out of line with decisions which the decision-maker regularly made on the topic."[18]

Hong Kong has also recently adopted the proportionality principle. This surfaced in a 2013 case overturning the government's residency requirement for accessing its social security program (*Kong Yunming v The Director of Social Welfare*, 2013):

"The Court then asks whether that restriction pursues a legitimate societal aim and, having identified that aim, it asks whether the impugned restriction is rationally connected with the accomplishment of that end. If such rational connection is established, the next question is whether the means employed are proportionate or whether, on the contrary, they make excessive inroads into the protected right."

The basis for review was that Hong Kong's Basic Law includes a right to "social welfare." Any change in policy that restricts that right is subject to proportionality review, including the government's decision to increase its residency requirement for accessing the program from one to seven years.

It is worth noting a budget-related point arising in the decision. The court notes that saving money does not *on its own* constitute a legitimate societal aim. The purpose and the impact of the spending cut would have to be considered to determine whether cutting spending furthers a legitimate social aim or not. In this case, the government argued that it was saving money in order to ensure the financial sustainability of the overall system. The court found that the residency requirement was not rational, as it undercut other government policies designed to ensure financial sustainability, such as encouraging the in-migration of young people. The court also rejected the argument that the policy was necessary to reduce the fiscal deficit, reasoning that current deficits were not a permanent, structural feature of the Hong Kong economy and could not therefore justify such a change in policy.

Hong Kong does not have a general requirement to consult the public prior to administrative action, but such requirements are included in specific statutes. For example, the Town Planning Ordinance (amended in 2004) contains specific requirements for notification and public participation. Development plans must be exhibited for two months, and notifications provided in both Chinese and English. Public inputs that are given during the two-month period must in turn be exhibited to the public. Public meetings must be held after the two-month period in which people offering comments, and those offering comments on those comments, are invited to attend. Similar procedures must be followed for amendments to the plan made after these consultations.[19]

South Africa. The South African constitution guarantees a right to "just administrative action" under section 33. The Constitution also requires that anyone adversely affected by administrative action be given written reasons for

[18] *Pearl Securities Ltd v Stock Exchange of Hong Kong Ltd*, 1999; *Reg. v. Higher Education Funding Council (D.C.)*, 1994

[19] See Sections 5 and 6-6H of the Town Planning Ordinance, available here: https://www.elegislation.gov.hk/hk/cap131?xpid=ID_1438402659157_001

the action taken. These rights are implemented through the Promotion of Administrative Justice Act (PAJA), 2000. Affected parties may request reasons in writing, and an agency must provide such reasons within 90 days, or the action will be considered to have been taken without good reason.

PAJA further specifies the requirements of fair administrative action, including the need to give affected parties adequate notice and opportunities to make representations before the agency. In cases of actions affecting a wider public, it requires agencies to hold public inquiries or allow for notice and comment periods. If a notice and comment period is pursued, then affected parties must be notified and any comments received must be considered. South Africa allows a case to be brought for judicial review by any affected party or anyone representing the public interest.

PAJA also delineates a number of principles that guide the conditions under which judicial review should be undertaken. These are laid out in section 6 of the act, and described in the table below, which also highlights similar principles from Kenya's Fair Administrative Action Act (described next). The comparison with Kenya clarifies areas of emphasis, as well as some areas that are missing in South Africa. For example, South Africa is explicit about bias and error of law, and imports the American concept of "arbitrary and capricious" from the APA, and *Wednesbury* unreasonableness from British law.

On the other hand, while South African law incorporates *procedural* unfairness, it does not account for the unfairness of the decision itself, that is, *substantive* unfairness, which is captured in the Kenyan legislation. There is no direct mention of principles of proportionality or legitimate expectations in South African legislation, whereas these are present in Kenya. In a number of cases, however, the two countries follow precisely the same principles, including an identically worded approach to the rational connection test, or they follow principles which are worded differently but may amount to the same thing (e.g., "unlawful" or "unauthorized" action and "abuse of power" might amount to the same thing).

