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Reasonableness and Law



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REASONABLENESS AND LAW

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Introduction

Reasonableness, such as we find it treated in the essays collected in this book,¹ is considered for its chiefly prescriptive import. Indeed, reasonableness is understood here as a core set of concepts concretizing into a series of practical and normative requisites that form the basis for judging decisions and actions of legal relevance. And this conceptual core can be said to spring from the demand that activities under the law necessarily be structured by working together normative reasons with concrete needs, such as these emerge out of different contexts and cases. Reasonableness can thus be conceived as quest for a *practical equilibrium*, in an attempt to bring into balance different normative possibilities, measures, and arguments in relation to different circumstances.

This conceptual core of reasonableness does not translate into any fixed set of requisites or hard-and-fast rules, but rather yields multifaceted criteria whose content varies from case to case. The different areas and cases where reasonableness comes to bear is such that you wind up having, in the outcome, open-ended criteria and standards. This pliancy and fluidity of the reasonable (its being amenable to concretize into any number of contents) explains why the concept is so widespread in legal discourse, serving a wide range of functions, and reasonableness can be described in this sense as a context-sensitive normative criterion (one that gets specified in different ways depending on context).

As a normative criterion, then, the reasonable operates on two levels: on the one hand, it is structured by a core meaning that consists in its calling to take into account different claims and reasons so as to find among them a common ground and an equilibrium; but at the same time—indeed *by virtue of* that core element—it gets specified in different ways depending on its different areas of application (the different areas of the law and the different situations that call it into being). And in each of these areas, an assessment of reasonableness can in turn operate on two levels: on the one hand, it can be predicated directly of acts or activities having

¹ Earlier versions of these essays, with the exception of A. Ripstein's, were presented at the international seminar *Reasonableness and Law*, held in Fiesole (Florence) on 17 and 18 November 2007 and organized by the European University Institute in association with the Bologna University Faculty of Law and with CIRSFID, a research centre based at the same university.

relevance in the law (as in private law) and, on the other hand, it can be used as a criterion by which to frame judicial decisions of broad scope (as in constitutional law).

The conceptual unity and cohesion of reasonableness emerges by looking at it against the rational. Reasonableness shapes up in this sense as a criterion inclusive of, but not reducible to, rationality. As John Rawls has underscored, reasonableness draws on moral considerations, among others, and cannot be reduced to correctness of reasoning or to instrumental rationality. Reasonableness comes into play whenever disputes or controversial issues are the matter, and in these situations, it asks us to take into account some fundamental criteria of moral judgment, such as universalizability and impartiality. So, it is this wider range of criteria that we must look to in determining whether a behaviour or a legal argument is correct and reasonable, and nothing becomes so in the concrete unless it strikes an equilibrium among such criteria.

However, as was noted earlier, the way in which the criteria of reasonableness are to be combined cannot be determined in advance, once and for all, but must be specified on a case-by-case basis depending on the comparative weight the different criteria will carry in the concrete circumstances of their application. To appreciate this, one need only take a quick survey of the plural uses of reasonableness in different legal systems and relations: both civil-law and common-law systems, as well as international law, invoke reasonableness under a wide spectrum of legal concepts and doctrines, in public and private law alike.

Thus, in common-law systems, reasonableness finds uses in public and criminal law. But it is in private law that reasonableness plays a central role, for it supplies criteria on which basis to identify the essential elements of legal concepts that are fundamental in regulating contractual relations as well as noncontractual ones, especially in tort law. In the private law of contracts, the reasonable circumscribes the restraints on trade that two parties can legitimately agree to; and in the private law of torts, the reasonable comes in as a standard of diligence excluding liability for injuries to others, in such a way that there is no obligation to pay damages: no liability or damages arise when the person against whom a claim is being asserted is found to have acted with the diligence that a reasonable person would have exercised in the same circumstances. In public law, reasonableness serves as a criterion on which basis the exercise of institutional powers can be legitimized; and in criminal law, reasonableness provides the standard of persuasion used to weigh the evidence against a defendant in determining guilt: Guilt beyond reasonable doubt.

In civil-law systems, reasonableness finds a place especially in public law, serving as one of the standards for determining the legitimacy of actions and decisions taken in exercising the powers of public office. The reasonable finds a prominent interpretive and argumentative use especially where constitutional adjudication is concerned, where it serves as a standard that grounds the judiciary's power to pass judgment on the legitimacy of laws, and indeed of all institutional actions at large. Here, too, reasonableness can take different forms based on substantive criteria (such as equality) as well as on a balancing of interests, principles, and constitutional protections. But judicial review is in any event a power exercised by bringing

reasonableness into relation with different contexts, and so it also proceeds from an evaluation of the characteristics specific to the concrete case.

As was previously noticed, there are two levels on which reasonableness operates in this scheme (a scheme whose architecture becomes even more complex where international law is concerned): reasonableness is used, on the first level, to evaluate the behaviour and choices of private citizens, and on the second level to scrutinize the decisions made in exercising the powers of public office, and law- and rule-making powers in particular. In private law, reasonableness comes in as a first-level principle whose requisites are directly *subjective* (applying to the reasonable person) or directly *objective*, in that they apply to circumstances making up the context within which events happen or relations take shape. In public law, by contrast, reasonableness comes in for the most part as a second-level principle on which basis to determine whether the powers of public office are being legitimately exercised, or whether the decisions made by other government bodies are legitimate, or whether the decisions made by judicial bodies at lower levels of judgment are correct. This flexibility enables the reasonable to combine and ground a wide range of evaluative criteria: at one end of the spectrum we find criteria for direct application to particular circumstances and sets of facts relevant to the solution of a concrete case (as when determining whether it was reasonable to act in a certain way or take a certain measure), and at the other end of the spectrum we find the second-level criteria on which basis to test the correctness of the arguments used in a legal judgment.

This open-endedness and ductility of the reasonable is both an asset and a liability. It is an asset because reasonableness enables and facilitates a kind of reasoning by which to adapt the abstract form of law to the concrete circumstances of its application, in that law takes shape in an equilibrium among reasons, and this equilibrium can only be established or tested by taking into account all the factors that with each new case become relevant. This means that every matter of fact or of law by which a case is characterized will come into the circle of reasons with respect to which a court is called on to make a decision. Reasonableness is a form of legal reasoning that combines different sorts of criteria, making it possible to identify the points of convergence between what universality demands and what fairness demands: between the abstract and the concrete. Legal discourse aimed at finding reasonable interpretations and applications of law is distinguished by its striving to ensure the necessary flexibility of law and by its sensitivity to justice and fairness, such as these demands come to bear in the concrete.

On the downside, problems emerge when it comes to specifying exactly what these demands and criteria are and how they should properly be balanced against one another. In fact, this is the most problematic part of the reasonable, from a theoretical standpoint as well as from the standpoint of the practice of law (and, as was just now mentioned, this goes not only for the criteria of reasonableness themselves, but also for the considerations to be taken into account in the process of balancing). From a theoretical standpoint, this poses the problem of the objectivity of reasonableness, an objectivity that, where law is concerned, translates into the problem of making sure that reasonableness is consistent with certainty, understood in the first instance as the predictability and coherence of judgments and of argumentative processes.

The problematic relation between reasonableness and certainty (such that what is reasonable might not be certain) emerges by looking at the evaluative criteria of reasonableness through which the reasonable becomes normative, and at the difficulty involved in making judicial decisions predictable and coherent with one another. The flexibility of a reasonable judgment is regarded as a source of uncertainty, for it tends to render unpredictable and incoherent the outcomes of judicial processes, thereby widening the fissure through which these elements can seep into the law.

It is these different questions—the core meaning and criteria of reasonableness, its flexibility and context-sensitivity, its objectivity and certainty—that make up the subject matter of the essays collected in this book. The overall attempt is to map out the concepts and the problems involved in reasonableness as it pertains to law. The essays discuss from different perspectives the constitutive elements and conceptual schemes framing the relation between reasonableness and law, and they also discuss the ramifications of applying reasonableness in different contexts, such as bioethics, international law, administrative law, and constitutional caselaw.

The book divides into two parts (each in turn divided into sections) and attempts to account for the different levels on which the problem of reasonableness is debated in its connection with the concrete operation of the law.

Part I—titled “Legal, Political, and Constitutional Theory”—is primarily devoted to analyzing the theoretical meaning of reasonableness, its relation to law, and the criteria of reasonableness. Figuring centrally in this discussion are the theoretical contributions of constitutional thought, especially as these emerge out of Europe.

The *first section* of this Part I—titled “The Reasonableness of the Law”—addresses the problem of specifying the theoretical and legal meaning of reasonableness. *Robert Alexy* analyzes what reasonableness means in the general context of practical rationality, identifying the role that reasonableness plays in balancing processes, which are considered as practical and also as legal processes, in light of the problem of disagreement and of the ways in which objectivity may be secured. *Giovanni Sartor* presents a sufficientist understanding of reasonableness in legal decision-making, arguing that reasonableness does not require cognitive or moral optimality: it only requires that a determination, whether epistemic or practical, be sufficiently good (acceptable or at least not unacceptable). This understanding combines the idea of bounded rationality with the idea of deference, as required by institutional coordination in the legal process. *Alberto Artosi* attempts to fill the epistemic gaps we have in our picture of the “reasonable person”: he does so by considering some aspects of Rawls’s idea of the reasonable, and especially its epistemological elements as these can be garnered from Rawls’s own account of reasonableness.

The *second section*—titled “The Moral and Political Dimension of Reasonableness”—is specifically devoted to the philosophical accounts of the concept. *Giorgio Bongiovanni* and *Chiara Valentini* analyze the dimensions of reasonableness in Rawls and Habermas. Rawls presents this concept as a criterion to be used in place of truth in practical discourse, and also as an element accounting for the legitimacy of political institutions. In this latter sense, reasonableness acts as a correlate of reciprocity and finds expression in the idea of proportionality which public

reason must incorporate. For Habermas, by contrast, reasonableness is an exclusively epistemic criterion and finds no political application. *Philip Pettit* considers how a government based on reason might frame the relation between law and liberty, and he compares in this respect Bentham's classic liberal conception of this relation with the neo-Roman republican conception: the republican conception is argued to be superior to Bentham's because it envisions a constitutional system in which law is compatible with liberty and in which the state's interference in the lives of citizens is subject to forms of control ensuring that such interference is non-arbitrary. *Wojciech Sadurski* outlines the main features of reasonableness in two different but closely interconnected areas—law and political theory—for the purpose of finding a common denominator between these two uses of reasonableness: on the one hand, our use of the same word, namely, *reasonableness*, can be taken to signify (without lapsing into any form of nominalistic fetishism) a functional similarity of reasonableness in the two areas in question; and, at the same time, reasonableness can serve in both of these areas (law and political theory) as a useful tool in seeking bases of consent in societies marked by moral disagreement. *Sebastiano Maffettone* discusses, from the standpoint of a liberal theory of justice, a notion of legitimation conceived as complementary to justification, arguing that Rawls's idea of an overlapping consensus can be sustained only insofar as it joins these two streams of liberalism, the one based on justification and the other on legitimation. He then brings global politics into view and presents for it an idea of global overlapping consensus based on the political ideal he calls pluralist integration; and he finally discusses two different but parallel notions of stability in Rawls's theory. *Luca Baccelli* offers a reading of Pettit's republican conception of criminal justice, based on the idea of liberty as non-domination: he finds Pettit's theory to be compelling in several respects (ranging from the idea of criminal parsimony to the primacy of individual rights in criminal law), but he also doubts whether the theory can take fully into account the complexity characterizing the legal systems of globalized societies, and he also criticizes the idea of ascribing to criminal law the role of serving as a moral guide for society.

The *third section*—titled “Reasonableness in Constitutional Adjudication”—analyzes the ways in which reasonableness has gained a foothold and been systematized in theoretical discourse on the question of constitutional review of laws. And the discussion also looks at the main criteria on which basis the requisite of reasonableness is framed. *Alec Stone Sweet* and *Jud Mathews* consider the spread of proportionality balancing in global constitutionalism, discussing its impact on law and politics in a variety of settings, both national and supranational, and offering a theory of the strategic and normative reasons accounting for the spread of this device. They conclude by arguing that proportionality balancing constitutes a doctrinal underpinning for the expansion of judicial power globally. *Andrea Morrone* presents the standards of reasonableness worked out by the Italian Constitutional Court, analyzing their meaning and modes of operation. His focus is on the court's use of reasonableness in its judicial review of statute law, where he identifies three standards—reasonableness as equality, reasonableness as rationality, and reasonableness in the balancing of interests—which he presents as merely descriptive, or

as heuristic devices by which to fully understand the meaning of the reasonableness as used in the court's caselaw. *Iddo Porat* brings up several critical points concerning the doctrine of proportionality. He notes that this can be counted among the leading manifestations of the concept of reasonableness in public and constitutional law, and so he goes on to discuss this widespread use in three respects: the reasons why proportionality has become so prominent, whether this prominence is a good thing or a bad thing, and what the future might hold for proportionality.

Part II of the book—titled “Private, Public, and International Law”—hones in on the criteria of reasonableness specific to different areas of the law: the discussion is not just focused on these legal understandings of reasonableness but considers them from a theoretical and conceptual standpoint, too.

The *first section* of this Part II—titled “Reasonableness in Private Law”—looks at the standard of reasonableness as used in common law as well as in the law of continental Europe. *Arthur Ripstein* considers the idea of a reasonable person as one who moderates one's actions in light of the legitimate claims of others: he thus focuses on the central role this idea plays in the Anglo-American legal tradition, especially in private law. *Chiara Alvisi* outlines the different uses of reasonableness in EU and Italian regulations on unfair commercial practices. She points out in particular the consumer's reasonable expectation as a fundamental element in assessing a merchant's compliance with the duty of fairness and good faith: reasonableness thus comes out as an element distinct from good faith and diligence, but in a way that makes it complementary to them.

The *second section*—titled “Reasonableness in Administrative and Public Law”—focuses on Italy and Europe. *Giacinto della Cananea* looks at the different ways that courts (mostly in Italy and England) have shaped the meaning of reasonableness as a general principle of administrative law: he analyses the common and distinctive features of these meanings and works out their connection with the idea of proportionality. *Michal Bobek* compares the functions served by different uses of reasonableness in the judicial review of administrative discretion in France, Germany, and the Czech Republic, arguing that, as much as there may be no self-standing tests of reasonableness in the law of these three countries, judicial review of administrative discretion can be shown to serve functionally similar purposes, and it is essentially for historical reasons that these functions go by different names and are fulfilled by different means.

The *third section*—titled “Reasonableness in Biolaw”—explores the different ways reasonableness may be conceived in this new area of law. *Carla Faralli* proceeds in this regard from two perspectives: a philosophical and conceptual one, from which she considers the relation between bioethics and law, and a legal one, from which she discusses the sources of biolaw and points up the controversial issues involved in identifying and applying such sources. *Amedeo Santosuosso* considers whether there is any consistency among the different uses of the idea of reasonableness in biolaw, and cautions against the use of this idea as a wildcard that anyone can produce whenever they feel they must take issue with research in the life sciences involving a controversial use of technology. *Stephanie Hennette-Vauchez* explores the link between reasonableness and biolaw from a legal-theoretical perspective:

her focus is on the border between reasonableness as a procedural concept and as a substantive one, and she argues that the legal use of this concept carries the risk of drifting from legal analysis to axiological prescription. *Stefano Canestrari* and *Francesca Faenza* discuss the use of reasonableness in shaping criminal law in matters of bioethical import: they highlight, on the one hand, the role that reasonableness plays in framing the guarantees provided under criminal law and, on the other hand, the different ways in which the reasonableness of criminal laws having a bioethical subject matter can be understood in different contexts, and they do so in particular by bringing into comparison the caselaw of the Italian Constitutional Court, the U.S. Supreme Court, and the European Court of Human Rights.

The *fourth section*—titled “Reasonableness in EU and International Law”—addresses the problem of finding a theoretical definition of reasonableness and of working out a corresponding set of normative criteria on which basis to guarantee this principle. *Adelina Adinolfi* points out the multiple facets that reasonableness reveals in EC caselaw and legislation. Her focus is on the substantive and procedural notions of reasonableness and on the different regulatory levels on which they apply in the caselaw of the European Court of Justice. *Lucia Serena Rossi* and *Stephen J. Curzon* look at the “rule of reason,” discussing whether, and how, it has been applied in the EU internal market and assessing the role it can play in this context. They work through this legal conundrum by carrying out a comparative analysis of two distinct areas of application, namely, the market rules dealing with competition and those on the free movement of goods, persons, services, and capital. *Ernst-Ulrich Petersmann* discusses the idea of public reasonableness, understood as a precondition for maintaining an overlapping consensus on the rule of law, not only in constitutional democracies but also in the international division of labor, with a view to promoting a mutually beneficial cooperation among citizens across national frontiers.

Part I
Legal, Political and Constitutional Theory

Part Ia
The Reasonableness of the Law

The Reasonableness of Law

Robert Alexy

In order to be able to say what the reasonableness of law is, one has to know what “reasonableness” in general means. The concept of reasonableness addresses theoretical questions, that is, questions concerning what is the case, as well as practical questions, that is, questions concerning both what ought to be done and what is good. The issue of the reasonableness of law primarily concerns practical reasonableness.

1 Reasonableness

1.1 Reasonableness and Rationality

The expression “reasonableness” bears a relation, not easily determined, to the expression “rationality”. Sometimes reasonableness and rationality, or being reasonable and being rational, are thought to be the same, or at least more or less the same, sometimes they are thought to be different, even fundamentally different. Georg Henrik von Wright stresses the difference. According to von Wright, rationality is “goal-oriented”, whereas reasonableness, by contrast, is “value-oriented” (von Wright 1993, 173). In determining rationality as goal-orientation he alludes to Max Weber’s concept of “*Zweckrationalität*” (ibid.), that is, purposive rationality, stressing at the same time, however, that his concept of rationality is “somewhat broader” (ibid.). According to von Wright, “rationality when contrasted with reasonableness has to do, primarily, with formal correctness of reasoning, efficiency of means to an end, the confirmation and testing of beliefs” (ibid.). This means that rationality comprises three elements: first, logic, second, means/end-reasoning, and, third, empirical truth or reliability. By contrast, reasonableness is said to be “concerned with the right way of living, with what is thought good or bad for man” (ibid.). If

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one wants to put this as briefly as possible, one can say that rationality is concerned with efficiency, whereas reasonableness is concerned with the right and the good.

A far more elaborated distinction between the rational and the reasonable is found in the work of John Rawls. According to Rawls, the distinction can be traced back to Kant's distinction between hypothetical and categorical imperatives (Rawls 1993, 48 f.; Kant 1964, 82). Thanks to this reference to Kant, it is clear that according to Rawls the decisive point of the reasonable is its moral nature. Rawls expresses this in the following way: "merely rational agents lack a sense of justice" (ibid., 52). There are, to be sure, important differences in von Wright's and Rawls' conception of the rational and the reasonable. In our context, however, it suffices to point out what seems to be the essential difference for both thinkers: the reasonable contains moral elements, the rational does not.