TABLE 1. A court may review administrative action if:

PAJA South Africa	FAAA Kenya
An administrator:	
• Was not authorized	
• Acted under a delegation of power that was not authorized	Same
• Was biased or reasonably suspected of bias	
A mandatory and material procedure was not complied with	
The action was procedurally unfair	Same
The action was materially influenced by an error of law	
The action was taken:	
• For a reason not authorized by law	
• For an ulterior purpose or motive	
• Irrelevant considerations were taken into account, or relevant considerations were not considered	Failed to take into account relevant considerations
• Because of unauthorized or unwarranted dictates of another person or body	
• In bad faith	Same
• Arbitrarily or capriciously	
The action itself:	
• Contravenes a law	
Is not rationally connected to:	Same (rational connection and sub-requirements)
• The purpose for which it was taken	Same
• The purpose of the empowering provision	Same
• The information before the administrator	Same
• The reasons given for it by the administrator	Same
The action consists of a failure to take a decision	
The exercise of the power…is so unreasonable that no reasonable person could have so exercised it	
The action is otherwise unconstitutional or unlawful	
	The action is unfair
	The action is not proportionate to the interests or rights affected
	The action violates the legitimate expectations of the person to whom it relates
	The action is taken or made in abuse of power

Case law suggests that the concepts of legitimate expectations and proportionality may have a role to play in South African law as well, even though not explicit in PAJA. Others argue that reasonableness review in South Africa falls short of proportionality but incorporates strong principles of equality or equity that go beyond traditional reasonableness review standards as applied in other jurisdictions. For example, in the well-known 2001

Grootboom case focused on the right to housing, the court found that a housing program was unreasonable because it "excludes a significant sector of society," which is a consideration that would be beyond the scope of how reasonableness review is interpreted in most jurisdictions.[20]

South Africa's regulations under PAJA also expand on the requirements for public consultation with affected parties.[21] These require publication of notice in newspapers that correspond to the level at which the action will occur and affect the rights of the public, with advance notice of at least 30 days. It requires an option to submit written or oral testimony. The notice must also "contain sufficient information about the matter to be investigated to enable the public to submit meaningful representation."[22] Notice must also be given in at least two official languages, and "must take account" of language in the area affected by the action. The regulations also require special support for communities where a "considerable proportion of people" cannot read or write, including "secretarial" assistance to the community to make submissions.[23]

Kenya. Kenya incorporates reasonableness standards from the U.K. but has gone much further. The country revised its constitution in 2010 and passed a Fair Administrative Action Act (FAAA) in 2015, drawing in part on South African law, as described above. Section 43 of the FAAA lays out requirements for administrative action, including a requirement for reason-giving. The FAAA also suggests that the absence of a reason for agency action shall create a presumption that the action was "taken without good reason" (Section 6(4)). Among the principles specified by the act are the need for a rational connection between means and ends, good faith reasoning, proportionality, and respecting legitimate expectations of citizens. Both of these latter ideas emerge from German and continental European law.

Case law in Kenya has also expanded the requirements for participation by those affected by agency decisions to clarify the need for agencies to disseminate relevant information, demonstrate inclusiveness, especially of those most affected by a policy, and provide evidence of good faith consideration of views. Some of these court cases involve legislation other than the FAAA. For example, in June 2019, the courts found that the government had failed to ensure adequate public participation in a case involving an environmental impact assessment of a coal project in Lamu. The decision in this case related to the requirements for public participation in the Environmental Management and Coordination Act and subsequent regulations.[24]

[20] See Katharine G. Young, "Proportionality, Reasonableness and Economic and Social Rights," in Jackson and Tushnet, eds., *Proportionality: New Frontiers, New Challenges*, New York: Cambridge University Press, 2017.
[21] See Republic of South Africa, "Regulations on Fair Administrative Procedures," Government Gazette, July 31 2002. Available at: https://adjasa.org/wp-content/uploads/2017/03/Regulations-on-Fair-Administrative-Procedures-2002.pdf
[22] Ibid., Part I, Section 4(a).
[23] Ibid., Part I, Section 5.
[24] Save Lamu, et al v. National Environment Management Authority, et al, June 2019.

Is Administrative Law Ever Directly Applied to Public Finance?

The premise of this paper is that there are standards from administrative law defining government "reasonableness" that can be used to think about reasonableness in other contexts. Thus, we start this inquiry knowing that these standards are not generally applied to decisions about the budget or to public finance more broadly. However, there are some aspects of public finance which are more administrative in nature and to which such standards have already been applied.

One potential target for such standards are rules and regulations issued by national treasuries or ministries of finance. For example, national treasuries issue rules related to how to calculate tax liabilities that are both administrative in nature and have a direct bearing on revenue collections, and therefore the annual budget.