The relation between reasonableness, so defined, to rationality can be interpreted in either an exclusive or an inclusive way. It is interpreted exclusively when reasonableness is understood as being concerned only with the right and/or the good, and not with logical correctness, efficiency, and empirical truth or reliability. According to this interpretation, contradiction, inefficiency, and erroneous assumptions about the relevant facts would not suffice to preclude one's being reasonable. Von Wright rejects this. He clearly endorses the inclusive interpretation of the relation between reasonableness and rationality: "The reasonable, is, of course, also rational—but the 'merely rational' is not always reasonable" (von Wright 1993, 173). According to this interpretation, the criteria of rationality form a subclass of the criteria of reasonableness. Only reasonableness is comprehensive and complete. Rationality as such, as both von Wright and Rawls put it, is "merely rational" (Rawls 1993, 52). It is incomplete and somehow falls short of the decisive point. Descriptions like "instrumental" or "technical rationality" seek to give expression to this. I myself have endorsed this sort of distinction in discussing the relationship between *Rationalität* or *razionalità* on the one hand, and *ragionevolezza* on the other (Alexy 2002, 144 ff.).

There exists, however, another interpretation of the concept of rationality. According to this interpretation, reasonableness and rationality are the same or at least more or less the same. This interpretation is often indicated where the adjective "practical" is added to "rationality". "Practical rationality" then refers to all criteria that practical reason has to apply in order to determine whether a practical judgment is correct. When I conceived of the rules and forms of rational practical discourse as something like a "code of practical reason" (Alexy 1989, 188), I had an understanding of rationality in mind that includes everything reasonableness comprises. Thus, being reasonable and being rational come to the same thing. The only difference is that the concept of reasonableness invites one's attention more directly to some special features of practical rationality than the broad concept of rationality does. In this respect the concepts might well be, though extensionally equivalent, in a special sense intensionally distinct. The difference here consists, as we will see, in focussing on a special form of argument, namely, balancing.

All of this shows that the expressions "reasonableness" and "rationality" can be used both in a way that renders them interchangeable and in a way that does not render them interchangeable. The only point of importance is that it is clear

what they mean when they are used. Where there is a danger of misunderstanding, qualifications can be employed. If reference is being made to what von Wright and Rawls call “merely rational”, the expressions “instrumental” or “technical rationality” can be used. If the concept of rationality is used in a way that comprises everything to which “reasonableness” refers, the expression “practical rationality” might be chosen. In the light of these possibilities, merely verbal stipulation seems superfluous.

1.2 Concept, Idea, and Criteria

1.2.1 Normative Concept

The concept of reasonableness is a concept used for the assessment of such matters as actions, decisions, and persons, rules and institutions, also arguments and judgments, and it is in this respect a normative concept. As far as it addresses judgments, its function is similar to that of the concept of truth. Both are concepts used at a meta-level in order to assess the correctness of judgments made at the object-level. In the case of reasonableness, the judgments at the object-level are value judgments and judgments of obligation. The assessment of value judgments and judgments of obligation such as “Smoking in public rooms is irresponsible” and “The parliament ought to decide against the poll tax” as being reasonable or unreasonable is intrinsically related to the assessment of actions, decisions, persons, rules, institutions, and arguments. If, for instance, the value judgment “Smoking in public rooms is irresponsible” is reasonable, then, *ceteris paribus*, smoking in public rooms or the decision to do so would also be unreasonable, and the same would be true of a person habitually doing so, or a rule allowing, or institutions encouraging, or arguments supporting it. Judgments appear to be the central issue of reasonableness. This strengthens the analogy between truth and reasonableness.

1.2.2 Regulative Idea

Characterizing reasonableness as an assessment concept that addresses, from a meta-level, value judgments and judgments of obligation is to describe the function of this concept, not its content. With respect to its content, the idea and the criteria of reasonableness are to be distinguished. The idea of reasonableness requires, first, that all factors that might be relevant in answering a practical question be considered and, second, that they be assembled in a correct relation to each other in order to justify the judgment that provides the answer. This idea is highly abstract and formal, but it points to the course that one has to pursue in developing and applying the criteria of reasonableness. In this respect, reasonableness has the character of a regulative idea.

1.2.3 Diverse Criteria

Diverse criteria are triggered by the concept of reasonableness. An initial group comprises, as already pointed out, the criteria of instrumental rationality, that is, the

requirements of logic or consistency, empirical truth or reliability, and efficiency or means/end-rationality. In order to acquire a complete concept of rationality, that is, of reasonableness, three kinds of requirements have to be added: (1) those that concern coherence, (2) those that concern the interpretation and criticism of interests, and (3) those that give expression to the idea of generalizability or impartiality. One way of bringing all of this together is to explicate these ideas in terms of rules and forms of general rational practical discourse (cf. Alexy 1989, 187–206). Here, however, a different procedure shall be employed. I will not attempt to describe the complexity of reasonableness as it is manifested by the diversity of rules and forms of practical discourse. Rather, I shall concentrate on a formal structure that—more directly than any other criterion—explicates the idea of reasonableness and may, therefore, be considered to represent the essence of reasonableness. This formal structure is the structure of balancing.

1.3 Balancing

The connection between balancing and reasonableness has been elucidated by Neil MacCormick in a highly instructive way. According to MacCormick, the reason for “resort[ing] to the requirement of reasonableness is the existence of a plurality of factors requiring [evaluation] in respect of their relevance to a common focus of concern” (MacCormick 2005, 173). MacCormick’s “plurality of factors” or “plurality of values” (ibid., 167) consists of a class of at least two competing reasons, that represent incompatible answers to a practical question. The idea of reasonableness requires, first, that all reasons that might be relevant be considered and, second, that “a balance” be struck (ibid.) according to their “relative weight or importance” (ibid., 168) in “a context-dependent way” (ibid., 173). In this way, balancing is identified as the essence of reasonableness.

The explanation of the idea of reasonableness by appeal to the idea of balancing gives rise, however, to the question of whether this might not have one defining reasonableness by means of something that is unreasonable. Balancing would, indeed, be unreasonable if it were completely subjective, for being reasonable presupposes objectivity at least to a certain degree, that is, it precludes being completely subjective.

1.3.1 The Structure of Balancing

The reproach of subjectivity that is so often raised against balancing (see e. g. Habermas 1996, 259) appears in two versions. Its first version says that balancing is no argument at all. To talk about balancing is nothing more than to use a metaphor that shrouds from view the fact of a pure decision. This objection, however, can easily be refuted.

Neil MacCormick concedes that

“weighing” and “balancing” may express *too crudely* the process of deciding whether, all things considered, they [the factors brought into consideration, R. A.] constitute not merely

good and relevant reasons in themselves for what was done, but adequate or sufficient reasons for so doing even in the presence of the identified adverse factors. (MacCormick 2005, 186; emphasis by R. A.)

MacCormick's concession that expressions like "balancing" or "weighing" may describe the process "too crudely" is, indeed, warranted if the description is confined to the claim that there are factors, values, or reasons which "outweigh" each other depending on their greater or lesser weight. Notwithstanding its correctness it is nevertheless possible to refine this in fact crude description. In order to do so, the different "factors" that are relevant in balancing have to be identified and systematically related to each other. In this way, the formal structure of balancing may become transparent. This can perhaps be achieved by means of a weight formula such as

$$W_{i,j} = \frac{I_i \cdot W_i \cdot R_i}{I_j \cdot W_j \cdot R_j}$$

that defines the concrete weight of a principle P_i relative to a colliding principle P_j ($W_{i,j}$) as the quotient of, first, the product of the intensity of the interference with P_i (I_i) times the abstract weight of P_i (W_i) times the degree of reliability of the empirical assumptions concerning what the measure in question means for the non-realization of P_i (R_i), and, second, the product of the corresponding values with respect to P_j (I_j, W_j, R_j), now related to the realization of P_j . This formula has been discussed elsewhere (Alexy 2003, 433–49; Alexy 2007, 9–27), and the exposition shall not be repeated here. The only point of importance is that if the formal structure of balancing can be represented in this way, then talking about balancing is talking about a perspicuously identifiable argument form, and is, for that reason, neither metaphorical nor crude.

1.3.2 The Assignment of Weights

At this point, the second objection from subjectivity comes into play. It concedes that balancing can, in principle, be described by means of a perspicuous scheme, but insists that an essential condition for the significance of this description is missing. A weight formula as an arithmetical scheme would be an adequate description of balancing only if the values of its variables could be represented by means of numbers. But this, the objection continues, is not possible. If numbers could be substituted for the variables at all, this could only be done in a completely subjective way.

The Tobacco Case

Now, "[r]easons do not have weights as material objects do", as Neil MacCormick aptly stresses (2005, 186). This does not mean, however, that it is impossible to ascribe values to the factors represented by the variables of the weight formula, that is, to the intensity of the interference with a principle, the abstract importance of

a principle, and the reliability of empirical assumptions. This can be illustrated by means of a decision of the German Federal Constitutional Court on health warnings. The Court considers the duty of tobacco producers to place health warnings respecting the dangers of smoking on their products to be a relatively minor or light interference with freedom to pursue one's profession (Decisions of the Federal Constitutional Court, *BVerfGE* vol. 95, 173, at 187). By contrast, a total ban on all tobacco products would count as a serious interference. Between such minor and serious cases, others of moderate intensity of interference can be found. An example would be a ban of cigarette machines along with the introduction of restrictions on the sale of tobacco to selected shops. Following examples like this, a scale can be developed with the stages "light", "moderate", and "serious". One simply has to turn things around to demonstrate that invalid as well as valid assignments of weights are possible. Take the case of a person who classifies, on the one hand, a total ban on all tobacco products as a light interference with the tobacco producer's freedom to pursue their profession, while the same person considers, on the other hand, the duty to set down health warnings as a serious interference. It would not be easy to take such judgments seriously.

The use of a scale with the stages "light", "moderate", and "serious" is also possible from the standpoint of the competing reasons. The Federal Constitutional Court considers the dangers of smoking as "serious", for they consist in "mortal diseases" (*BVerfGE* 95, 173, at 184 f.), and it assesses, in addition, the empirical assumption that smoking involves mortal dangers, owing to its causing cancer and vascular diseases, as "according to the current state of medical knowledge certain" (*BVerfGE* 95, 173, at 184). On this basis, the result of balancing is, as the Federal Constitutional Court says, indeed "obvious" (*BVerfGE* 95, 173, at 187). The serious weight assigned to the reasons for protecting the population from the health risks of smoking outweigh the light interference with tobacco producers' freedom to pursue their profession.

Scales

The tobacco case raises many questions. Only two shall be taken up here. The first concerns the three-grade scale "light", "medium", and "serious". The fact that this triadic scale may be used in the tobacco case by no means implies that a triadic scale is necessary for balancing. Balancing is possible once one has two steps, and the number of steps is, in principle, open. It is only if one had no scale at all, that is, if all weights were equal, that balancing would become impossible. The triadic scale fits many cases quite well, however. This is due to the fact that practical argumentation can work only with relatively crude scales (Alexy 2003, 445).

Commensurability and Comparability

The question of the number of steps and also the question of the attribution of numbers to them (Alexy 2007, 20–3) concern the question of just how balancing works. A far more pressing question is whether it is at all possible to assign grades

of weights to the intensities of interferences with such differing principles or values as freedom to pursue one's profession and public health or—to take an example in which individual rights stand juxtaposed to one another—freedom of expression and protection of personality (see *ibid.*, 12f.). In the event of a collision of principles of this kind, there exists no common unit of measure like money that would allow for commensurability. Incommensurability in the sense of a lack of any common unit of measurement does not, however, imply incomparability (see Chang 1997, 1f.). To be sure, such things as rights or interests are not directly comparable. Comparability, however, does not presuppose a common unit of measurement, it only requires a common point of comparison. In moral questions, this common point of comparison is the moral point of view, in legal questions, it is the legal point of view. These points of view are constituted by the questions of what is morally, or legally, correct.

1.4 Discourse

It might be objected that concepts like those of the moral or legal point of view are so abstract that they cannot serve as a common point of comparison. The abstractness of these concepts, however, does not imply their emptiness. The moral as well as the legal point of view can be explicated by means of a procedure: that of moral and of legal discourse. Moral as well as legal discourse are procedures defined by a set of rules and forms of rational argumentation. In this way, the reasonableness of assigning weights is proceduralized.

1.4.1 Exchange of Roles

Neil MacCormick, too, engages the idea of procedure in order to solve the problem of ascribing weights. According to MacCormick, the answer to the question “what are the grounds of such ascription” is, perhaps, “best given by referring back to the ‘procedural’ aspect of reasoning” (MacCormick 2005, 186, see also 168). This, he says, “calls for something like Adam Smith’s ‘impartial spectator’ procedure” (*ibid.*). Following this line a “measure of weight” is said to be “found in the sympathetic or empathetic response of the deliberator to the feelings of persons involved, after making adjustments for impartiality and adequate information” (*ibid.*). The impartial spectator, “ideal deliberator” (*ibid.*, 168), or “ideal observer” (Firth 1952, 321) procedure is a classical one-person procedure (Alexy 1995, 96). In contrast to this, discourse theory argues for a procedure in which each person may participate. A main reason for this is that deliberation about the relative weights of interests ought not to take place without giving a voice to those who are concerned. Here “giving voice” means not simply receiving information but also engaging in argument. Interpreting interests without listening in this way to a self-interpretation would mean not considering all reasons, and not considering all reasons is an essential part of being unreasonable. In practice, the monologic one-person and the dialogic all-person procedure would, however, often boil down to nearly the same: the discourse cannot actually be performed; it can only be performed virtually, that is,

in the mind of one person. What is more, the requirements of impartiality overlap in part. The monological and the dialogical approach both consider role exchange as a crucial procedure for achieving impartiality. Adam Smith puts it this way:

In all such cases, that there may be some correspondence of sentiments between the spectator and the person principally concerned, the spectator must, first of all, endeavour, as much as he can, to put himself in the situation of the other, and to bring home to himself every little circumstance of distress which can possibly occur to the sufferer. He must adopt the whole case of his companion with all its minutest incidents; and strive to render as perfect as possible, that imaginary change of situation upon which his sympathy is founded. (Smith 1976, 21)

A discourse-theoretical version runs as follows:

Everyone who makes a normative statement that presupposes a rule with certain consequences for the satisfaction of the interests of other persons must be able to accept these consequences even in the hypothetical situation where he or she is in the position of those persons. (Alexy 1989, 203)

The main difference here consists in the fact that this requirement, as addressed to each person individually, is embedded by discourse theory in an overarching procedure that seeks to achieve impartiality over and above the exchange of roles by granting everyone both the right to take part in discourse and freedom and equality in discourse (ibid., 193).

1.4.2 Objectivity

A sceptic might well insist that none of this suffices to attain objectivity. Neither role exchange as such nor as embedded in discourse excludes the possibility that different persons will arrive at different answers to the practical question under discussion. One might call this the “disagreement objection”.

Reasonable Disagreement or Discursive Possibility

The disagreement objection addresses a crucial point. For the observation of discourse rules does not by any means guarantee that agreement will be reached in all cases. This is obvious where real discourses are concerned, and perhaps even true with respect to ideal discourses (Alexy 1988, 50 f.). But this does not mean that practical reasoning is a thoroughly subjective enterprise. Two points are decisive here. The first is that several results will be stringently required or flatly excluded from the point of view of discourse. This is the case, for example, with the imposition of the status of slavery or the denial of freedom of speech. In this sense it is possible to speak of “discursive impossibility” (Alexy 1989, 207). There remain, however, numerous incompatible normative judgments that can be justified without violating any of the rules of discourse. This is the range of what is merely discursively possible. But—and this is the second point—judgments falling into the class of what is merely discursively possible may contradict judgements of other persons that also belong to the range of discursive possibility. At the same time, these incompatible judgments may be backed by reasons that are defensible without violating any rules

of discourse. To be backed by reasons in a way that does not violate the rules of reason means, however, that the judgment is reasonable. The range of discursive possibility is for that reason coextensive with that of reasonable disagreement (see MacCormick 2005, 163, 169).

The Conjunction of Objectivity and Subjectivity

To be backed by reasons that do not violate the rules of reason is, however, to be, in this respect, objective and not to be merely subjective—as would be a judgment not backed by reasons or backed merely by reasons that violate the rules of reason. In a case of reasonable disagreement, the competing judgments are objective in so far as they are compatible with the discourse rules as rules of reason, and subjective in so far as they depend on the persons who argue on their behalf. This shows that objectivity and subjectivity may coalesce into one. Reasonableness consists of such a coalescence. In this way, the reasonable escapes, as Paul Ricoeur puts it, the alternative between “*dimostrabilità ed arbitrario*” (Ricoeur 1996, 81; see also Ricoeur 1994, 378).

2 Law

2.1 *The Necessity of Law*

To describe the fact of reasonable disagreement, however, is to describe a problem. If every person were allowed not only to *argue* for his or her opinion but also to *act* in all cases of reasonable disagreement according to, as Kant puts it, one’s “own judgment” (Kant 1996, 456), then social questions that must be answered in order to protect rights, to prevent violence, to secure public welfare, and the like would remain unanswered. The reasonableness of persons as such or of discourse as such does not suffice to establish social co-ordination and co-operation. Under this condition the application of reason to its own weakness leads to the necessity of law.

This step from reason to law can be interpreted in two ways. According to the first interpretation, the transition is conceived of as a substitution of reasonableness by the authority of legal decision-making in parliament, courts, and offices. Reason’s yielding to decision is, happily, not the only possibility. The alternative to this substitution of decision for reason is the institutionalization of reason (Alexy 1999, 23 ff.). This second interpretation leads to an enhancement of reasonableness by connecting reason with the form of law. Here the process has a dialectical structure. Reason requires law in order to become real, and law requires reason in order to be legitimate. This fusion of the real and the ideal is the essence of the idea of the reasonableness of law. The interdependence of law and reason manifests itself in two dimensions of law: a procedural and a substantive dimension.

2.2 Procedural Dimension

Neil MacCormick describes the requirement of procedural reasonableness as the demand for “proper procedures”, and he speaks of ensuring “the discursive and deliberative quality of the search for final decision or answer” (MacCormick 2005, 169). The problem of the procedural dimension of the reasonableness of law is hereby aptly described. The description is, however, highly abstract. It says nothing about what the postulate of optimizing the discursive quality of institutionalized legal procedures requires. The requirement here turns on the kinds of procedure and the circumstances in which they have to function, matters that cannot be elaborated here (see Alexy 1999, 33–41). In any case, the criteria of arranging the institutions are always the same: the enhancement of the role of argument on the one hand, and efficiency on the other.

2.3 Substantive Dimension

Discourse theory is a procedural theory. To speak in connection with discourse theory of a substantive dimension prompts the question of whether there can be anything substantive in the orbit of discourse theory. The answer is that there can be, for the rules of discourse express the ideas of freedom and equality. By way of these ideas discourse is intrinsically connected with human rights. Discourse theory implies human rights (Alexy 1996, 220–33). This means that law cannot be reasonable in a full sense without incorporating human rights either as constitutional rights or in some other form that guarantees their priority.

The incorporation of human rights into positive law as norms that bind all state powers and precede all other norms changes fundamentally the character of the legal system. The power of legislation is substantially restricted, and when human rights are perfectly institutionalized, as reasonableness requires, this restriction is controlled by constitutional review. What is more, constitutional rights not only concern legislation. Adjudication and administration, too, have to consider the demands of constitutional rights when they apply and execute the law.

Reasonable application of constitutional rights requires proportionality analysis. Proportionality analysis includes balancing. The incorporation of human rights into a legal system therefore underscores and enhances the role of balancing. This does not mean that subsumption under a statute and the comparison of cases lose their importance. Abolishing subsumption and the adherence to precedents in favour of an unlimited rule of balancing would be unreasonable, for it would give voice to an unbalanced disregard of the principles of legal certainty, democratic parliamentarism, and equal treatment. On the other hand, to make no room for balancing, even in hard cases, would also be unbalanced. This means that in a reasonable legal system, balancing appears not only at the object-level of the application of law but also at a meta-level where problems concerning the proper method of law’s application are to be resolved. Here, the phenomenon of meta-balancing appears.

As already explained, balancing, however, is intrinsically connected with the possibility of reasonable disagreement, and one of the main reasons for the introduction of law was the problem of reasonable disagreement. This problem now reappears at just that point where it was thought to have disappeared. But it reappears in another form. Due to its having been embedded in the authoritative and institutional context of law, its urgency diminishes and its prospects of being mastered are increased. It would not be reasonable to require either more or less. This means that the reasonableness of law requires that proper scope be given to reasonable disagreement.

References

- Alexy, R. 1988. Problems of Discourse Theory. *Critica* 20: 43–65.
- Alexy, R. 1989. *A Theory of Legal Argumentation*. Trans. Ruth Adler und Neil MacCormick. Oxford: Clarendon. (1st ed. in German 1978.)
- Alexy, R. 1995. *Recht, Vernunft, Diskurs*. Frankfurt-on-Main: Suhrkamp.
- Alexy, R. 1996. Discourse Theory and Human Rights. *Ratio Juris* 9: 209–35.
- Alexy, R. 1999. My Philosophy of Law: The Institutionalisation of Reason. In *The Law in Philosophical Perspectives*. Ed. L.J. Wintgens, 23–45. Dordrecht: Kluwer.
- Alexy, R. 2002. Ragionevolezza *im Verfassungsrecht*. *Acht Diskussionsbemerkungen*. In *La ragionevolezza nel diritto*. Ed. M. La Torre and A. Spadaro, 143–50. Torino: Giappichelli.
- Alexy, R. 2003. On Balancing and Subsumption. A Structural Comparison. *Ratio Juris* 16: 433–49.
- Alexy, R. 2007. The Weight Formula. In *Studies in the Philosophy of Law*, vol. 3. Ed. J. Stelmach, B. Brożek, and W. Załuski, 9–27. Krakow: Jagiellonian University Press.
- Chang, R. 1997. Introduction. In *Incommensurability, Incomparability, and Practical Reason*. Ed. R. Chang, 1–34. Cambridge, Mass.: Harvard University Press.
- Firth, R. 1952. Ethical Absolutism and the Ideal Observer. *Philosophy and Phenomenological Research* 12: 317–45.
- Habermas, J. 1996. *Between Facts and Norms*. Trans William Rehg. Cambridge: Polity. (1st ed. in German 1992.)
- Kant, I. 1964. *Groundwork of the Metaphysic of Morals*. Trans. H.J. Paton. New York: Harper & Row. (1st. ed. in German 1785.)
- Kant, I. 1996. The Metaphysics of Morals. In Id., *Practical Philosophy*. Ed. and trans. M.J. Gregor, 353–603. Cambridge: Cambridge University Press. (1st ed. in German 1797.)
- MacCormick, N. 2005. *Rhetoric and the Rule of Law*. Oxford: Oxford University Press.
- Rawls, J. 1993. *Political Liberalism*. New York: Columbia University Press.
- Ricoeur, P. 1994. Zu einer Hermeneutik des Rechts: Argumentation und Interpretation. *Deutsche Zeitschrift für Philosophie* 42: 375–84.
- Ricoeur, P. 1996. Interpretazione *e/o* argomentazione. *Ars interpretandi* 1: 77–93.
- Smith, A. 1976. *The Theory of Moral Sentiments*. Ed. D.D. Raphael and A.L. Macfie. Oxford: Clarendon Press. (1st ed. 1759.)
- Wright, G.H. von. 1993. Images of Science and Forms of Rationality. In Id., *The Tree of Knowledge and Other Essays*, 172–92. Leiden: Brill.

A Sufficientist Approach to Reasonableness in Legal Decision-Making and Judicial Review

Giovanni Sartor

1 Introduction

I shall argue for a sufficientist understanding of reasonableness in legal decision-making: cognitive or moral optimality are not required for reasonableness; what needed is just that a determination—be it epistemic or practical—is sufficiently good (acceptable, or at least not unacceptable). Correspondingly, judicial review on the ground of unreasonableness requires more than mere suboptimality: it requires failure to achieve the reasonableness threshold.

To develop this idea, I shall first analyse the notions of rationality and reasonableness, examining the role they play in cognition. I shall then consider rationality in legal (and in particular legislative) decision-making, focusing on teleological reasoning. I shall consequently develop an idea of sufficientist reasonableness, by combining the idea of bounded rationality with the idea of deference, as required by institutional coordination in the legal process. Finally, I shall consider when a legislative determination can be considered irrational or unreasonable, and how this is related to the violation of constitutional requirements.

2 Reasonableness and Rationality

The concept of reasonableness is often understood as having a larger content (intention) and thus a smaller extension than the concept of rationality understood as cognitive optimality: in order to be qualified as reasonable, a practical determination would need to be both rational and moral. This makes reasonable practical determinations a subset of rational determinations, those qualified by morality (the

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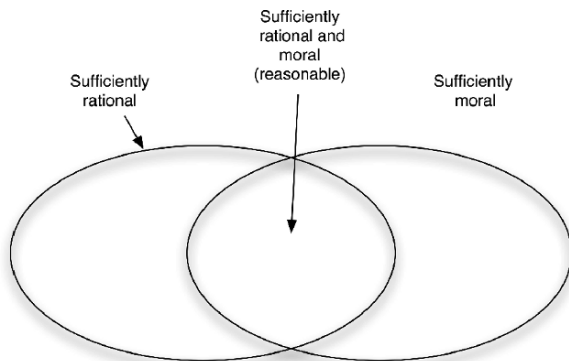


Fig. 1 Sufficientist reasonableness

differentia specifica of reasonableness within the genus of rationality), and also a subset of moral determinations, those qualified by rationality (the *differentia specifica* of reasonableness within the genus of morality).

However, a different characterisation is possible, based on sufficiency rather than on optimality: reasonableness pertains to determinations that are good enough though not necessarily optimal; reasonable choices need to “satisfice”; they are not required to maximise (on the notion of *satisficing*, see Simon 1983). This sufficientist understanding of reasonableness, combined with the idea that practical reasonableness requires both morality and rationality, entails that reasonable practical determinations need to be both rational enough and moral enough, as shown in Fig. 1.

Figure 2 illustrates the connection among sufficientist practical reasonableness, rationality, and morality. The oval of the reasonable includes the practical optimum,

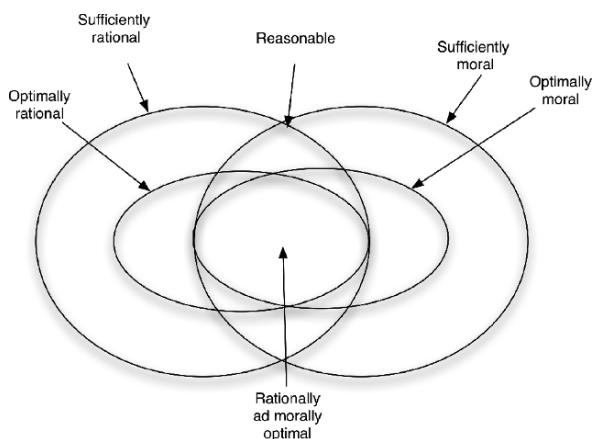


Fig. 2 Optimality and sufficiency in rationality and in morality

namely, the set of determinations that are both optimally rational and optimally moral, but is not limited to such a set. It also includes determinations that, while failing to achieve optimal rationality or optimal morality (or both), still reach the sufficiency threshold in both respects. In this contribution, I shall not address moral reasonableness (which is discussed in other chapters of this book), but shall focus instead on cognitive reasonableness. With regard to moral reasonableness, I shall just specify that I view morality—understood, in a general sense, as taking fairly into account the interests of others within one’s practical reasoning—as a separate aspect of reasonableness. It seems to me that, in legal decision-making, namely, the activity whereby coercible decisions are taken in the name of the collectivity, morality entails the general requirement that everybody (each member of the polity) be treated with equal consideration and respect (on equality, see Sadurski 2008). This is much a stronger requirement than the idea involved in reasonableness in private law, where the moral dimension of reasonableness requires taking into account other people’s interests to some extent, but does not require equating them with one’s own interests (for a discussion of reasonableness in private law, see Ripstein 2001). In particular, this means, with regard to rights, that the satisfaction of each right-holder’s interest in exercising a right should equally be taken into account. However, even with regard to this moral dimension, no more than a sufficientist threshold needs to be respected, a threshold compatible with different understandings of the notion of equal concern and respect.

A third aspect (besides rationality and morality) is often included in the notion of practical reasonableness: in order for a determination to be reasonable with regard to a certain context (culture or form of life), it must also be *consonant* (or at least not completely dissonant) with the ideas prevailing in that context (for a development of this idea in the legal domain, see Aarnio 1987), and in particular, with the norms that are practiced in that context. This culturally dependent idea of reasonableness must be distinguished from the trivial assertion that the beliefs of a person about what is reasonable (sufficiently rational and moral) may be influenced by the surrounding culture. The requirement of consonance does not concern what is (possibly mistakenly) believed to be reasonable: it concerns what is reasonable in a certain context. Such a requirement is violated when between a legal determination and general opinion there is a distance that cannot be overcome with the cognitive resources available to people. Consonance with general opinion may entail a certain conservatism, but it corresponds to the idea that legal decisions should be taken in name of the people, namely, of the legal community: though a legal decision-maker may take his decision on the basis of views that are shared only by a part of his community, and may and should rationalise and revise such views when opportune (correcting biases and prejudices, taking into account relevant scientific knowledge, etc.), a certain proximity should be retained between the law and the opinions of the community it is supposed to govern. By adding this further component, the concept of reasonableness represented in Fig. 3 is obtained, which results from the intersection of three requirements, sufficient rationality, sufficient morality and sufficient consonance.

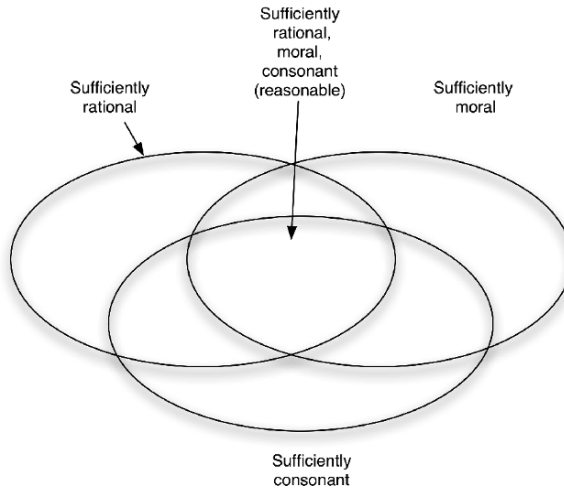


Fig. 3 Reasonableness as sufficient rationality, morality and persuasiveness

3 The Process of Rational Problem-Solving in Individuals

Though reasonableness is to be distinguished from rationality, it needs to be characterised with reference to the latter. Thus, in the following I shall provide a summary analysis of rationality, based on the account in Pollock (1995), which expands the belief-desire-intention model often adopted in artificial intelligence (see Sartor 2005). This analysis refers to individual action, but its patterns, as I shall argue, also apply to rational decisions of collective bodies, and in particular to legislative decisions.

Rationality pertains to cognition, namely, to the activity through which we process information in order to come at reasoned determinations. These determinations can be epistemic, i.e., meant to identify the features of the world surrounding us, or practical, i.e., meant to establish the goals to be pursued, the plans of action to be implemented, or the norms to be endorsed. Epistemic cognition consists in the appropriate formation of epistemic states, namely, internal (mental) states meant to model features of the agent's environment. Two types of epistemic states can be distinguished, percepts and beliefs. *Percepts* come about by way of mechanisms of perception, which are activated when inputs are provided to the agent's sensors (on the distinct cognitive function of percepts and beliefs, see Pollock and Cruz 1999, 84ff.). A *belief* consists in the endorsement of a proposition: it consists in adopting a proposition as a premise in one's reasoning and action, as something one is ready to reason and act upon. An agent endowed with the faculty of epistemic cognition will process external inputs and obtain percepts. The agent will then reason, producing new beliefs on the basis of previously formed percepts and beliefs. Hence, epistemic reasoning is the process through which one builds new epistemic states proceeding from the epistemic states one already possesses.

Practical cognition also consists in forming appropriate cognitive states, but these are conative rather than epistemic. Conative states are not intended to represent one's environment: their function is rather that of guiding one's deliberative process, of playing a role in the process determining behaviour. Thus an agent endowed with the faculty of practical cognition possesses conative states, and has the ability to form new conative states on the basis of his current epistemic and conative states. Practical reasoning is thus the process through which one builds new conative states on the basis of the epistemic and conative states one possesses.

Typically, in epistemic cognition, perception leads to beliefs about the environment. Such beliefs—when combined with other beliefs the agent already possesses, and when they go into a logical process (such as deduction, induction, defeasible reasoning, and probability calculus)—lead to the formation of further beliefs. The set of beliefs one possesses, however, does not consist mostly or even mainly of beliefs one constructs, directly or indirectly, out of one's own perceptions, according to some pattern of logical reasoning. It also includes inputs provided by the built-in cognitive modules of which our mind consists, modules for language, for building three-dimensional representations out of perception, for recognising faces, for making analogies, for inventing hypotheses and theories, for detecting other people's attitudes and the rules they are following, etc. (for different views on the "modularity of mind," see Fodor 1983 and Pinker 1999). These modules do not proceed in a "ratiocinative" way: they do not follow reasoning patterns of which we are aware and which we can monitor and direct. However, they provide sufficiently reliable inputs, inputs our conscious reason needs to accept (or at least to take into serious consideration). Moreover, in a social context, our beliefs mostly include information obtained from others, and through various social processes of cognition (see Goldman 1999, 2006). The rationality of a person's determination to accept the outcomes of a social source is based on the evaluation of the reliability of such a source, an evaluation that should take into account the cognitive limitations of the evaluating person. So it would be irrational for a layperson to refuse to adhere to the outcome of the scientific community, given the impossibility of autonomously forming a judgement on a scientific matter, or given that this judgement would much more likely be wrong than the judgement of the scientific community (unless one has evidence that the formation of the judgement of the scientific community was altered by disturbing factors, such as commercial or political interests, biases, prejudice, etc.).

It is often assumed that in practical cognition, an agent's goals are directly connected with the performance of actions believed by the agent to be necessary in achieving the same goals, thus making it so that actions, rather than mental states, are the conclusions of practical reasoning, as Aristotle says with regard to a syllogism described in *De motu animalium* (Aristotle 1912, 7). This model, however, is not really adequate for a bounded reasoner, who cannot perform all reasoning at the time of acting, and needs to store the outcomes of his practical reasoning in appropriate ways. Thus, a more articulate view of bounded practical rationality is required, where a key role is played by intentions, which store practical determinations for the purpose of guiding future action. Here I shall adopt the model found in Pollock (1995), who distinguishes three basic conative states.

The first conative attitude consists in having *likings* or *preferences* (I use these expressions as synonymous). By a liking (or a disliking), I mean a generic *pro* (or *con*) attitude with regard to certain situations (present or future) or with regard to certain features of them (Pollock 1995, 12ff.). Consider, for instance, one's dissatisfaction with a job that does not satisfy one's tastes and ambitions, as compared to the (imagined) satisfaction in having a different job.

The second conative attitude consists in having *goals* (the state of having goal is usually called a *desire*).¹ A goal is more specific and focused than a liking. An agent's adoption of a goal has the function of prompting the agent to make plans to achieve that goal. Not every liking gives rise to a goal (for instance, my liking for the idea of being a football player or of winning a Nobel prize will not become my goal, since I know from the start that these outcomes I cannot achieve): only a liking for an objective one views as achievable can give rise to a goal. Consider, for instance, how a dissatisfied worker can adopt the goal of finding a new job.

The third conative attitude consists in having *intentions*. An intention is the state of mind of an agent who has determined that a certain action is to be performed, if need be under certain conditions.² When we have formed an intention to perform an action (or a combination of actions), we have made up our minds as to whether we will perform that action, under the appropriate conditions, and are ready to perform the action as soon as these conditions are satisfied. Adopting intentions is our way of storing the plans of action (combinations of instructions) we have adopted, and of staying ready to carry them out: instructions contained in chosen plans provide content to our intentions. Thus, an agent who has formed an intention is *committed* to implementing the corresponding instruction, since this is required by the way in which practical rationality works: we may rationally withdraw our intention, but it would be irrational for us not to implement our intention all the while having that intention. For example, if we have the goal of being hired for a new academic job, we may adopt the intention of applying for a position with certain universities. We may withdraw this intention (if, for instance, we are offered the job we desired, in which case we would interrupt our job search), but it would be irrational for us both to retain the intention and not implement it.³

¹ A desire may be distinguished from the mere wishing, the latter being a positive attitude toward a state of affairs, regardless of the possibility of achieving it (see Aristotle 1924, III). A desire in the sense here indicated presupposes that the agent does not consider impossible the achievement of the object of desire.

² I use here the term *intention* in the usual, commonsense meaning (which corresponds to the way in which this term is used in artificial intelligence or practical philosophy: see Bratman 1987). I am not using it to express the "aboutness," or direction toward an object, of a mental state or content of consciousness, as it is sometimes used in the philosophy of mind (on the approach of Brentano 1973).

³ According to Pollock (1995), there is a fourth conative attitude, which he calls a *want*. A want is an unconditioned impulse toward performing an action, an impulse one feels when one has the intention of performing a certain action given certain conditions (including a certain temporal and spatial framework) and given that one believes that the conditions for the immediate performance of the action obtain. For simplicity's sake, I shall not include the idea of a want in the present

The cognitive states just described are integrated into a reasoning process, which can be called *ratiocination*, where the adoption of certain cognitive states is the reason that leads to, and justifies, the adoption of further cognitive states. In epistemic reasoning:

- having a perception with content P is a reason for believing P ;
- having certain beliefs P_1, \dots, P_n is a reason for believing a certain conclusion P linked to the input beliefs according to the various patterns of correct epistemic reasoning (deductive inference, defeasible inference, probabilistic inference, induction, etc.).

In practical reasoning

- liking a state of affairs P , and believing that it can be achieved, is a reason for adopting the goal of achieving P ;
- having goal P , and believing that a plan (action) A is a teleologically appropriate way to achieve it, is a reason for intending to execute A .

By arranging these reasoning schemata into sequences, we obtain downward chains: in epistemic reasoning, from perception to beliefs, and from beliefs to further beliefs; in practical reasoning, from likings and beliefs to goals, and from goals and beliefs to intentions (leading to action). These chains may be extended with intermediate steps, where sequences in a chain are recursively activated: the intention to perform an abstract action (e.g., going to a conference) leads to the goal of performing that action (an instrumental goal), and this goal leads to the intention of executing a corresponding plan (registering for the conference, buying a ticket, etc.); the belief that the antecedent of a conditioned intention is satisfied leads to an unconditional intention, etc.