This issue has emerged as an evolving area within administrative law in just the last decade in the United States, with courts in recent years beginning to adopt stricter review of Treasury's tax regulations. This follows scholarly analysis of the unique deference that has been paid to Treasury rulemaking over the years.[25] An important source of arbitrary action by the U.S. Treasury has been the use of temporary rules that are legally binding and that are issued either without any notice and comment period, or with a request for comment issued at the same time as the binding temporary rule. Treasury has also typically claimed that much of its rulemaking is exempt from the APA, allowing it to avoid notice and comment rules, but it has not normally justified these exclusions. One estimate suggests that the U.S. Treasury has eschewed standard APA procedure in about 40 percent of recent rulemaking.[26]

In 2011, the U.S. Supreme Court found that tax issues should not be treated differently from that of other regulatory issues, in a case that the Treasury Department actually won (requiring medical residents to pay taxes).[27] This decision made it clear that Treasury regulations should fall under the APA and standard doctrines of deference. In 2015, the courts duly overturned a Treasury regulation under the "hard look" doctrine discussed above, arguing that the department should be treated like all others.

This regulation concerned the taxability of compensation issued in the form of stock. The courts found that Treasury failed to identify a factual and reasoned basis for taxing such compensation.[28] In 2017, the courts overturned another Treasury rule, this time on the tax treatment for stock in so-called "inversions," where large US companies merge with smaller foreign companies and shift their residence to the foreign country. In this case, the

[25] Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack Of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 Notre Dame L. Rev. 1727 (2013).
[26] Ibid.
[27] Mayo Foundation for Medical Ed. and Research v. United States, 562 U.S. 44 (2010)
[28] Ann Murphy, "A Sea Change in Court Analysis of Treasury Regulations: How the Treasury Department Won the Battle but Lost the War," ABA Tax Times, February 26, 2016.

courts found that Treasury acted within its statute and reasonably. However, it also found that its practice of issuing temporary binding rules without prior notice and comment periods violated the APA.[29]

In 2019, the U.S. Treasury issued a public statement recognizing the need to be more forthcoming about the reasons for issuing temporary rules with immediate effect, one of the main sources of arbitrary behavior by the department: "the Treasury Department and the IRS will make their reasons for issuing such immediately-effective regulations clear by including a statement of good cause in the preamble."[30]

This section is of course not a comprehensive review of reasonableness review in tax administration, but it does at least hint at the direct ways in which the standards we have reviewed already relate to public finance decisions.[31]

Standards of reason: toward a synthesis

In Table 2, I summarize those principles from U.S. and international law that seem to have both cross-national appeal and application to budget choices. I argue that these represent emerging standards of reasonableness for evaluating government's public reasons for policy choices, including budget decisions and actions. I briefly expand on each of the principles in the table below.

TABLE 2. Legal principles of "reasonableness review": application to public finance

LEGAL PRINCIPLE	Application to BUDGET/PUBLIC FINANCE	Comment
All decisions, or at least major ones: Reasons must be given for all major decisions affecting rights and interests.	Reasons should be given and should be published for all major budget changes, as nearly all budget changes affect rights or interests.	Budget changes include allocative changes from previous year budget, but also changes that occur during budget implementation.
Means and ends, and rational connection: 1. There must be a rational connection between the means and ends of an agency rule/action.	Reasons should link the annual budget to broader strategic plans or multi-year frameworks explaining spending decisions in terms of priorities.	The requirement here is not for a specific planning instrument, but a link between planning and budgeting, explicable in terms of desired nonfinancial outcomes (targets) of the budget.
2. Agencies must show fidelity to the means and ends of laws approved by the legislature.	Changes to legislatively approved allocations of the budget to specific programs require robust explanation in terms of the means and ends of the legislature, as codified in legislation.	This would apply to all major changes during budget execution, even if legal, such as virement (in-year budget shifts) and supplementary budgets.

[29] EY, "US District Court holds US Treasury violated APA's notice-and-comment requirement in issuing new anti-inversion rule with immediate effective date," Global Tax Alert, October 13, 2017.
[30] Department of the Treasury, "Policy statement on the regulatory process," March 5, 2019.
[31] For more on the application of proportionality in international tax law, see Joao Dacio Rolim, *Proportionality and Fair Taxation*, The Netherlands: Kluwer Law International BV, 2014.