A chain of practical reasonings ends with the agent's intention to unconditionally execute a specific action. If all reasoning steps have functioned properly, we will act in such a way as to be successful, at least in most cases (failure is always possible, in a complex and unpredictable world, even when we have used our cognitive functions as well as we can): by implementing our intentions, we achieve our goals; by achieving our goals, we satisfy our desires; and by satisfying our desires, we adapt the world to our likings. Thus, practical ratiocination enables a reasoner to reach the target of higher-level conative states by achieving the target of lower-level conative states. The fact that a single reasoning step is correct does not mean that the whole sequence, including all previous steps, is correct: a mistake can have taken place above, so that rationally correct inferences can be included in chains of reasoning that, as a whole, are irrational.

It is important to stress that rational problem-solving requires a connection between epistemic and practical reasoning (see Fig. 4).

model, and shall limit myself to the idea of an unconditioned intention to perform a specific action, without considering the further process leading to action.

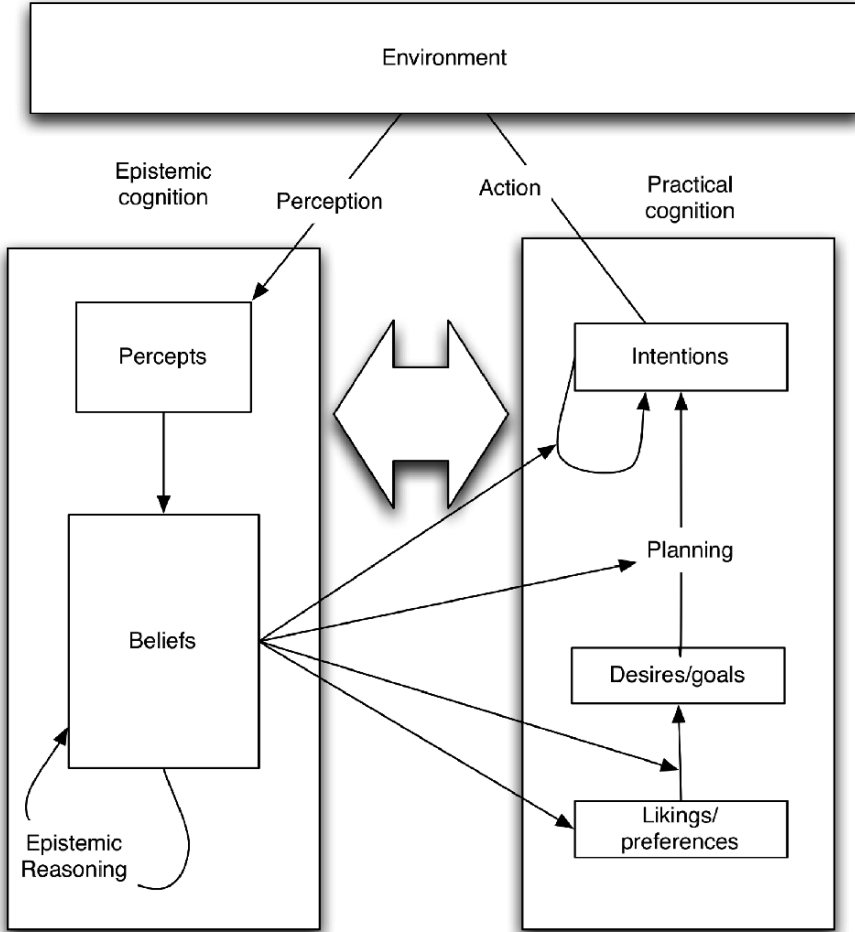


Fig. 4 Rationality = Practical cognition + Epistemic cognition

Advances in practical reasoning are dependent upon the results provided by epistemic reasoning: we adopt a goal assuming that it is achievable and we adopt an intention to execute a plan on the basis of the belief that this that plan provides a teleologically appropriate way to achieve its goal (it would be irrational to have a goal to achieve something that we believe to be unachievable, or to have an intention to do something while believing that doing something else would be a better way to achieve our goals, consistently with our interests and constraints). Thus failures in practical rationality may depend (and do most often depend) on a failure in the epistemic processes providing inputs to practical reasoning. On the other hand, epistemic inquiries can be activated by practical reasoning (they depend

on the reasoner's practical interests): when we need new information in order to develop a plan of action (I have the goal of going to a conference, but I do not yet know what means of transportation are available), or in order to establish whether a precondition for an adopted intention holds (I do not know whether I am scheduled for a lecture today, but it is my intention to lecture if I am scheduled), we engage in epistemic-reasoning and auxiliary information-seeking actions aimed at coming to know what we need to know. This does not imply that all epistemic interests are only instrumental to specific "material" goals: humans have an inborn conative disposition for knowing (curiosity), regardless of further specific uses knowledge, and a corresponding liking for the discovery and possession of knowledge, a drive that supports scientific research as well as gossip. As Aristotle observed in *Metaphysics*, "all men by nature desire to know" (Aristotle 1921, 980a).

Rational thinking and decision-making under complex circumstances are both defeasible and argumentative. Rationality is defeasible in the sense that many of the inferences it validates consist in inferring conclusions on the basis of limited information, conclusions that may need to be revised when additional information is provided. For instance, the perceptual conclusion that an object is pink (having been perceived in this way) should be abandoned when we become aware that the object was viewed under a red light; the conclusion that Tweety is white, being a swan, should be withdrawn when we come to know that Tweety comes from Australia, where swans are black; an explanation of certain aspects of a phenomenon should be abandoned when a more comprehensive explanation is available; etc. Similarly, in the practical domain a goal should be abandoned when new evidence shows that it cannot be achieved; the intention to perform a specific action in keeping with a general intention (e.g., an intention to do exercise today as a consequence of an intention to do exercise every morning) should be abandoned when it conflicts with a prevailing intention (catching an airplane very early in the morning); the belief that a plan is the most appropriate way to achieve a goal should be abandoned when further evidence shows that a better option is available (there is a train that takes me to my destination more cheaply and comfortably than the airplane I had decided to take); etc.

The argumentative nature of rational thinking is related to its defeasibility. If epistemic and practical reasoning is defeasible, then justifying a conclusion will require more than considering the reasons supporting that conclusion: it is also necessary to consider the reasons against it. As Mill (1991, 41) puts it, in "any subject on which difference of opinion is possible, the truth depends on a balance to be struck between two sets of conflicting reasons," so that the use of *positive logic*, which relates a thesis to its supporting grounds, must be supplemented with critical discussion of the opinion to the contrary, that is, by that *negative logic* which "points out weaknesses in theory or errors in practice, without establishing positive truths" (ibid, 109). Recent research on defeasible reasoning has indeed identified for different patterns or schemes of defeasible argument the corresponding "critical questions," pointing to information that (if it were to be accepted) would defeat the argument in question (see, for all of this research, Walton et al. 2008).

4 Rationality and Practical Determinations

Epistemic reasoners do not restart from scratch whenever they need to understand or predict their environment: they approach new a situation by using previous epistemic determinations, stored as beliefs in their memory. Similarly, practical reasoners keep memory of their practical determinations to use them at a later time, rather than restarting their practical reasoning from scratch whenever a problem comes up. Once an agent has adopted certain practical determinations, rationality requires the agent to proceed on the basis of these determinations, giving them an appropriate weight in his or her reasoning process, until the agent abandons such determinations. For instance, it would be (procedurally) irrational for me to have an intention to make a €50 donation to charity *X* and not do so (though it may not be irrational for me to withdraw such an intention in appropriate circumstances, for instance, upon discovering that *X* is a fake charity, exclusively aimed at enriching its organisers).

Not deriving the practical conclusion supported by our conative states is as irrational as failing to derive the consequences of our beliefs. Failing to proceed in reasoning may be the right thing from the point of view of an external observer who knows that the belief or conative state providing the premise of the inference at issue is wrong (and reliance on it is likely to lead the reasoner to further false beliefs or inappropriate determinations), but it is irrational from the internal perspective of the reasoner, who has nothing else to go on. This does not mean that we should put an absolute trust on our cognitive states (I know that my determinations may be wrong, and my beliefs false, even when I sincerely believe that they are right and true), but the awareness of our fallibility only justifies continuing the inquiry meant to question such determinations and beliefs (when we have no more-urgent things to do), it cannot justify epistemic and practical paralysis.

In the model of reasoning provided in Section 3, an important role in storing practical determinations is played by intentions: an intention stores the outcome of a teleological deliberation, and it prompts to action. An agent having an intention to do action *A* under condition *B* is ready to (unconditionally intends to) perform *A* when *B* is met and is committed to perform *A*, in the sense that it would be irrational for the agent not to perform *A*, as long as the agent continues to have that intention (and believes that *B* obtains).

Intentions are not the only practical determinations we store and reuse: by retrieving from memory our preferences and goals, we input them into our present reasoning, and we are indeed justified in doing so, as long as we do not have prevailing reasons to the contrary. However, it seems to me that we often also choose our preferences and goals by making them conscious objects of intentions. This happens in particular when, having questioned a preference or a goal, we come to a determination to adopt it: then we form an intention to have that preference, or to pursue that goal. Subsequently, we retrieve this intention and implement it by adopting the preference or goal contained in the intention. Thus an intention can take different contents:

- a determination to act in a certain way on a particular occasion (I will make a €50 donation to Oxfam tomorrow) or to not act in a certain way (I will not go skiing tomorrow);
- a determination to act in a certain way on all occasions of a certain kind (I will make a €100 donation to Oxfam every year; I shall do physical exercise every evening);
- a determination to qualify in a certain way a certain object or fact under certain conditions (I will consider unjust any act which diminishes human happiness; I will assume that any student making a serious effort satisfies the course requirements, regardless of his or her abilities);
- a determination to aim at a certain goal (I will aim to get fit; I will aim to reduce hunger in the world);
- a determination to view a certain situation as a factor or ground favouring a certain practically relevant conclusion, without committing to the view that such a ground is a necessary or a sufficient condition (I will consider a student's laziness as a factor that supports giving him or her a lower mark; I will consider a person's need as a factor that supports helping him or her).

One may adopt these determinations taking different perspectives: a self-interested perspective (e.g., when deciding what restaurant to go to, an evening when I am on my own), an altruistic view (e.g., when choosing to donate to a charity), or the perspective of a participant in a certain community (e.g., when accepting to follow the rule that professors should reply to student e-mails, or the rule that citizens should respect speed limits). When we are taking the perspective of a participant in a community (which can have different extensions: a private or public organisation, a country, a federation, the whole of humanity, etc.), we adopt determinations assumed to hold for the community itself (or for particular members of it) on the basis of reasons we believe to be appropriate to that community: we each participate in communal reasoning, possibly taking into account our particular role within the community (on participation on collective reasoning and action, see, for instance, Postema 1995; Tuomela 2000). This takes place when we are acting as members of a political body or as officials participating in the legal process, but also when we willingly practice the norms of our community, coordinating our own behaviour with that of others (I am not considering the case where someone pretends to be acting out of a communal concern while acting out of self-interest).

It seems to me that normative legal reasoning (the reasoning through which one establishes, for oneself and for others, what patterns of behaviour should collectively be enforced) pertains to this kind of reasoning, so that legal norms may be viewed as collective counterparts of individual commitments (intentions). More generally, the process of rationality concerns not only individuals but also collectives and institutions. Also in the latter case, decision-making will proceed stepwise, moving from reasons to conclusions, but reasoning will be performed by different individuals, acting on the basis of the cognitive states (beliefs, goals, intentions) they attribute to the collectivity in which they participate, and in particular on the basis of the

commitments and legal norms adopted by that collectivity through the procedures it recognises.

This requires rationality to be detached from individual self-interest, so that we can each apply it from the different perspectives we may adopt. Thus, we may rationally pursue our self-interest, but we may also rationally act for the benefit of others (regardless of the particular effects on our wellbeing: see Sen 2004b) or in the interest of the policy we represent. In the latter case, we should locate our determinations within the decision-making process of that policy and within its implementation (see Pettit 2002). Indeed, there is nothing mysterious about the fact that we may view ourselves as rationally pursuing the interests of our community, organisation, or institution, both in the public and in the private domain, rather than our individual benefit. Simon (1965, 205) speaks in this regard of *identification*: “a person identifies himself with a group when, in making a decision, he evaluates the several alternatives of choice in terms of their consequences for the specified group.” Rational participation in collective decision-making not only requires reference to the interest of the group (collectivity, community, organisation): it also requires that we be aware that our decision is to be located within the group’s decision-making process, where we are entrusted with a specific role (legislator, judge, administrator, etc.), involving specific functional requirements and constraints (for further consideration and references, see Sartor 2005, Chapters 9 and 13). Rational participation thus requires that we accept as bases of our own reasoning (as far as our participation in the collective activities is concerned), the relevant practical or even epistemic determinations already adopted by the group in which we are participating, and it requires that we view our choices (made in name and on account of the group) in the framework of the group’s reasoning process (namely, as determinations which are guided by earlier determinations of the group and which possibly contribute to guide its successive determinations): thanks to this identification, the group (and in particular a legal community) can be viewed as a subject to which mental states (goals, intentions, commitments) can be rightfully attributed (Pettit 2004), and which may be capable of rational action.

5 The Reflective Dimension of Reasoning

Reflective reasoners not only have certain cognitive states, but they are also able to critically examine, question, and revise their cognitive states. They wonder whether they should have a certain belief, preference, goal, or intention. In case they conclude that they should not have a certain cognitive state they possess, they withdraw it (though this may not be easy or immediate). In case of a conflict between incompatible attitudes (two contradictory beliefs, two intentions leading to incompatible actions, etc.), they consider the comparative strength of such attitudes, withdrawing the less important of them (unless one of these attitudes appears upon reflection to be unacceptable on other grounds).

This reflective attitude leads reasoners to couple their cognitive states with apparently doxastic states (Pollock 1995): each such state is associated with a proposition,

which can be viewed as a bearer of truth and falsity, and belief in which leads the reasoner to the corresponding practical determination (for instance, the proposition that I should do *A* is a reason for me to adopt an intention to do *A*).

- My intention to act in a certain way on a particular occasion is associated with my belief that I should act in that way on in that occasion (if the weather is nice tomorrow, I should go skiing).
- My intention to act in a certain way on certain or on all occasions of a certain kind is coupled with my belief that I should act in that way on all such occasions (I should make a €100 donation to Oxfam every year).
- My intention to qualify in a certain way a certain object or fact under certain conditions is accompanied by the belief that the corresponding qualities obtain under such conditions (any act diminishing human happiness is unjust; the laws enacted by Parliament are legally valid).
- My having a goal *A* is coupled with my belief that I should pursue *A*, or that *A* deserves to be pursued, i.e., that *A* is a valuable goal, or a value (friendship is a value; privacy is a value, etc.).
- My viewing *F* as a factor favouring a practical conclusion *C* is coupled with my belief that the corresponding connection obtains, namely, that *F* is indeed a factor in concluding *C* (having committed a crime for the purpose of obtaining certain advantages favours the conclusion that one is not to be entitled to such advantages).

This method allows reasoners to detach themselves from their cognitive states and recast practical reasoning as if it were a piece of epistemic reasoning. Consider, for instance, the pattern of practical reasoning according to which someone, having goal *G* and believing that action α would achieve *G*, forms an intention to perform *A*. This can be recast as the apparently epistemic pattern according to which someone, believing that *G* is a value and believing that action α would achieve *G*, forms the belief that he or she should implement α . The reformulation of conative states (goals and intentions) into beliefs seems to transform practical reasoning into epistemic reasoning, but the applicable reasoning patterns remain substantially the same: the conditions under which it would be rational for one to believe the proposition corresponding to the content of a certain conative state are exactly the same as those under which it would be rational to adopt such a state. For instance, the conditions under which it would be rational for me to believe that I should perform action α , given my belief that *G* is a value (a valuable goal), are the same as those under which rationality would lead me to intend to perform action α given that I am pursuing goal *G*. Giving an epistemic form to practical reasoning, however, has some advantages. First of all, by transforming our conative states into beliefs, we can more easily detach our selves from our practical attitudes and submit them to critical analysis. Moreover, we can more easily distinguish what practical propositions (and consequently what determinations) we should adopt from different perspectives (as a fully egoistic-self interested individual, as altruistic parents taking care of our family, as members of a polity acting for its common good, etc.). Finally,

this approach has a distinctive advantage when we get to dialogical argumentation, and views about what one or everyone should do (or should not or may not do) become the focus of moral or legal argument (on the way conative attitudes become quasi-epistemic propositions, see Blackburn 1998).

Reflective reasoners proceed as well in an upward direction: they not only infer certain cognitive states from the cognitive states they already have, but they also move in the opposite direction. When a belief, intention, or goal they have appears to be questionable, they consider whether they may or should accept premises that justify having such an attitude, and they may also question such premises. In case they are unable to find an appropriate justification, they tend to abandon the unjustified attitude, or at least they tend to take it with some reservations.

Finally, a rational reasoner needs to keep coherence (see Thagard 2001) among his beliefs and attitudes. Coherence on the one hand, increases the chance that beliefs are true and, on the other hand, contributes to ensure that preferences and goals are realised over time (which would be impossible if one was randomly adopting contradictory beliefs or was adopting incompatible preferences and goals at different times). The requirement of coherence, however, should not be taken too strictly, and in particular, it should not be understood as requiring full logical consistency. Our persistent cognitive states constitute an argumentation framework, namely, a set of propositions, rules of experience, norms, goals, intentions, and preferences (some of which may be in conflict) including inborn attitudes as well as the stored outcomes of our previous cognitive efforts. This information includes in particular defeasible inference policies, namely, rules that tell us what conclusions to derive from certain preconditions, but only as long as such rules are not contradicted or undercut by prevailing arguments to the contrary. In an argument framework, usability matters more than consistency, that is, the framework must be compact and flexible enough to enable the reasoner to anticipate experience and make appropriate choices.

6 Teleological Reasoning: Using Reason in the Pursuit of Goals or Values

Practical reasoning is broader than teleological reasoning, understood as the procedure through which one constructs plans to achieve goals and becomes committed to implementing these plans (adopts the intention to do so). However, teleological reasoning constitutes the core of practical reasoning (Nozick 1993) and a large part of legal reasoning and problem-solving indeed consists in teleological reasoning.

Teleological reasoning consists in the following: a reasoner that aims to achieve a certain goal constructs and tests possible plans to achieve that goal, and then adopts a plan once he or she is satisfied that it appropriately achieves the goal. The adoption of the plan consists in forming an intention to implement its instructions (in an appropriate sequence). Here is the schema of *teleological inference*:

Reasoning schema: *Teleological inference*

- (1) having goal *A*; AND
- (2) believing that plan *B* is a teleologically appropriate way of achieving goal *A*

IS A REASON FOR

- (3) intending to execute *B*

By a *teleologically appropriate* way of achieving a goal I mean a way that—though neither necessarily *being* optimal nor necessarily *believed* to be optimal—is better than inactivity, and not worse than any other plan the reasoner has been able to conceive so far through an adequate inquiry.⁴ In fact, believing that a better, incompatible plan is available is a sufficient reason for abandoning the previously adopted plan. This is rational since sticking to the old plan would imply a failure to achieve a superior result. Teleological appropriateness thus combines the idea of *satisficing* with the idea of *critical cognition*. According to the first idea (satisficing), we may justifiably act on the basis of a suboptimal plan: even when we know that the plan is suboptimal (we know that a better plan exists, though we cannot identify), it may still be adequate to our needs. However, according to the second idea (critical cognition) teleological reasoning is inherently defeasible: if we come upon a better way to achieve our goals, then we should abandon the inferior one. Suppose, for example, that I have some money I intend to put in a bank. Suppose that the offer of bank *b*₁ provides the best conditions, among the offers I have collected so far. Suppose, further, that a financial expert, whom I consider to be both competent and sincere, tells me that she knows of a bank *b*₂ offering better conditions, but she will not tell me the name of bank *b*₂ (she gives this information only to her clients, and I do not intend to become one of them). Clearly, under such conditions, rationality commands me to choose bank *b*₁, even though I know that my choice is suboptimal. However, if I succeed, before making the contract, in coming to know which bank *b*₂ offers better rates, I should retract my intention to put my money in *b*₁ and should instead go for the more profitable deal. Defeasibility also characterises teleological reasoning in the legal domain (as was observed in particular by research in Artificial intelligence and law, see for all Benuch-Capon and Prakken 2006). Suppose I am a prosecutor, and I am convinced that the man in front of me has murdered a child, but the legal evidence I have only allows me to request his conviction for child pornography. Clearly, under such conditions, I should try to have him convicted for the latter offence. However, if before the end of the trial I come upon evidence supporting his conviction for murder, I should pursue this stronger count.

As I observed in the previous section, practical reasoning could be given a doxastic form, where conative states are substituted by corresponding beliefs.

⁴ I say “not worse” to cover “Buridan ass” cases, namely, cases where the reasoner views two alternative plans as equally good (and both better than inactivity): in such a case, rationality requires that the reasoner adopt one such plan by random choice (rather than being paralysed by an inability to form a preference).

Correspondingly, teleological inference could be rephrased in a pattern where goals are substituted by values and intentions by duties (“shoulds”):

Reasoning schema: *Teleological inference*

- (1) believing that *A* is a value; AND
- (2) believing that plan *B* is a teleologically appropriate way of realising value *A*

IS A REASON FOR

- (3) believing that *B* should be executed

To prevent possible misunderstanding, I should specify what is meant here by a *value*. In the *New Oxford American Dictionary*, this term is said to have the following meanings (among others): “1. the regard that something is held to deserve; the importance or preciousness of something; 2. (values) a person’s principles or standards of behaviour; one’s judgement of what is important in life.” Here I shall not use the term *value* in either of these two senses: for the first of them I shall instead use the term *worth*, and for the second the term *norm*. By a *value*, as is often done in legal and constitutional debates, I shall instead mean a property (a feature or pattern of states of affairs) that deserves to be pursued (to constitute a goal), since states of affairs instantiating this property are better (more valuable) than those not instantiating it. For instance, when I say that freedom is an individual legal value, I mean that, according to the law, each person’s freedom deserves to be pursued (this is a goal for the legal system), since the law prefers one’s freedom to one’s unfreedom. Similarly, when I say that science is a communal legal value, I mean that, according to the law, widespread scientific and technological competence and the ability to produce scientific advances deserves to be pursued, since the law prefers, with regard to science, knowledge and competence to ignorance and incompetence.

A value may be individualised, i.e., its realisation may consist in the fact that the relevant property is satisfied with regard to each single individual, or it may be collective, i.e., it may consist in the fact that the relevant property is satisfied by the community as a whole. For instance, freedom of speech is an individual value, since it is satisfied when each individual enjoys the opportunity to express him- or herself: the situation where a small minority is completely deprived of its freedom of speech, while all other people enjoy it at the maximum level, would still entail a serious subversion of this value. Science, by contrast, is a collective value (e.g., according to the Italian Constitution, which says that the Italian Republic is to promote science), since the value is achieved when there is widespread scientific knowledge and competence, even if some people do not have any scientific knowledge (though an individual’s right to participate in science may be violated if ignorance has been imposed upon that individual, rather than depending on his choice or incapacity). On this understanding of the notion of a value, value-based practical reasoning cannot be separated from norm-based practical reasoning. Certain norms directly require value-based reasoning, i.e., they prescribe the pursuit of certain collective or individual values (e.g., culture, privacy, freedom of speech), and complying with these norms requires engaging in the pursuit of these values through teleological reasoning. Other norms do not directly require the pursuit of values, but

rather prescribe particular positive or negative actions (consider for instance the prohibition to prohibition to process sensitive data without the express consent of the data subject), but these norms are justified by the fact that compliance with them would contribute to the achievement of the values at issue (privacy).

7 The Evaluation of Plans

When we have constructed a plan to achieve a certain goal (value), we need to evaluate the plan and decide whether to adopt it. This decision may require a comparison with alternative plans to achieve the same goal. The most abstract model for evaluating and comparing decisional alternatives is provided by *decision theory* (see, for all, Jeffrey 1983). Decision theorists usually assume that the value of an outcome consists in a numeric measure, which is called the *expected utility* of that outcome. Rationality (as it is understood in decision theory) recommends choosing the plan that provides the highest utility, which is a very difficult task.

Let us consider the simplest case first, a fully *deterministic* plan: the plan has just one possible outcome, about which the planner is absolutely certain. The merit of the plan is then to be determined by the expected utility of this outcome alone. Consider the following example: a judge is tasked with deciding whether a convicted criminal should be granted parole, and the judge is absolutely certain that the convict has now essentially changed and will no longer commit any serious crime. The judge thus believes that the only relevant outcome of his decision will be a very positive one: the convicted person will be free again and will probably find a job and contribute to supporting the family. The alternative decision (keeping the convict in prison) will achieve, with equal certainty, a negative outcome: the convict is likely to slide into drug abuse and to be introduced into serious forms of criminality, and that will diminish for this person all chances of finding a job and providing for the family. When one is so lucky as to find so simple a decisional context, the decision is easy, even when one cannot assign numerical utilities: one knows for certain that one decisional alternative is better than all the others.

The situation is more complex when the plan is non-deterministic, that is, when the plan may have different outcomes having different utilities. Consider, for example, the situation of another judge: she has to decide whether to release on parole someone convicted of paedophilia. Suppose the judge believes there is a good chance that the paedophile will now be able to control his impulses, but she is also aware that there is some chance he will relapse and repeat the same crime. According to decision theory, she needs to evaluate each action she may take by considering the utility of each possible outcome of that action, multiplying this value by the chance of that outcome, and adding up all the results she obtains for the different possible outcomes.⁵ For example, suppose that the judge makes the

⁵ In general, when plan a may lead to n mutually exclusive outcomes O_1, \dots, O_n —each outcome O_i having probabilities P_i and utility U_i —then α 's expected utility, $EU(a)$, is expressed by the formula $EU(\alpha) = \sum_1^n (P_i * U_i)$.

following utility assignments: utility 1 to the situation where the paedophile will not relapse and utility -6 to the situation where he will. If there is only a 10% chance that the convict relapses, then a decision to let him free will have a positive score, with an expected utility of 0.3, according to the following calculation:

$$(1 * 0.90) + (-6 * 0.10) = 0.30$$

Even if, for the sake of simplicity, we discount the problem that a plan may have multiple possible outcomes, depending on unknown circumstances, we still face a very tough problem when applying such calculations in practical cases: it is very difficult, in many practical domains, to assign a numerical utility to the outcomes of possible plans in such a way as to make it possible to establish their comparative merit. In fact, it seems that in order to “rationally” compare alternative plans (choices, decisions), we need to first analyse the expected outcomes of each one of those plans, by identifying the desired (valuable) features that characterise each outcome and establishing to what degree each feature will be satisfied (promoted) by that outcome. We will then need to assess the total worth of each plan, by considering the plan’s combined impact on all those features. Finally, on the basis of such an evaluation, we will need to compare the different alternative plans that we have been able to devise.

For example, when considering a plan to go to a restaurant r , I may consider to what degree I expect that a dinner at r would exemplify the features I desire relative to the food, wine, service, price, and so on. I would then need to compute the overall expected worth of the experience of going to restaurant r as being characterised by the fact that the desired features are satisfied to such a degree. Having done that, I would be able to compare plans to go to different restaurants, each of which offers a different combination of levels as to the quality of the food, wine, and service, and as to price.

Similarly, a judge, when considering different alternative ways of deciding a case, may examine how each possible choice may impact on legal values. For example, a decision that permits putting video cameras in public spaces and storing the footage for a year would impact on two individual legal values, privacy and security. To evaluate this decision, and compare it with possible decisional alternatives (prohibiting cameras altogether, or allowing them only if footage is deleted after a very short time), we need to assess how the decision impacts on each of these values, and need to provide, on the basis of such an assessment, a comprehensive evaluation.

According to the procedure that is usually suggested by decision theory, making the evaluations we have just described requires a mathematical characterisation of both

- the information on the basis of which a plan is to be evaluated; and
- the procedure that computes, on the basis of that information, the merit of the entire plan.

In the simplest case, this is done by

1. assigning a (positive or negative) weight to every relevant feature of the outcome;
2. quantifying the degree to which every feature will be satisfied by the expected outcome of a certain choice;
3. multiplying the degree of satisfaction of each relevant feature by its weight; and
4. adding the results that are obtained in step (3).

Note that weights are negative for those features which impact negatively on the outcome: the higher the quantity of these features, the worse their outcome (all the rest being equal). So, for example, suppose I assign weight **4** to food, **2** to wines, **1** to service, and **-3** to price, and that I expect that restaurant *r* will score 3 on food, 2 on wine, 1 on service, and 2 on price (0 indicates average, so that 2 describes a fairly high price). The expected worth of a choice to go to *r* will then be

$$(3*4) + (2*2) + (1*1) + (2*-3) = 11$$

Similarly, suppose that a judge gives weights **3** to security and **2** to privacy, and expects that a situation where footage is recorded and stored for a year will satisfy security to level 3 and privacy to level **-2**. The expected worth of such a choice would then be

$$(3*3) + ((-2)*2) = 5$$

Such a numerical procedure appears intuitively correct, and even upon reflection it appear to be free from apparent flaws. The issue we need to address, then, is why humans rarely perform such numerical calculations, especially when taking important decisions: few people use arithmetic when choosing their partner, their house, or even their new car. We may conjecture that the reason for this apparent “irrationality” is that our natural (implicit) cognitive capacities include more-powerful unconscious mechanisms for evaluating plans. It is not clear at all how such mechanisms may work, but they are certainly there. This does not imply that explicit plan evaluation (and even the assignment of weights and numbers) is always useless, since our unconscious decision-making processes, though far better than any approach decision theorists have yet been able to provide, are far from infallible. We should rather say that explicit evaluation of plans (according to the indications of decision theory) should be used to check the intuitive results that are provided by our implicit cognition. It would be improper, in most cases, to use it on its own, as an independent procedure for decision-making.

8 Bounded Rationality and Teleology

Teleological reasoning represents the core of human problem-solving and provides the pivotal link between epistemic and practical reasoning: (1) practical reasoning provides epistemic reasoning with goals, (2) epistemic reasoning constructs and evaluates plans according to one’s likings and beliefs, and (3) practical reasoning

endorses an intention to implement a sufficiently good plan (which must be one of the best among the constructed ones). However, due consideration should be given to the practicability of teleological reasoning: teleological reasoning requires an enormous amount of knowledge, which often is not available. Such knowledge is required not only to address the formidable problem of planning (constructing plans) but also to compare and evaluate the constructed plans. Optimal planning thus seems to exceed human cognitive powers in many contexts.

In fact, in order for there to be a guarantee that a decision-maker will choose the optimal plan, the decision-maker must succeed in both (a) constructing a set of candidate plans that includes the best possible one and (b) making the right choice among the constructed plans. In both regards, optimisation is often out of reach for a bounded decision-maker. Firstly, we cannot consider all possible strategies for achieving certain objectives, and so we may fail to construct the best strategy. For example, in planning an out-of-town dinner, I may fail to detect the restaurant that is better suited to my tastes, since I am not aware of its existence. Similarly, consider how a legislature may fail to see what the most effective solution to economic growth is, and so may adopt a wrong decision (for example, cutting taxes may trigger a recession and a huge deficit rather than favouring economic development, as expected), or how judges or legal scholars may fail to discover optimal solutions to the problems they are considering (for example, punishing certain crimes too harshly may impede rehabilitation and lead convicts to commit further, more serious, crimes).

Secondly, even when we have constructed the best plan (together with other candidate plans), we may not be able to realise that it is the best one, and so may choose an inferior option. Failure to rank the available options according to their merit may depend in particular on the following:

- we have very little knowledge of the factual consequences of many of our choices;
- we have very confused ideas about what ends should inspire our evaluations, and about their relative importance, in various possible situations.

This problem concerns individual psychology, but also the functioning of organisations. It frequently happens that “the connection between organisation activities and ultimate objectives is obscure, and these ultimate objectives are incompletely formulated, or there are internal conflicts and contradictions among the ultimate objectives, or the means selected to achieve them” (Simon 1965, 64). Obviously, such problems are particularly serious in political and legal decision-making, which should ideally take into consideration all valuable goals, namely, all values that are relevant to a community. This makes it very difficult to assess the rationality of decisions impacting on different values by way of a combined assessment of resulting gains or losses with regard to all relevant ends. Consider for example, how difficult it is to assess the rationality of decisions in issues of Internet law, where one has to balance such diverse values as privacy, freedom of information, individual liberty, democracy, economic growth, and technological and scientific development.

Various views have been expressed in this regard. Some authors seem to believe that we can understand and justify decision-making by moving beyond teleological

rationality and focusing instead on *systemic rationality*: we should look at how certain forms and styles of decision-making contribute to the functioning of the social systems in which they take place, regardless of how effective they are in achieving the goals pursued by the decision-makers (this is the view famously advanced in Luhmann 1973). Others, such as Habermas (1999, 259), have rejected the idea that rational decision-making involves assessing and comparing impacts on relevant values, affirming that “weighing takes place either arbitrarily or unreflectingly, according to customary standards and hierarchies.” Unfortunately, in many cases human reasoners have no alternatives to teleological reasoning. We thus need to overcome such dismissive views, all the while seriously addressing the issue of the limitations of teleological reasoning, especially with regard to the problem of the evaluation of plans.

9 The Evaluation of Outcomes

In evaluating a plan we need to identify its outcome (the results it will produce), distinguish the relevant desirable or undesirable features involved in that outcome, consider to what degree these features are advanced or impaired by the plan, and finally establish what merit is to be accordingly attributed to the plan. For instance, when considering a plan to go to a restaurant r , we may consider to what degree we expect a dinner at r to exemplify the following features: quality of the food, quality of the wines, quality of the service, and price. We would then move from the level of each feature’s realisation to the evaluation of their combination. The most delicate step is the last one, namely, moving from single features to their joint evaluation. Analytical reasoning (ratiocination) is in general not very effective at capturing and assessing interconnected sets of features: this is a task we seem to accomplish through a kind of holistic understanding, similar to pattern recognition in perception (as argued in Thagard 2000). However, under certain conditions, analysis may help. The analytical evaluation of multi-featured decisional outcomes is facilitated when all of the following conditions hold:

- there is a numerical measure for the realisation of each relevant feature;
- the worth of realising each feature grows linearly (always in the same proportion or weight) according to the measure of the realisation of this feature; and
- the desired features are all mutually independent.

Under these conditions, we can evaluate an outcome simply by multiplying the measure of the realisation of each feature in that outcome by the weight of the feature, and then adding up the results.⁶ This provides an easy way to compute the worth of plans of action, and so an easy way to compare them.

⁶ The evaluation EV of outcome ω —where ω realises features f_1, \dots, f_n , to the degrees d_1, \dots, d_n , and each feature f_i has weight w_i —is expressed by the formula $EU(\omega) = \sum_{i=1}^n (d_i^* w_i)$.

Table 1 The expected worth of two restaurant experiences

	Food	Wine	Service	Price	Total
r_1	4 *3	2 *2	2 *1	6 *(-2)	6
r_2	3 *3	2 *2	1 *1	1 *(-2)	10

For instance, suppose I assign weights **3** to food, **2** to wines, **1** to service, and **-2** to price. Moreover, I expect that in restaurant r_1 food will score 5, wines 2, service 1, and price 6 (€60), while in restaurant r_2 food will score 3, wines 2, service 1, and price 2 (€20). This allows me to assign points 6 to restaurant r_1 and points 10 to r_2 , as Table 1 shows.

Thus, if the input data are correct, and if all assumptions above hold, rationality requires me to go to the cheaper restaurant r_2 , even though the food and service it offers are lower-quality than at r_1 .

This example shows how this way of evaluating choices gives questionable results, when no precise and objective way is available for quantifying degrees of satisfaction and weights, or when different features interfere. One may rightly challenge my choice for restaurant r_2 (or in any event my procedure for reaching that choice) by pointing out the arbitrariness of assigning degrees of satisfaction and weights—How do I know that food quality at r_1 is 4, and not 5 or 3? How do I know that food quality has weight **3**, and not **4** or **2**?—or by pointing out that these evaluations are contingent on particular individual circumstances (for example, the benefit afforded by the quality of service depends on how much time I have and on how irritable I am on that particular day), or by pointing out their interdependence (having bad service would likely spoil my enjoyment of the food).

However, it may still be possible to compare the degrees of satisfaction of a certain desired feature in different situations. By combining this assumption with the idea of monotonic growth of desires as the degree of the desired feature grows, we obtain some clues on how to develop our preferences.

10 Pareto Superiority

If outcome δ , in comparison to outcome γ , presents at least one feature at a more desirable degree and no feature at a less desirable degree, then it seems that a rational agent should prefer δ to γ (and thus, that it would be irrational for this agent to prefer γ to δ).

Let us state this idea more precisely. Let us write $x > y$ to mean that x is strictly preferable to y . Thus, when x and y are degrees of an advantageous feature (a feature that is preferable in a higher degree, like the quality of the food), then $x > y$ (x is preferable to y) whenever $x > y$ (x is greater than y). On the contrary, when x and y are degrees of a disadvantageous feature (like the price of the food), namely, a feature that is preferable in a lesser degree, then $x > y$ whenever $x < y$ (x is lesser than y). Accordingly, we can say that a rational agent should prefer outcome δ to outcome γ under the following conditions:

- δ and γ share the same desirable features f_1, \dots, f_n , and
- δ presents these features to degrees d_1, \dots, d_n and γ to degrees g_1, \dots, g_n .
- there is an i such that $d_i > g_i$, while for no j , $g_j > d_j$.

For instance, if a restaurant r_1 offers better food than a restaurant r_2 , and equal or better wines and service, then a rational agent should prefer r_1 to r_2 ($r_1 \succ r_2$).

This is the idea of *Pareto superiority* applied to impacts on different goals or values: when a choice is required between alternative decisions δ and γ , and the two decisions impact on the same values (desirable features), but δ raises some of these values to a higher degree than γ does, the impact on all other values being equal, then δ is to be preferred (for a technical account of multicriteria decision-making, see Keeney and Raiffa 1993). Consider for example, a choice between these two ways of treating videos recorded by cameras located in a street having a high crime rate:

- deleting the data after a week; or
- keeping data for a year.

Let us assume that deleting data after a week enables the value of privacy to be achieved to a higher degree, while there is no difference with respect to the attainment of the value of security (one week being sufficient to check video recordings in connection with serious claims). Under such conditions, a decision to keep the video footage for a year would be irrational according to the idea of Pareto superiority (assuming the only relevant values are privacy and security): an alternative choice would provide a higher achievement of some values without diminishing the level of achievement of any other value.