Justify changes from past practice: Any change in policy that undermines citizens' legitimate expectations of government requires justification.	A reason for changing budget policies must explain what alternative social goal is more important than meeting the expectations of citizens from specific existing programs or benefits.	This applies not only to budget decisions, but to the program rules governing social welfare programs that are not made through the budget, but through other legislation.
Proportionality, consideration of alternatives and costs and benefits: Decisions must be explained in terms of a careful and balanced weighing of alternatives and their costs and benefits that can withstand external scrutiny.	Budget decisions involve trade-offs which must be acknowledged and justified with respect to a cost-benefit analysis.	Trade-offs should be acknowledged among sectors, or among programs within a department, and there should be scrutiny of any claims related to fiscal sustainability.
Consideration of evidence and evidence of consideration: Agencies must show evidence of consideration of data and inputs received in coming to a good faith decision.	Governments must show consideration of relevant evidence in justifying budget decisions.	In particular, this would include consideration of the nonfinancial impact of the budget, and of inputs from affected stakeholders.
Effective Participation: Participation refers to an inclusive process of receiving and responding to inputs from affected parties and the public at large in order to ensure that the public interest is realized.	The government must consult with those affected by budget decisions and justify its decisions in terms of a broader public interest.	Participation may occur through notice and comment procedures, or through physical meetings that encourage negotiation in the manner of more inclusive sector working groups. Major areas of disagreement should be exposed and addressed in the final explanations for decisions.

All decisions, or at least major ones

The very first area or principal that emerges from administrative law that is relevant for our consideration of reasons is the increasingly wide range of government decisions that are subject, around the globe, to a requirement for reasons. Some countries, like the U.S. and Germany, require reasons to be published for all administrative decisions. These reasons must be elaborate; in Germany, as we saw, these reasons must include a review of the different views which the agency considered in coming to its decision. In the UK and Hong Kong, it is recognized that not all decisions require reasons, but any decisions affecting important rights do. Where the object of an action is very broad, such that a large share of the population is affected, a general duty to publish and a requirement to inform affected persons may amount to similar standards.[32]

Given the wide impact of most budget decisions, the implication of these evolving standards for public finance is that reasons should be given and should be published for all major budget changes. As I have argued elsewhere, what constitutes a major change is specific to the context, but would not be restricted only to large changes in

[32] In countries such as Uganda, reasons must be given at least to affected persons, if not published.

financial terms.[33] Small changes in financial terms that have a significant effect on specific marginalized populations would also be considered major, as would other apparently small changes with significant nonfinancial impacts. The burden is on the government to justify a change as being too minor to require justification.

Means and ends, and rational connection

Judicial review standards around the world speak to several aspects of the relationship between means and ends. First, there is the need for a rational connection between means and ends; that is, the government must choose a course of action which it has a reasonable basis to believe will lead to some end. This is a subset of what it means to make a reasonable decision. In addition, the issue of means and ends arises with respect to the ways in which an agency uses discretion to meet a statutory purpose. In this case, the key issue is that an agency must respect the ends of the legislature as expressed in law and must also respect the means to achieve those ends, unless it has been given explicit discretionary authority. Thus for example, in the Medicaid case, the court found that the agency had substituted its own means to the end of providing health services yet it lacked discretionary authority to do so.

Both of these ideas about means and ends apply to budgeting. In the first case, the justification for investing in particular parts of the budget should relate to a government's priorities and in particular its planning documents. Increases and decreases in spending should be explainable in terms of these broader plans. The annual budget is essentially a means to the end of a multiyear planning framework. Where the government is unable to explain these links, its reasoning would be considered inadequate.

In thinking about fidelity to the relationship between the means and ends of the legislature, there is also an analogy to budgeting. For example, consider a decision to shift the legislature-approved budget from health to defense during the budget year based on an argument that better defense will lead to improved health. The issue here is not that this claim is necessarily false; rather, if the legislature approved funds for health and funds for defense in the budget, changing those allocations requires proper justification, as the legislature has chosen an allocation based on its determination of the resources and policies needed for both health and defense. Otherwise, we open the door to arbitrary decisions at any point during budget execution.

Justify changes from past practice

As the U.S. courts confirm in a recent immigration case, agencies must acknowledge changes in position, and provide reasons for the change. "Unexplained inconsistencies" in agency positions are evidence of arbitrariness.[34] This was explored in the Keystone Pipeline case discussed above as well. This idea is similar to "aberrance" in British and Hong Kong law, one of the conditions in which a reason is required for an action. When an agency

[33] https://www.internationalbudget.org/wp-content/uploads/assessing-the-quality-of-reasons-in-government-budget-documents-ibp-2018.pdf

[34] USCA4 Appeal: 18-1521 Doc: 60 Filed: 05/17/2019

makes a sudden change in practice that is inconsistent with previous decisions or previous practices, then an explanation must follow for this change. We might also see this as related to the principle of legitimate expectations, which originated in German law but now appears across jurisdictions. This is the idea that residents of a particular jurisdiction may come to rely on policies of an agency over time and are therefore owed some deference and some justification for changes in policy that undermine their legitimate expectations from the government.