The idea of Pareto superiority is a useful minimum standard for evaluating decisions. For instance, it seems to subsume some of the standards of *reasonableness* that are used in constitutional and administrative review. For instance, a decision that would undermine certain values without contributing to the realisation of any other value is certainly inefficient, and in this sense it is more than just unreasonable: it is irrational. Similarly, a choice (a) would be irrational on grounds of its Pareto inferiority when it achieves certain values by undermining certain other values, and there is an alternative choice (b) that would realise the same values to the same extent without undermining any other values (or would do so undermining them to a lesser degree): choice (a) would be irrational since it determines a prejudice which is unnecessary to achieve its beneficial outcomes.

The condemnation of Pareto-inferior choices needs to be attenuated with some sufficientist considerations. It would certainly be irrational to choose α rather than β , knowing that α is Pareto-inferior to β . However, we may not know that α is inferior to β , since we may be proceeding on a mistaken appreciation of the impact of the two options on the values at issue. For instance, we may fail to recognise Pareto inferiority owing to our inability to take into account certain complex causal connections (as may happen with regard to choices pertaining to economic policy). When an epistemic mistake remains below the threshold of unreasonableness, the resulting choice remains reasonable, though it may rightly appear Pareto-inferior to an observer immune to the mistake.

11 Weighing Alternatives

The idea of Pareto superiority does not, help us make choices in those situations where there are alternative choices α and β , such that α advances certain values more than β , and β advances certain other values more than α . Consider, for example, the problem of making a choice between two restaurants r_1 and r_2 , such that r_1 offers better food, r_2 provides better service, and all other relevant features are satisfied to the same degrees. Similarly, consider the problem of choosing whether to delete video footage after one day or after seven days of recording, assuming that deletion after one day yields a higher level of privacy while deletion after seven days provides a higher level of security.

It may be said that such issues can be solved through a comparative analysis that takes into account (a) the degree to which the values are satisfied by different choices and (b) the importance of the values. Choice α is better than choice β if the comparative gains relative to the values that are better promoted by α outweigh the comparative loss relative to the values that are better promoted by β . For instance, rationality requires me to go to restaurant r_1 instead of restaurant r_2 if the comparative advantage in food quality outweighs the disadvantage in service quality. Similarly, it may be said that rationality requires deleting footage after seven days rather than after one day if the gain in security outweighs the loss in privacy.

The difficulty, however, consists in finding a sufficiently precise characterisation of how one should rationally “weigh” such alternatives. It may be said that the weighing judgement depends both on the quantities that are gained or lost and on the importance of what is gained and lost, but this offers very little help to the decision-maker, for whom the problem is exactly that of establishing quantities and relative importance.

Moreover, the importance of a gain or a loss relative to a certain value does not only depend on the “quantity” of the value that is gained or lost (whatever is meant by *quantity*) and on the importance of the value at issue: it also depends on the level from which we measure a gain or loss. With many values, there are two distinct aspects to be considered: the quantitative measure of the value and the benefit (the impact on human wellbeing) of achieving that value up to that quantitative measure. For instance, when buying a flat, a valuable aspect to be considered is the spaciousness of the flat, as measured by the surface area of the flat, but even though the benefit of having a flat of a certain surface increases in proportion as surface does (this benefit being a monotonic function of the surface), this proportion is not fixed: while the additional benefit obtained by moving from 20 to 40 square meters is usually very important, the additional benefit obtained by moving from 200 to 220 is likely to be less significant.

Let us consider now a more significant value—nutrition, the object of the right to food, much discussed nowadays by human-rights scholars—and let us assume that any intake below 2,000 is insufficient to sustain human health. A 1,000-calorie drop below that minimum would thus constitute a very significant failure of nutrition (it would lead to starvation, and probably to death), whereas adding 1,000 calories

on top of an already more-than-sufficient of 3,000 calories would not bring any additional benefit as far as nutrition is concerned.

A similar analysis would also apply to less-quantifiable values, such as liberty. Having a wider (more inclusive) set of options increases one’s liberty. Suppose that $A_1 \subset A_2$, A_1 contains 100 options, while A_2 contains 110, and the additional 10 options in A_2 have the same average significance as the options in A_1 . We will then certainly be able to say that having choices A_2 , rather than A_1 , is significantly more beneficial as far as liberty is concerned. However, consider two sets of choices A_3 and A_4 , such that $A_3 \subset A_4$ and A_3 contains 1,000,000 options while A_4 contains 1,000,010, and the additional 10 options in A_4 have the same average significance as the options in A_3 . In this case, the difference in the benefit provided by having A_4 rather than A_3 would be much less important, probably quite imperceptible. Finally, suppose that one has the possibility of choosing from a range of only 20 options (e.g., kinds of jobs one may aspire to), and that a piece of legislation reduces this range to 10 by eliminating 10 options previously available. This would certainly be a very serious inference in the core of one’s freedom of employment.

In Fig. 5 you can see the difference between a value providing a benefit that increases linearly (in a fixed proportion) relative to increases in the associated quantitative measure, and a value providing a benefit that increases nonlinearly, bringing a diminishing marginal benefit (as represented by the curve). As Alexy (2002b, 103) observes, the latter pattern characterises not only economic goods (whose marginal utility usually diminishes, i.e., an additional unit of a good G brings less benefit when one has a larger quantity of G) but also legal values. The difficulties I have just considered should lead us to be wary and critical (maybe even sceptical) of any pretence to “objective” or “scientific” evaluations

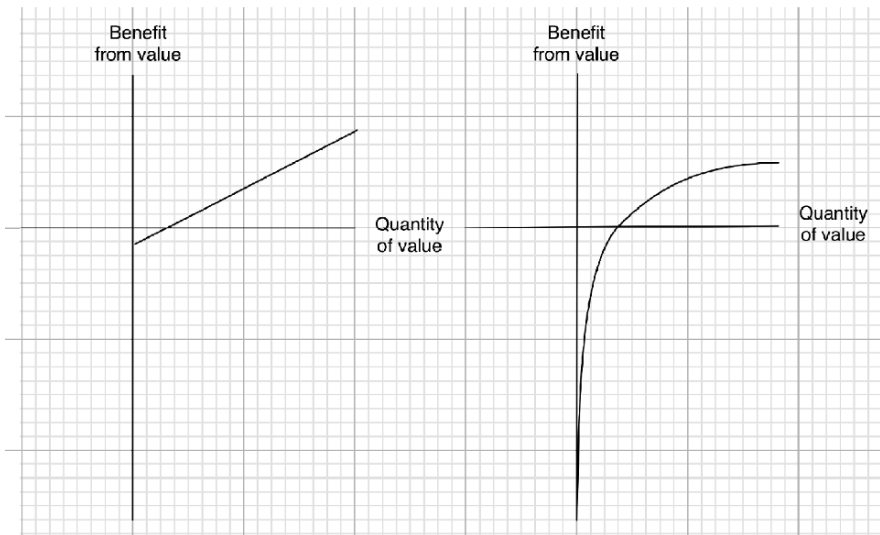


Fig. 5 Quantitative measure and benefit: linear (left) and non linear case (right)

of decisional alternatives. However, they should not lead us to conclude that the rational comparison of alternatives is impossible, that the tools of decision theory are useless, or that every choice puts us in front of the incommensurable or the “absurd,” as existentialists used to say, and that it calls for (or at least presupposes) an arbitrary commitment (cf. Sartre 1993). In fact, we need to approach the problem of weighing and balancing on the basis of our awareness, not only of our failures, but also of our cognitive powers and, in particular, of the power of our implicit cognition. As a matter of fact, we know how to take many decisions impacting on different goals and values, and we can approach this task in a way that, though far from perfect, is sufficiently good for most of our purposes. Humans seem to possess an adequate cognitive faculty to evaluate and compare alternative plans of action under conditions of uncertainty, though we cannot tell precisely how this faculty works, nor can we fully replicate its functioning through explicit reasoning. It is no accident that even decision theorists, when they have to make choices involving multiple aspects in complex domains (choosing a partner or a profession or buying a house or even a car), rely more on their intuitive judgement than on the conceptual tools provided by their discipline. So the fact that our comparative evaluations usually involve an unconscious process does not imply that they are random or absurd. On the contrary, our implicit cognition usually also takes into account data that are explicitly provided, and it processes these data unconsciously, along with information which remains implicit, and which we do not have the ability or the time to express and consciously evaluate. For instance, my choice to buy a certain car may be influenced by the information I find in automobile magazines, or by suggestions by friends, along with various other things I know, though I can only partially articulate this data.

Moreover, we can articulate this implicit knowledge at least in part (and in important cases we *should* articulate it) at the stage where we are critically analysing our choices, trying to rationalise them, as being based on good grounds. For instance, before making a check out to the car dealer, I may try to consider whether my intuitive preference is really based upon relevant grounds, by explicitly listing the pros and cons of a certain particular choice, as compared to the available alternatives. I should stop only at the stage where I have found equilibrium between intuition and reason, that is, when intuitive assessment and explicit reasoning converge on the same result.

The situation is no different in legal decision-making. Consider, for instance, a judge who has to decide, in the absence of a precise rule, whether a certain way of processing data taken through street cameras is permissible, or whether an employer is allowed to have access to e-mails an employee sent and received using the account provided by the company. One can take a stand on such issues only with reference, on the one hand, to the individual and collective legal values at stake (individual security, individual privacy, the efficiency of the economic system, and so forth) and, on the other hand, to the technological and social knowledge concerning the ways in which different arrangements are going to impact on these values. All of this knowledge is brought to bear, usually unconsciously, on one’s evaluation as to whether a certain policy or choice unduly undermines the value of privacy as

compared to what other possible policies or arrangements might do. This intuitive judgement, however, needs to be rationalised by articulating the grounds for it, and this rationalisation should lead the decision-maker to find an equilibrium between intuition and reasoned assessment.

We can thus say that, in balancing the benefits obtained by achieving different values, explicit reasoning should process and rationalise the outcomes of intuition (implicit cognition) rather than substituting it. Therefore, we can draw two indications. The first is that cognition and rationality can (and should) also govern comparative evaluations. The second is that, in most contexts, the quantitative methods proposed by decision theory should be used to check intuitive choices, analyse their compatibility with similar choices, and fit them into a background theoretical framework rather than to provide a self-sufficient alternative to human intuition (to implicit cognition).

12 Simplifying Evaluations

For some purposes, and under certain conditions, some simplifications may help by providing workable ways of evaluating legal decisions. For example, Alexy (2002a) proposes a method of numerically characterising the impacts on relevant values. He observes that the German Constitutional Court frequently justifies its judgments on the legitimacy of certain laws by examining the impacts these laws have on legal values, and by characterising these impacts as *light*, *medium*, or *serious*. Correspondingly, he recommends that we should qualify legal values according to their low, medium, or high importance, and that we link this qualification to numerical weights (for instance, **1** for values having low importance, **2** for medium importance, and **4** for high importance); we should also qualify gains and losses in the achievement of legal values (gains being positive and losses being negative) as light, moderate, or serious, and should link such qualifications to simple numerical quantities (for instance, **1** for light, **2** for medium, and **4** for serious).

A much rougher simplification than that proposed by Alexy can be had by assuming that there is a *lexicographic order* of values: values (or sets of them) can be listed in order of importance, and no gain, however big, in a lower-ranked value can outweigh a loss, however small, in a higher-ranked one. For example, it is frequently said that personality rights always prevail upon economic rights. Clearly, such an extreme view cannot be taken literally, or rather, it can only be maintained by sensible persons at the price of hypocrisy and self-deceit (masquerading economic rights as personality rights whenever one feels that they ought to prevail, and vice versa). For instance, it seems undeniable that the modest loss in privacy involved in a vendor's practice of keeping a record of the sale, for a limited time, is outweighed by the possibility of monitoring the performance of the contract. On the other hand, the idea that personality rights normally (defeasibly) prevail upon economic rights, and that this defeasible presumption can only be defeated when there is a clear and specific reason to the contrary, seems quite sensible.

Lawyers may use further techniques to simplify teleological evaluation. First, we may limit ourselves to considering “the types of decision which should have to be given in hypothetical cases which might occur and which would come within the terms of the ruling,” and one may evaluate those consequences by asking about “the acceptability of such consequences” (MacCormick 1978). This means that, rather than examining the social and economic consequences produced by decisions taken in keeping with certain rules, we could simply consider what legal decisions would be taken in certain classes of cases if certain rules were adopted (for a discussion of this idea, see also Luhmann 1974, Chapter 4, Section 5).

A different way of simplifying teleological reasoning is provided by reasoning *per-absurdum*. This consists in focusing on just one negative implication of a certain choice, and on the values that are undermined through such an implication. This very crude way of cutting away at the complexity of teleological reasoning is appropriate when a single consequence of a decision is so detrimental that it will very unlikely be outweighed by any advantageous impacts of the same decision. Often, a vivid impression of the negative impact of a certain choice can be had without even having to specify what values are going to be undermined.⁷

Some criteria of reasonableness used in constitutional or administrative review also give clues for detecting irrationality. For instance, a choice to allocate a certain advantage or burden to certain persons, while not allocating it to others who are in an equal situation (in all relevant respects), does not just violate the principle of equality: is it also an index of irrationality. In fact, where such a choice is concerned, there must usually be a better alternative, which may consist either in allocating the same advantage or burden to these other persons too (if this advantage or burden has a positive impact on the achievement of the values at issue) or in eliminating it completely for everybody (if it has a negative impact). A decision as to whether to extend or eliminate an advantage (or a burden) is a difficult one, but refusing to address it in a reasonable way may lead to very negative consequences. For instance, the Italian Constitutional Court has long been adopting, in the name of the principle of equality, a policy under which every benefit conferred on any person or category (as concerns salary or pension, for example) must also be conferred on every person in the same situation as those already enjoying the benefit. This policy had a very bad impact on public finances, and so the judges had to reconsider it: they now admit that a privilege may have to be eliminated rather than extended, and they usually prefer to stimulate a legislative adjustment rather than act directly.

⁷ Here is how, in *Donoghue v. Stevenson*, Lord MacMillan refuted the thesis that producers owe no duty of care to customers: “Suppose that a baker through carelessness allows a large quantity of arsenic to be mixed with a batch of his bread, with the result that those who subsequently eat it are poisoned. Could he be heard to say that he owed no duty to the consumers of his bread to take care that it was free from poison, and that, as he did not know that any poison had fallen into it, his only liability was for the breach of warranty under his contract of sale to those who actually bought the poisoned bread from him?” (House of Lords [1932] A.C. at 620).

Similarly, the fact that a choice completely disregards certain values is a strong index of its likely irrationality. Since the loss of benefit brought about by compressing a value increases more than proportionally when the value is achieved to a minor extent, it is very unlikely that the complete non-achievement of a certain value can be outweighed by an increase in the achievement of other values. For instance, an increase in security, though it may justify a reduction of freedom, cannot justify the complete elimination of freedom, and the less freedom we have, the higher the increase in security must be to justify additional restrictions on freedom.

13 The Rationality of Legislative Choices

In what follows, the foregoing analysis of teleological reasoning shall be brought to bear upon legislative choices and their judicial review. As Waldron (1999) has observed, it is often too pessimistic a view that is taken of legislation, a view often coupled with an excessive optimism about judicial decision-making. In fact, jurists often develop normative theories of constitutional adjudication to suggest how judges should reason and act in order to remedy legislative mistakes: legal analyses thus tend to combine a realistic-empirical approach to legislation, focusing on the defective instances of legislation (where legislators are bow to special interests, are moved by prejudice and ideology, pursue particularistic or even sectarian goals, develop ineffective policies, fail to achieve the promised outcomes, etc.), with a normative analysis of adjudication suggesting how judges should remedy such mistakes and thus focusing on the best instances of adjudication (where judges succeeded in protecting fundamental rights or other constitutional values against wrong legislative choices). This approach often entails a reductive view of legislation, failing to take into account that, besides normative models of adjudication, there are also normative models of legislation, models to some extent adopted by the participants in the legislative process, and motivating their behaviour. Effective practice, both in legislation and in adjudication, cannot be reduced to the implementation of a normative model or to the dialectics of opportunistic interests: it instead requires the integration of both aspects, the tension towards a normative standard and the opposite (and often prevailing) pressures to depart from it. So, in analysing legislation, I shall first lay out some aspects of a normative model of legislative rationality, and shall then consider its possible failings.

Legislators (like judges and administrators) should not reason from their private perspective (pursuing their individual interest). When serving as members of a legislative body, they should instead act in the name and for the benefit (the common good) of the polity they are representing, and should make their choices integral to the decisional process of that polity. Thus, when evaluating the teleological rationality/reasonableness of the determinations adopted by a legislature, our reference point should not be the particular private objectives the individual members of a legislative body might pursue, but rather the political goals they adopt according to their vision of the public good, combined with the constitutional values the

legislature has to take into account. With this proviso, legislative decision-making can be assimilated to the model of individual rationality I described above, which integrates epistemic and practical rationality (the role for epistemic rationality in legislation is stressed by the idea of evidence-based legislation, on which see, among others, Seidman and Seidman 2001). This assimilation has to be integrated, as I shall argue in what follows, by taking into account the plurality of institutional agents involved in the public decision-making process.

Legislators (supported by their staff, communicating with their constituencies, participating in political debate inside and outside the legislative body) need to first detect a problem-situation, namely, a social arrangement that appears to be unsatisfactory, expressing an unsatisfied social need that they think should be addressed. On the basis of an empirical analysis, they should identify more precisely the issue characterising that problem-situation and the social behaviour from which it emerges. This will enable them to establish what goal (values) should be pursued through legislation in that situation. For instance, let us consider a problem now being discussed by the Italian legislature: a very high number of private telephone communications are wiretapped under police investigations, and the content of such communications often winds up being published in the media, with serious prejudice to its author. A new law designed to deal with this problem-situation should aim to better protect individual privacy, a goal achieving which would in turn also be a way of protecting individual liberty.

Putting such a goal on the legislative agenda would start teleological reasoning, in order to draft a legislative measure protecting privacy with regard to private communications wiretapped under crime investigations. For this purpose, an empirical analysis is required aimed at understanding how possible measures (plans) will impact on the values at stake: not only privacy, but also freedom of speech, freedom of the press, publicity (and the consequent public control) of judicial activities, repression and hence prevention of crimes, and limitation of the costs of judicial inquiries (by reducing wiretapping costs). For instance, an absolute and unconditional prohibition against wiretapping in crime investigations would increase privacy protection, and would leave freedom of speech untouched, but would seriously limit the possibility of identifying the authors of many crimes, especially those carried out by organised crime rings. It would reduce to 0 the costs of wiretapping, though this may require different kinds of investigations, possibly more expensive ones. By contrast, an unconditional wiretapping authority conferred on every prosecutor in investigations concerning any kind of crime, coupled with an unlimited authority to distribute and publish the wiretapped conversations, would increase the likelihood of preventing crimes (assuming that prosecutors were able to devote their resources to the most effective investigations, on the basis of a correct cost-benefit analysis) and would emphasise freedom of the press.