Legitimate expectations can be a powerful requirement in public finance decisions because many interests are linked to the existence of particular budget policies, including social welfare programs. Any proposal to reduce spending on such programs with the result that fewer people would access those programs clearly implies the need for government to provide substantive reasons to go against the legitimate expectations of recipients. The implication of this standard is that government's public reasons must directly address themselves to citizen expectations, explaining why some other consideration outweighs those expectations. An important aspect of legitimate expectations is the requirement for a transition: where citizens have legitimate expectations of government policy, these should not simply be eliminated suddenly without a transition process that allows their expectations to adjust. One can easily imagine as well that this principle encompasses major changes of all kinds to the tax system.

Proportionality, consideration of alternatives and costs and benefits

Proportionality is an increasingly prevalent, if not universal, standard. Certain aspects of proportionality overlap with general principles of reasonableness. For example, a proportionality test implies that an agent has considered alternatives and chosen one which puts less of a burden on fundamental rights and interests than others. Proportionality therefore intrinsically incorporates the requirement to seek alternatives, which is a less rigorous principle of reasonableness. Similarly, proportionality demands that there be a balancing of the costs and benefits of an agency's decisions. This requirement for balancing is frequently present in reasonableness review even where proportionality is not explicitly adopted.

An important aspect of proportionality that may not always be present in reasonableness review is the requirement to assess alternatives against a publicly stated objective of public policy.[35] Proportionality thus implies that agencies must be more explicit about why they adopt decisions in the first place in order to demonstrate reasonableness.

Proportionality encompasses a family of principles that are clearly linked to budget decisions. While a strict cost benefit analysis may not be applied to the annual budget, proportionality would demand a justification for trade-offs made in the budget, particularly those affecting the incremental increase in agency budgets in a given year. In other words, the ministry of finance should justify the decision to allocate more to one area or another based on

[35] Thomas, "Legitimate Expectations."

the benefits of doing so, relative to alternatives. Of course, this logic can be taken too far if we require, for example, that a government explain every conceivable pairwise comparison of proposed spending down to the program level. An adequacy standard should be limited to explaining why particular areas were prioritized and others were not, rather than a comparison of all possible alternatives. These explanations should relate to larger public purposes which can be assessed for a reasonable link between means and ends.

However, the proportionality standard is stricter than the test of a reasonable link between means and ends, as it also requires that the proposed means interferes as little as possible with other rights. Such a test would be relevant in the case where benefits of some kind were to be cut in order to reduce a fiscal deficit. While there might be a rational link between cutting the benefits and achieving the reduction in the deficit, we would ask whether there was no other way of achieving the reduction in the deficit that was less burdensome to those benefiting from a public program. The burden is on the government to show that this is so.

Consideration of evidence and evidence of consideration

It is not uncommon for administrators to claim to have taken into account certain factors including the views of the public, but to show no actual evidence that those views were considered nor any reason why they were not taken into account in the final decision. The Kentucky Medicaid case described above clarifies the inadequacy of simply stating that evidence was considered without showing any evidence of consideration.

The same principle can be found in South African law, as per a 2015 case involving private security companies. Here the matter is whether there is any evidence of consideration of alternatives to the decision made by the agency and whether it properly responded to industry inputs in setting a fee schedule. The court finds that the agency failed to consider the alternatives: “It is difficult to comprehend how all avenues could have been exhausted without any further consultation with the industry, including the appellant, after the impact of the increases on smaller security service providers was squarely raised in the representations.” The agency did not demonstrate that it had taken into account evidence placed before it by key stakeholders, nor did it consider the alternatives to its course of action.[36]

The obvious implication of this straightforward principle is that governments must show that they have considered relevant evidence in making budget choices, and particularly, that they have considered any inputs from the public, an issue taken up further below.