Such considerations need to be based on empirical analyses that will take into account the complex social connections at issue. It is not sufficient to consider only law in the books; analysis has to extend to law in action. Legislators need to evaluate the probability that legal provisions are not followed, since penalties are not enforced or fail to deter unwanted behaviour: will a fine imposed on officers and journalists succeed in deterring them from communicating and publishing

wiretapped conversations? They must also consider the chance that the legal process is used for deterring legitimate actions: will journalists be deterred from publishing legitimate information concerning legal proceedings of powerful people, fearing the costs and uncertainties of judicial proceedings? Moreover, they need to extend the analysis from the immediate social effects of the intended legislation to its indirect effects: what consequences would the increased impunity, consequent upon the impossibility of using wiretapping in investigations, have on certain kinds of criminality, such as political corruption, extortion and racketeering, or drug trafficking? It may also happen, as when economic policy is involved, that the empirical predictions required to establish the likely outcome of certain measures are very difficult and questionable, being dependent on much-debated theories: will a tax cut boost investment? Will it improve or worsen the condition of the poor?

After considering some alternative measures aimed at solving the problem (not *all* possible measures, since this would exceed human capacities), legislators will need to compare such measures and write into law the measures having the best combined impact on all the values at stake. The analysis of the impacts of a new law on all relevant values can be very difficult. Difficulties may pertain to different aspects: predicting the empirical effects of alternative choices, spelling out the values to be achieved, specifying their content, and establishing their relative importance.

Finally, rational legislators should monitor the outcome of the law, to check whether it achieves the intended objective, or whether it has unwanted consequences, or whether a better solution to the problem can be found, a solution not considered when the legislative choice was made (possibly because certain knowledge became available only later, through advances in the natural sciences or in technology or economics).

Legislative rationality also includes the reflective element I described above, at least to a certain extent: legislators need to represent the interest of their constituencies, or rather the view that their constituency has of the common good, but they should also subject such views to critical examination, taking into account empirical knowledge, correcting biases, etc.

We can distinguish the substantive and the procedural rationality of legislative procedure, where substantive rationality relates to a decision's effective capacity to achieve the goals that legislators aimed at, and procedural rationality has to do with following a procedure that reliably tends to provide substantially rational decisions. Such procedural features include the ability to consider different normative and factual opinions, to collect evidence for and against a policy, to carry out empirical inquiries, to stimulate public debate and take its outcome duly into account, etc.

14 Constitutional Commitments and Legislative Rationality

Rationality requires taking duly into account previously adopted epistemic and practical determinations: it requires that these determinations guide subsequent reasoning until they are withdrawn. While individual reasoners can memorise past

determinations as intentions (or duty-beliefs), where a collective agency is concerned, past determinations can be stored in normative sources (official documents, but also shared customs or doctrines) which are publicly accessible and embed norms to be followed and applied by officials, and which are to be modified according to established procedures. There may be different kinds of norms:

- norms establishing general or specific duties or permissions to carry out or not carry out certain acts;
- norms establishing a duty to aim at certain goals (values) or to not prejudice them;
- norms conferring a legal status; and
- norms indicating what factors support certain normative conclusions

All such norms—if they are part of a constitution—should constrain and guide the legislature’s deliberative process. It would be irrational for individual reasoners not to act on the basis of a commitment they continue to accept, unless they believe they are in a situation where the commitment is inapplicable or is overridden by a prevailing reason to the contrary (I stand by my commitment to work out every evening, though this evening this commitment is made inapplicable or overridden by my commitment to give a lecture). Similarly, legislative determinations departing from constitutional norms could in a sense be viewed as irrational, i.e., as disregarding some commitments that govern legislative decision-making: for legislators who continue to uphold their commitment to a constitution (as they should when reasoning and acting in the name of the community governed by that constitution, i.e., a community that has undertaken such a commitment), it would be irrational not to respect a constitutional norm, unless they believe they are in a situation where the norm is inapplicable or is overridden by prevailing communal reasons to the contrary. Note that this irrationality only exists when legislators are viewed as members of a legislature acting in name and on account of the community committed to the constitution: violating the constitution to install a permanent dictatorship or to gain immunity from prosecution may be perfectly rational from the perspective of individual self-interest.

How to go about respecting a constitutional norm, however, depends on the content of that norm:

- a constitutional norm establishing duties or permissions to carry out or not carry out certain action is violated when a new legislative determination either directly instantiates a prohibited action or makes permissible what was prohibited or prohibits what was permissible;
- a constitutional norm establishing a duty for the legislature to realise a value (aim at a goal) is violated when the value does not enter in an appropriate way, according to its importance, into the teleological reasoning of legislators, namely, when it is not appropriately taken into account in legislative choice-making;
- a constitutional norm conferring a legal status is violated when a legislative determination denies such a status (similarly, a norm denying certain persons a legal status is violated when a legislative determination confers such a status on them);

- a constitutional norm indicating that a factor supports a certain normative conclusion is violated when the factor is not considered in a legal determination where it was relevant.

According to this broad characterisation of the notion of a constitutional norm (which seems to me to tally with the common usage of the term *norm*), it also includes constitutional prescriptions requiring the pursuit of certain values (goods). If legislators have to take into account all constitutional norms, then these norms too will have to direct in legislative decision-making, along with the norms specifying that certain actions be to be taken or omitted.

In order to analyse how a legislature should comply with constitutional commitments, we need to focus specifically on norms establishing rights. On the traditional view that a right protects an individual interest or opportunity (the so-called benefit theory of rights, advanced by authors such as Jeremy Bentham and Rudolf Jhering: see, for a logical analysis and for references to the literature, Sartor 2006), two components are entailed by the statement that “*j* has a right to *A* toward *k*”, where *j* is the beneficiary of the rights and *k* is the counterparty: on the one hand, the situation where *j* enjoys *A* is viewed as valuable and, on the other, it is assumed that there exist guarantees aimed at facilitating this enjoyment, which bear upon *k* (these guarantees can be specified in other norms or may have to be argued from general principles).

Thus a right-conferring norm includes in the first place a value component: the norm stating that “*j* has a right to *A* toward *k*” entails that the legal system values *j*'s having *A*, or views it as an objective to be pursued through the law. More precisely, a right-conferring norm protects an individualised value, namely, a set of valuable situations pertaining to particular individuals separately considered (my freedom to speak, your freedom to speak, etc.). Consequently, the interest (value, good) protected by a right is essentially non-aggregative: the fact that someone's right is satisfied to an optimal extent does not make up for the fact that someone else enjoys the right to an insufficient extent.

Secondly, there is a guarantee component: *j*'s having a right to *A* toward *k* entails that the law provides some normative guarantees that facilitate *j*'s having *A* and bear upon *k*. For one thing, this right entails that *j* is permitted to have *A* as far as *k* is concerned (i.e., it is not the case that protecting *k*'s interests requires prohibiting *j* from having *A*).⁸ The protection provided by a mere (or unprotected) permission to have *A* (see Hart 1982) can be strengthened by what might be called, in Hohfeldian terms, a disability or incapacity, namely, by *k*'s inability to change *j*'s legal standing with regard to *A*, namely, of turning *j*'s permission to have *A* into a prohibition (as would happen if *j*'s right was established under a constitutional norm, one that legislature *k* could not make any exception to). And, for another thing, *j*'s right to *A*

⁸ For instance, if the legal system *L* prohibits *j* from having an opportunity to express his or her opinion in the interest of the state, we should conclude that *j* has no right under *L* to express his or her opinion about the state.

toward *k* may include further legal guarantees, consisting in obligations incumbent upon *k* to facilitate *j*'s pursuit of *A*:

- *k*'s goal-duty (an imperfect duty, in Kant's terminology: see Kant 1996, Chapter 2; Sen 2004a) to consider in *k*'s deliberative process the goal that *j* should have *A*, recognizing for this goal an appropriate relevance (e.g., the duty to consider freedom of speech when introducing a regulation aimed at protecting privacy);
- *k*'s negative action-duty not to prevent *j* from having *A* (e.g., a duty to not prevent a person—as through imprisonment—from expressing his or her opinion);
- *k*'s positive-action duty to ensure that others do not interfere with *j*'s having *A* (e.g., a duty to protect a person against attempts to prevent him or her from expressing an opinion);
- a positive-action duty to ensure that *j* has the means to enjoy *A* (e.g., a duty to provide access to the media)

Moreover, these duties are often accompanied by the right-holder's power to activate judicial enforcement when some of these obligations are not complied with (a power included in the restrictive notion of a legal right in Kelsen 1967).

In order for a right to exist, it is not necessary that full protection be provided (as would result from the combination of all the duties I have introduced, plus the corresponding powers of enforcement). The protection of certain rights (e.g., some social rights, such as the right to work or to housing) may consist in only a goal-duty, often not judicially enforceable though the right-holder's autonomous action. This would provide a lesser, but not irrelevant, protection of the corresponding individualised values (on how certain rights may consist in only an obligation to take them into account in deliberation, see Sen 2004a). Some rights may operate in different ways with regard to different counterparts (e.g., the right to privacy may be protected by a negative action-duty with regard to administrative authorities, who are prohibited from using personal data unless specifically allowed by the law, but only as goal-duty with regard to the legislature, who can limit the protection of privacy though legislation taking competing interests into account). Certain rights (such as social rights) may be protected only by a goal-duty at a constitutional level, and by action-duties at the legislative level. The view that rights are values also protected (and sometimes only protected) by goal-duties does not mean that all rights are equal. This view is consistent with the assumption that certain individualised values (the enjoyment of civil and political liberties) may carry more weight than other values, and hence have priority over them, and in particular over collective values. This is also consistent with the view that some rights also include protection through defeasible or even indefeasible action-norms. However, outside the domain where an action-norm is to be applied (e.g., the prohibition against torture), goal-norms (norms that deal with values such as individual self-determination and integrity) would still operate.

To understand the distinction between action- and goal-duties, we should go back to our analogy between individual and collective decision-making: just as an individual determination (intention) to perform an action is adopted by a person

because he or she considers that action to be an appropriate way to achieve certain goals, so a norm establishing an action-duty is adopted by a certain authority (or collectivity) because that authority (collectivity) considered the norm to be the appropriate way to achieve certain public values. Respecting the authoritative determination that has led to the adoption of an action-norm requires us to not disregard that norm on the basis of a different comparative assessment of the values considered in that determination. Thus, if a constitution requires that nobody can be detained for more than 48 hours without a judicial warrant, interpreters (legislators and judges in particular) should not disregard this rule on the basis of the value of security (even when they believe that the constitution is wrong, e.g., that it should have established for detention a longer term based on a better balance of the values at issue): the constitution made its evaluation concerning the way to balance security and freedom, and respecting the constitution means respecting this evaluation (this corresponds to Raz's 1978 view of rules as exclusionary reasons).

In other cases, however, the situation is different. A particular constitutional norm obligating the legislature to uphold a certain value, even when the value is individualised and non-aggregative, may only require that the value be taken into account in legislative decision-making according to its constitutional importance. Consequently, this norm does not uniquely determine a legislative decision, which will instead result from a teleological evaluation aimed at achieving not only this value but also the other constitutional values at stake, and to do so in keeping with these values' relative importance. Thus, legislators are obliged to take into account and evaluate all relevant constitutional values: when aiming to guarantee security, for instance, they should also take into account privacy and freedom of speech. Sometimes a constitutional norm will guide such an evaluation by indicating what values should be relevant to this decision (thus excluding that other values may interfere with the outcome, or that they may interfere beyond the limit of evaluation accorded to the decision-maker). Thus, it may be possible to limit freedom of speech only for reasons pertaining to public order and morality, and not, say, for reasons pertaining to scientific progress (which consequently could not be used to justify a ban on advocacy for creationism or homeopathy).

The distinction between action-duties and goal-duties overlaps with another significant distinction, namely, the distinction between a yes/no state of affairs and a scalable state of affairs. A yes/no state of affairs either obtains or does not obtain, while a scalable state of affairs may hold to different extents. For instance, while being a citizen is a yes/no state, being free or unfree is a scalable state of affair (since this is a function of the number and quality of the options within one's reach). When two duties concern the realisation of a yes/no state of affairs, preference should be given to one duty to the exclusion of the other, so that at least one of the two is satisfied (this is the domain of defeasible reasoning). By contrast, when two duties concerning scalable goals have to be satisfied, the best compromise usually requires that neither of them be completely neglected or completely satisfied. A scalable duty (the duty not to make people suffer when questioned or detained) can become an action-duty with regard to a particular threshold (the duty not to torture people).

Action duties concern the realisation of yes/no states of affairs, while goal duties usually concern the realisation of scalable states of affairs.

Given the premises of legislative reasoning—constitutional goals, further legislative goals, preferences for such goals, and constitutional constraints on the pursuit of such goals—legislators should make a teleologically appropriate determination. From the legislators' perspective, this means that after an adequate inquiry, the chosen determination should appear better than inactivity and it should not appear to be worse than any particular alternative determination the legislators have so far identified. The legislative choice would fail to reach *teleological appropriateness* if the legislators made a choice they believed to be worse than another possible choice they were aware of in achieving the public good (even though the choice may be better suited to advancing the legislators' private interests). Similarly, the legislative choice would fail to reach teleological appropriateness if it were adopted impulsively, without an appropriate inquiry (which would have led to discover a recognisably better option). It would fail as well if it were vitiated by previous epistemic mistakes—in evaluating the evidence, identifying causal connections, examining evidence to the contrary, etc.—when such mistakes would not have been committed through an appropriate cognitive effort.

Figure 6 shows the connection between the satisfaction of a scalable value and the benefit it provides: a decrease in the satisfaction of the value determines an increasingly significant loss in the benefit deriving from it. We reach a point, the *core threshold*, such that any further decrease in the satisfaction of the value determines a loss of benefit that is unlikely to be compensated by gains in the benefit provided by the greater achievement of other values. The portion of the value line to the left of the core threshold is what may be called the value's core or nucleus. On the other hand, when the level of achievement increases, we come to a point such that any further increase will have little importance. The portion of the value line to the right of this point represents situations where the value is achieved at a fully satisfactory level, so that any further increase, though still positive, may not come within the scope of a legal obligation to advance that value.

If scalable values have the structure just indicated, then decisions affecting competing values (e.g., privacy and security) take place in a decisional context of the kind represented in Fig. 7.

The continuous lines indicate indifference curves, namely, combinations of levels of satisfaction of two competing values giving the same compound benefit. For instance, the most external indifference curve shows that achieving level 22 (measured by counting the number of small squares from the origin of the quadrant) with regard to both values *A* and *B* is equivalent to achieving level 40 with regard to *A* and 10 with regard to *B* (both points, [22, 22] and [40, 10], are situated on the same indifference curve). This curve expresses the idea that *B* (e.g., privacy) is less important than *A* (e.g., security): for most curves, a higher quantity of *B* is required to make up for the loss of one unit of *A*. However, when the quantity of *B* decreases, having one additional unit of *A* becomes more and more important, up to the point where any further increase in *B* will no longer make up for a further equal loss in *A*. Let us assume that the decision-maker has choices 1, 2, 3, and 4

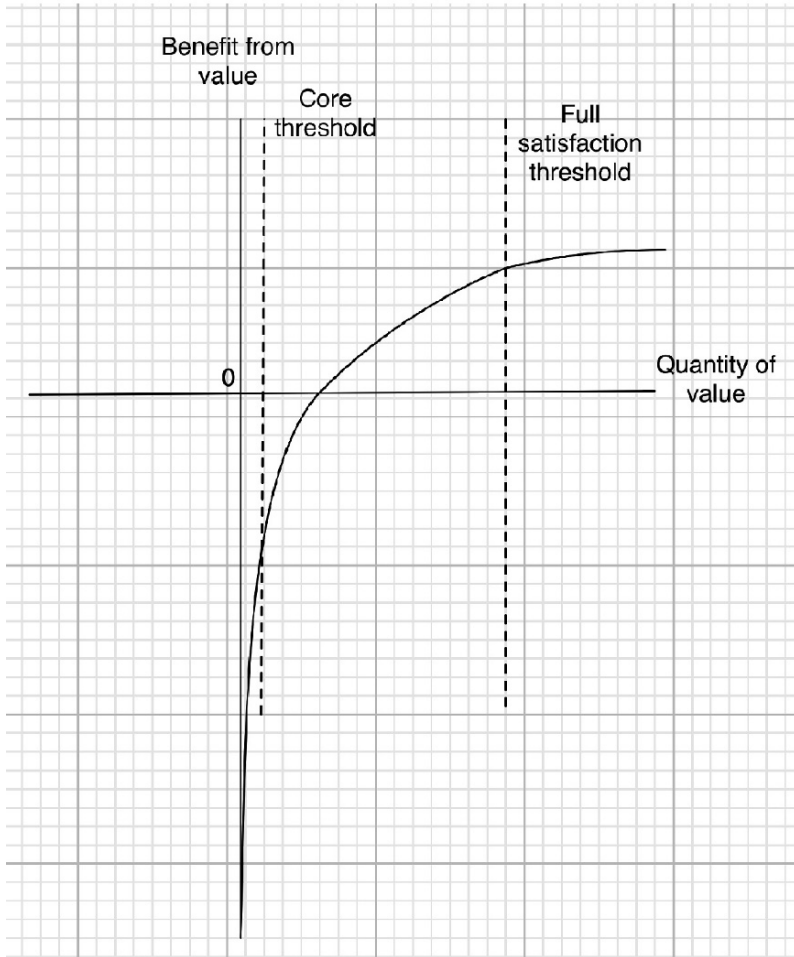


Fig. 6 Core and satisfaction threshold for a value

available (represented in the figure by way of the numbered circles). Choice 1 is Pareto-superior to choice 3, since it provides not only a higher compound benefit, but also a higher level of satisfaction with regard to both values. Choice 4 is not Pareto-inferior to 1, since it indicates a level of satisfaction for value *B* which is higher than that provided by 1. However, this is obtained at the cost of a very low level of satisfaction for value *A*, a loss which is not made up for by the benefit provided, consisting in an increase in security. Thus choice 4, while ensuring the highest level with respect to *B* obtains the lowest compound score. The conclusion that choice 4 is inferior to 1 thus presupposes a “comparative value judgement,” namely, a judgement about the comparative importance of values *A* and *B*. On the basis of this judgement, the loss with regard to *A* in choice 4 is not offset by the

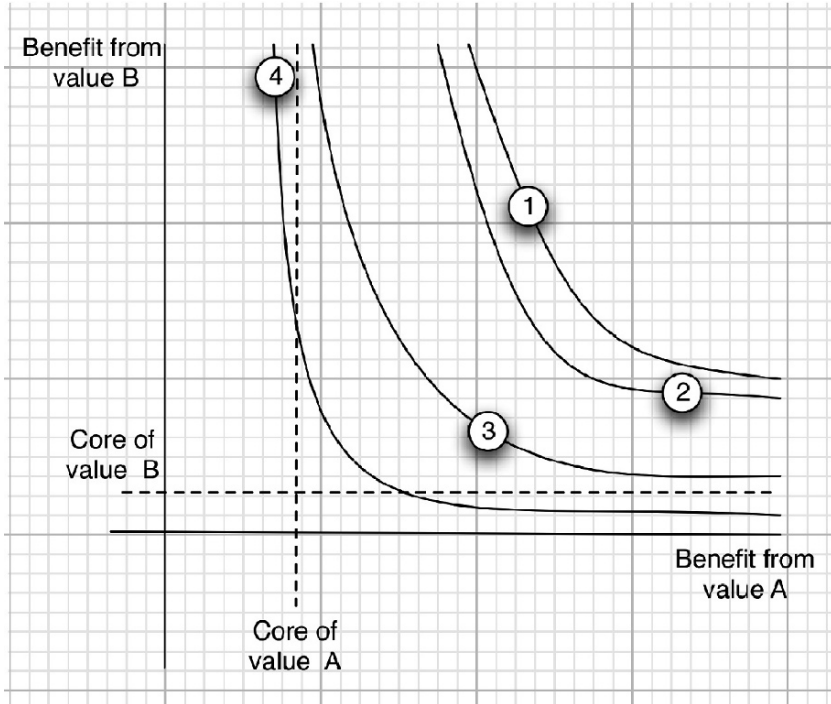


Fig. 7 The balancing of competing values

corresponding gain in *B*. Even 2 is not Pareto-superior to 1, but this happens for the opposite reason, which is that 2 achieves *A* to a higher degree than 1 but at a cost that is not offset by the loss with regard to *B*.