Effective Participation

Participation as a principle of administrative law emerges mainly from the American case, although many countries (including the U.S.) have participation requirements written into specific statutes, such as environmental laws, as

[36] Security Industry Alliance v Private Security Industry Regulatory Authority and Others 2015 (1) SA 169 (SCA).

we saw in the case of Kenya, Hong Kong and Germany. Case law in the U.S. has expanded the requirement to hear affected parties into a much broader requirement for participation that permits a wide range of interests, including agents representing the "public interest," and requires that agencies respond to them. The logic of this principle has been that by bringing in all relevant parties, the agency is less likely to be "captured" by industry and more responsive to the "public interest." The requirement for wide participation by stakeholders is also enhanced in American case law by the requirement to respond to all of the issues raised by stakeholders in a way that makes clear the major areas of concern or disagreement, as discussed in the Keystone Pipeline case above.

The requirement for greater participation may be seen as a precondition for reasonableness, where the lack of participation is likely to lead to partiality, or to agency decisions with incomplete information. In this sense, the primary goal is to improve decision-making and avoid arbitrariness, rather than to meet a normative demand for greater democratic participation, though that may be a secondary goal.[37]

There are generally two approaches to making decisions under administrative rules. The first is to issue a notice and request written comments, where the comment procedure is open to any member of the public. Alternatively, there are physical meetings, which can include adjudication processes, and which are more court-like in nature, or more general meetings to discuss comments or inputs, as in the Hong Kong Town Planning case.

In terms of public finance, the obvious utility of ideas about participation is that those who are affected by public finance decisions should have an opportunity to review those decisions before they are finalized and give their views in some form analogous to notice and comment. Since nearly all public finance decisions affect large groups in society, this would amount to a general requirement for substantive and inclusive public participation in decisions about the budget, including tax, expenditure, debt, and so on.

Adjudication procedures would not seem to be highly relevant for budget decisions, but there may be other approaches drawn from the practices of agency rulemaking that are more appropriate and also go beyond notice and comment. For example, some forms of consensual dialogue-based negotiation (based on alternative dispute resolution models) with all interested parties represented directly or through some form of caucus have been used successfully by the U.S. Environmental Protection Agency and others. In the education sector in the U.S., there are also negotiated rulemaking procedures that go into the formulation of the rule in the first place and incorporate key stakeholders into a deliberative space.[38]

These approaches would not be entirely alien to the idea of sector working groups, which already exist in a number of countries to facilitate some degree of input into the budget process.[39] In many countries, however,

[37] Richard Stewart, "The Reformation of American Administrative Law," *Harvard Law Review*, 1975. This is closer to an epistemic defense of participation along the lines of the collective "wisdom of crowds."

[38] Rebecca Natow, "Negotiated Rulemaking for U.S. Higher Education Regulatory Policy: A Process of Deliberative Democracy?" *Journal of Public Deliberation*, Vol. 15:1, 2019.

[39] On these approaches, see Philip Harter, "The role of courts in regulatory negotiation – a response to Judge Wald," in Peter H. Schuck, *Foundations of Administrative Law*, New York: Oxford University Press, 1994.

sector working groups do not fully or adequately incorporate participation by affected interests, so in this respect there may be something to learn from alternative negotiation processes carried out by other executive agencies.

Conclusion

The principles above are plausibly related to budget decisions in the ways I have described but are not generally applied to them. However, we have also seen that in some of the cases reviewed, such as the Hong Kong social welfare case and the Kentucky Medicaid case, there were direct links to the budget. The courts reviewed and opined on budget-related arguments, particularly those justifying budget cuts, and found them wanting in terms of the principles articulated here: failure to consider alternatives, failure to rationally connect means and ends, and so on. We have also seen how these principles are increasingly applied to tax issues, given that revenue authorities often make policy through administrative action. These examples demonstrate that reasonableness standards not only can but already do apply to budget decisions in some circumstances.

The purpose of this review is not to suggest that budget matters should all be litigated in courts. Rather, it is to point out that there is a set of standards on justifying policy and budget decisions which we can see at work in the courts that is also relevant for the kinds of written and oral deliberation that takes place around the approval and implementation of annual budgets. While there are differences between decisions taken by legislatures, executive agencies, and courts, there appears to be no reason why the standards for justifying such decisions should differ, given that they all coalesce in a determination of policy. They should all be subject to a universal standard of justification, at least within any single jurisdiction. This standard should be used by governments in the public reasons they provide, and by citizens and legislatures to demand adequate justifications for budget choices. The foundation of this universal standard, which I believe can partially be extracted from legal standards in the area of administrative law, is what I have tried to illustrate in this brief.