This quantitative characterisation of the notion of a right's core needs to be integrated by qualitative considerations by taking into account the diversity of the interests protected by a right. A single constitutional right can be analysed into different components, concerning different individual interests, but unified within the same framework (under the same overarching value). For instance, the right to private and family life recognised by the European Convention on Human Rights includes related, but different, components such as protection of the domicile, freedom to establish a family, freedom of sexual orientation, and information privacy (data protection). Interference with each such component takes the nonlinear shape I described above: as the level of satisfaction of a particular component of the right decreases, the negative impact on the corresponding interest becomes more and more important, in an accelerated way. Thus, each right includes a family of cores pertaining to different individual values (interests): for each of the specific constitutional values falling under a single right, there is a point when further losses are unlikely to be matched by gains with regard to other constitutional values pertaining to the same or to other rights. For instance, the fact that a legal system provides

full protection of the domicile, along with full data protection, cannot make up for the fact that homosexuality is criminalized: a core of the right to private and family life would still be violated. The same would also happen if freedom in sexual orientation were protected but no data protection were provided. Similarly, a core of the right of freedom of speech would be violated if freedom of speech were fully protected in all respects save for a prohibition against criticising the current government.

15 The Constitutional Evaluation of Legislative Choices: Reasonableness and Deference

When we examined legislative decision-making from the perspective of the decision-makers themselves, we focused on bounded rationality. If sufficientist reasonableness is equated with bounded rationality, then a choice will be reasonable when it remains in the region between bounded rationality and optimal rationality. A reasonable but non-rational choice would be a non-optimal determination, such that no criticism of cognitive ineptitude can be directed at the decision-makers: they appropriately used their cognitive powers (in developing an economic policy, or in designing privacy regulations), only they failed to achieve the best possible result and caused negative outcomes (growing unemployment, citizens' privacy unduly restrained) because of the unfortunate cognitive circumstances in which they were acting (new unexpected social or technological developments, unavailability of good predictive models, etc.). Correspondingly, any departure from bounded rationality (any mistake in acquiring and processing the available legal or factual information) would count as unreasonable.

This does not seem to correspond to the way in which reasonableness (and unreasonableness) is understood in judicial review, with regard to both legislative and administrative choices, where a broader notion of reasonableness is generally preferred, according to which a determination remains reasonable even though it is affected by cognitive faults, according to the reviewer.

With regard to judicial review the analogy we used between individual decision-making and the institutional decisional process of a legal community breaks down: while in case of individual decision-making the same agent is involved in the entire process (agents can consequently review any outcome of their previous reasoning which appears faulty to them), the decisional process of a legal community involves different bodies and institutions, each having its own functions and capacities. It is unlikely that the best integration between a decision-maker and a judicial reviewer will be one where the reviewer can strike down the decision maker's choice whenever the reviewer sees it as failing to achieve complete rationality (this would empower the reviewer to strike down all decisions she views as suboptimal, namely, all decisions she would not have taken had she been in the decision-maker's place, but with the hindsight of someone having all knowledge available the time of the review), even with regard to the achievement of constitutional values (this would

empower the reviewer to strike all decisions she views as failing to maximise the total outcome with regard to all the constitutional values at stake). Nor is the best integration likely to be one in which the reviewer can strike every decision she views as failing to achieve bounded rationality (this would empower the reviewer to replace with her own decisions all the decisions she would have taken differently had she been reasoning with the information the decision-maker had at the time the decision was made).

We must therefore define a different notion of reasonableness, a notion tailored to the institutional role and competence of decision-makers and of their reviewers, and in particular a notion that takes into account the reviewer's deference space, namely, the area within which the reviewer should not attack the measure under review even though she believes a different measure should have been taken (on deference, see Soper 2002). If unreasonableness (where constitutional values are concerned) is understood as providing a sufficient ground for review, then the notion of reasonableness is not independent of deference but is rather delimited by institutionally due deference. In other terms, considerations of institutional deference enable us to identify a sufficientist reasonableness threshold, encompassing not only the decision the reviewer would have taken but also other choices which he or she considers to be faulty but not yet unreasonable (insufficiently faulty to be unreasonable). However, this means that we cannot provide a universal characterisation of deference-based reasonableness, precisely because such a characterisation will depend on institutional deference.

Figure 8 illustrates how a determination (1) that does not coincide with what the reviewer would choose (5) may still fall within the margins of the decision-maker's appreciation (as indicated by the dotted lines) and may thus escape review: though the reviewer views the decision-maker choice as imperfect (it is based on an indifference curve that in the reviewer's opinion accords too much importance to value *A*), she does not consider it to be attackable, being within the margin of reasonable appreciation.

The idea of a sufficiency threshold applies as well to a legislature's epistemic judgements, which too can determine a failure to appropriately balance the values at stake. For instance, given the factual premise that a terrible terrorist attack is imminent, and the premise that scouring all Internet traffic with data-mining techniques will probably foil the attack, a legislator may be justified in adopting such measures to the detriment of privacy. However, if there are no grounds for accepting either of those premises (no convincing evidence that an attack is underway, and little evidence that unrestricted data-mining will be able to prevent it), then sacrificing privacy may be considered unreasonable. But substituting the court's epistemic assessment for the legislature's seems to require something more than a mere mistake of the latter: it should require a mistake consisting in epistemic unreasonableness, namely, a serious and indisputably ascertainable fault. Thus, this should not be done when the legislature's fault, according to the court, only depends on the adoption of a particular economic or social theory which the court favours (viewing it as more reliable, better supported by the facts), but which other reasonable people reject (as Judge Holmes famously argued in the *Lochner* case).

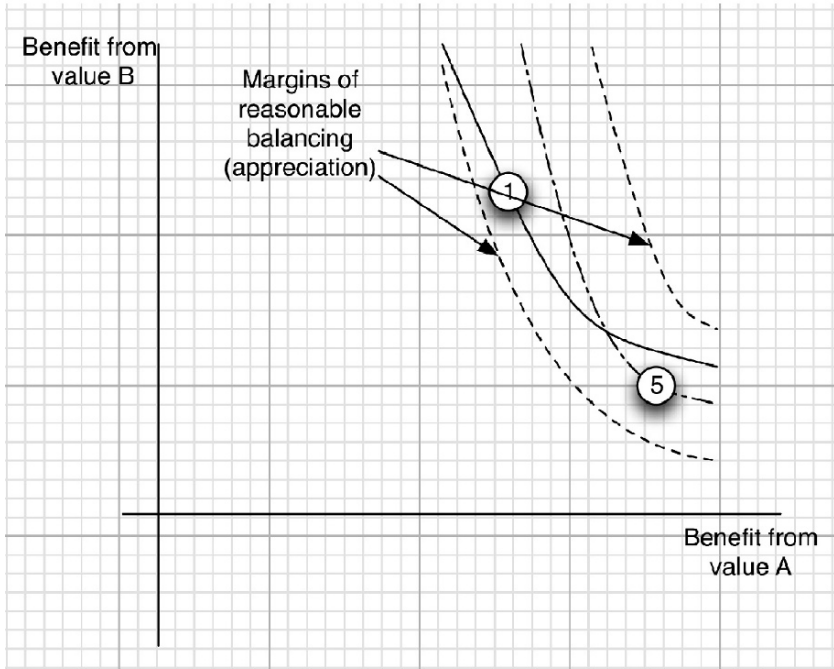


Fig. 8 Reviewer’s choice and margin of appreciation

16 A Sufficientist Understanding of Proportionality

By combining the foregoing analysis of failures in rationality with a deference-based sufficientist idea of reasonableness, we can derive the tests usually available in proportionality analysis (see, among others, Alexy 2003; Stone Sweet and Mathews 2008) as applied to determinations sacrificing constitutional rights. For this purpose, it is useful to stipulate some additional terminology.

I shall say that α satisfies V more than β does, in formula $\alpha >^V \beta$, to mean that, the level of achievement of value or goal V resulting from action α is higher than the level resulting from action β (and I use similarly, the symbols $<^V$, \leq^V and \geq^V). For instance, if a the level of achievement of privacy resulting from legislative determination α (keeping the footings taken with street cameras for 1 day) is higher than the level resulting from determination β (keeping the footings for 1 year), I shall say that α satisfies privacy more than β does ($\alpha >^{\text{privacy}} \beta$).

By saying that α sacrifices V , I shall mean that α satisfies value or goal V less than the inaction (omitting α without replacing it with a different initiative), in formula, $\alpha <^V \emptyset$ where \emptyset denotes inaction. For instance, if a new regulation α allows for the registration of genetic data of all newborn children (which was previously forbidden), I shall say that α sacrifices privacy.

Similarly, I shall say that α *advances* V , to mean that α satisfies value or goal V more than inaction ($\alpha >^C \emptyset$). For instance, if a new regulation α prohibits processing personal data for commercial purposes without the consent of the person concerned (which was previously permitted) I shall say that α advances privacy.

I shall also say α *satisfies a set* $\{V1, \dots, Vn\}$ *more than* β *does* ($\alpha >^{\{V1, \dots, Vn\}} \beta$) to mean that the α 's compound impact on all values in the set is better (higher, more valuable) than β 's. In assessing this compound impact the relative sacrifice in one value can be outweighed by the relative advance in another (in case numerical indicators can be given, the satisfaction of a set of values would be the weighted sum of the satisfaction of each single values in the set, as we observed in section 4). Consequently, it is possible that α satisfies the value set $\{V1, \dots, Vn\}$ more than β does even though β satisfies certain values the set more than α does. This happens when α satisfies certain other values in the set more than β does, and the comparative advantage provided by α with regard to the latter values outweighs the advantage provided by β with regard to other values. Assume, for instance (see Section 4), that β consists in prohibiting street cameras, and α consist in allowing cameras and requiring the destruction of the footage after 1 day, and that the comparative advantage in security provided by α outweighs the comparative disadvantage in security provided by β . Then it can be concluded that α satisfies the set $\{privacy, security\}$ more than β ($\alpha >^{\{privacy, security\}} \beta$), even though β satisfies privacy to a higher extent than α does ($\beta >^{privacy} \alpha$).

As we observed above, a more rigid kind of comparison, excluding tradeoffs between different values, is provided by Pareto superiority. For α to be Pareto superior to β (and β Pareto inferior to α) with regard to a set of values $\{V1, \dots, Vn\}$ it is required that α satisfies at least one value in the set more than β *and* that α satisfies every other value no less than β (there exists no value in the set such that β satisfies it to a higher extent than α). This condition would not be satisfied in the latter example, where β satisfies privacy to a higher extent than α . Thus in this example, even though α satisfies the set $\{privacy, security\}$ more than β does, α is not Pareto-superior to β . The advantage of the criterion of Pareto-superiority is that it allows us to conclude for the preferability (rationality) of a choice without engaging in balancing, understood as the (usually controversial) assessment of tradeoffs between impacts on different values. However, when we have to compare choices α and β that impact different values, α satisfying more certain values and β certain others, then Pareto-superiority is not applicable, and balancing is required. Let us consider the four usual proportionality tests.

Test 1: Legitimate aim 1 (permissible intended purpose). A legislative determination sacrificing a constitutionally protected value must aim at advancing a constitutionally permissible goal. This requirement is violated when the legislature adopts a determination sacrificing a constitutional value, and does so in order to pursue a goal that it is constitutionally impermissible. Such a decision would fail to be rational (or, for that matter, reasonable) with regard to the decisional context as emended by removing the impermissible goal. In other words, when the impermissible goal is eliminated, the only relevant

intended impact of the decision is its negative impact on the constitutional right/goal, which makes that choice internally irrational (Pareto-inferior to the choice that consists in inactivity).

Test 2: Legitimate aim 2 (legitimate outcome). A legislative determination sacrificing a constitutional value must effectively advance a constitutionally permissible goal. In other words, if a constitutional value C is sacrificed by α , there must exist a legislative goal G that is advanced by α , where the pursuit of G is constitutionally permitted. Assuming that requirement 1 is met, i.e., that a permissible goal G is pursued, the *legitimate-outcome* requirement is violated when the legislature adopts a determination α that sacrifices a constitutional value without advancing the pursued legislative goal (e.g., a useful medical therapy is prohibited assuming, on the basis of wrong medical information about the effects of this therapy, that it damages patients' health). This determination will be unreasonable when the legislature's epistemic mistake is very serious and indisputable (unreasonableness can also involve retaining the new legislation when new indisputable evidence is made publicly available showing the previous choice to be mistaken). It seems to me that the reviewer's consonance and the legislature's dissonance with regard to the scientific community's evaluations should often play a decisive role in justifying the reviewer's intervention.

Test 3: Pareto-necessity. A legislative determination that advances a certain goal while sacrificing a constitutional value, must not be Pareto inferior (where constitutional values are concerned) to any determination that equally advances the goal with a smaller sacrifice of the constitutional value. This requirement is violated when the determination α —while respecting requirements 1 and 2, i.e., pursuing a permissible goal G through effective means—sacrifices a constitutional value C , and there exists an alternative determination β that advances G at least to the same extent, sacrifices C to a lesser extent and imposes no additional burden on any another constitutional value. Under such conditions, we may that α is not necessary to advance G , since β rather than α could have been taken (avoiding the unnecessary sacrifice at no cost). Thus, when Pareto-necessity is violated, the following conditions hold: α sacrifices C , and there exists an alternative choice β such that β satisfies C more than α does, and β is Pareto-superior to α with regard to a value set $\{C, C1, \dots, Cn, G\}$ comprising all constitutional values $C, C1, \dots, Cn$ plus the pursued legislative goal G . Note that for β being Pareto-superior to α it is necessary that β satisfies each of $C1, \dots, Cn, G$ no less than α . Consequently, if satisfies any of the $C1, \dots, Cn, G$ more than β does then β fails to be Pareto-superior to α , which means that α satisfies Pareto-necessity (as far as β is concerned). For instance, a law α requiring DNA samples being taken of all citizens (for their use in future police investigation), would stand the test of Pareto-necessity as compared with the choice β of getting samples only from suspects for particular crimes: even though α sacrifices privacy to a very high extent, if satisfies the value of security more than β does, and this is sufficient to exclude that β is Pareto-superior to α . Failure to

satisfy Pareto-necessity may depend on an epistemic mistake in assessing the impacts of α and β (e.g., the mistaken belief that α sacrifices C less than does β), or it may depend on a heuristic failure to identify determination β . When such mistakes overstep the unreasonableness threshold, review is justified.

Test 4: Comparative balancing. A legislative determination sacrificing a constitutional value must satisfy the set of all constitutional values no less than inaction (\emptyset) would do. Let us assume that a determination α sacrificing constitutional value C meets all requirements 1–3, i.e., that α effectively pursues a permissible goal G and α is not Pareto-inferior to any other possible determination β . Under these assumptions, α complies with the requirement of Test 4 if α satisfies no less than \emptyset the value set $\{C, C1, \dots, Cn\}$, including all constitutional values. Given that α sacrifices value C , this requires that α advances other values, to an extent offsetting C 's sacrifice. Conversely, failure to satisfy Test 4 would mean that C 's sacrifice is not offset by the advancement with regard to other values. For instance, the conclusion that a law requiring DNA samples being taken from all citizens fails to meet the requirement of comparative balancing (as compared to the current state of affairs when samples are only taken on suspects) requires that the advance this law provides with regard security is outweighed by the sacrifice it imposes on privacy. Failure to satisfy Test 4 may derive from the legislators' practical mistake in assessing the relative importance of two or more values at issue (giving too much importance to some values advanced by α or too little importance to some value sacrificed by it), or from their epistemic mistake in assessing the impact of their decision on those values. In either case, in order for α to be unreasonable, these practical or epistemic mistakes must also have been unreasonable.

Special care is required in Test 4, especially when unreasonableness depends on a mistaken evaluation of the comparative importance of the constitutional values (goals) at stake. Here the court's interference with the legislature's political autonomy would be highly controversial (given that disagreements over matters of fact tend to more easily be resolved than disagreements over matters of value). Such an interference can be more easily justified (considering the democratic derivation of the legislature's power) when the judges' evaluation appears to comport with people's assessment of the relative importance of the values (or with the assessment of the people who are interested in the matter and have been discussing it), namely, when it appears that the legislature has failed to take duly into account the idea of reasonableness as agreement or consonance with general opinion (see Section 2).

The way in which balancing in a strict sense has been characterised in Test 4 above does not exhaust all possibilities. Let us consider two variations, the first one making judicial balancing *less* intrusive and the second one *more* so.

The first variation consists in admitting the relevance of non-constitutional goals pursued by the legislature. This is excluded by the Test 4 as characterised above, which only contemplates constitutional values: a diminution (meeting the required seriousness threshold) in the combined satisfaction of constitutional values

is sufficient to strike down legislation regardless of any increase in the satisfaction of non-constitutional values. This means that constitutional values are viewed as lexically superior to non-constitutional values (no achievement of any level of a non-constitutional value can justify a diminution with regard to constitutional values, that is, non-constitutional values are irrelevant to constitutional balancing).

Let us say that a choice α *outbalances* β with regard to values V_1, \dots, V_n , to indicate that α satisfies the values set $\{V_1, \dots, V_n\}$ more than β , to an extent sufficient to make it unreasonable to prefer β over α . On the approach under Test 4, if C, C_1, \dots, C_n are all the constitutional values involved in the case, and inaction (\emptyset) outbalances α with regard to those values, α fails the test, regardless of α 's impact on non-constitutional values. For instance, let us assume that privacy and security are constitutional values, while cutting down on spending is not. Let us also assume that choice α (e.g., introducing body-scanning in airports) impacts with a negative combined outcome on both privacy and security (and on no other constitutional value besides), but that implementing α is much cheaper than implementing the previous policy (which entails costly inspections by airport customs). It then follows, on the approach under Test 4 above, that if a judge believes that inactivity (maintaining the previous policy) outbalances α with regard to the set $\{privacy, security\}$, this judge should disregard the older policy's higher costs (assuming that cost-effectiveness is not a constitutional value) and should accordingly strike down α . The same judge could reach a different conclusion if non-constitutional values were also relevant in the comparison. In the latter case, then α could stand the review if the judge believed that α 's gain with regard to the non-constitutional legislative goal (cost-cutting) would balance α 's loss with regard to the constitutional values (or at least would keep the imbalance within the unreasonableness threshold). This leads to the following weaker version of Test 4.

Test 4.1: *Comparative balancing* (weaker version). A legislative determination α to achieve a certain goal G sacrifices a constitutional value C , it must not be outbalanced by \emptyset as concerns both the impact on constitutional values $\{C, C_1, \dots, C_n\}$ and the impact on the larger set $\{C, C_1, \dots, C_n, G, L_1, \dots, L_m\}$, comprising the goal pursued plus any other objectives L_1, \dots, L_m valued by the legislature. This requirement can be considered unfulfilled only when both \emptyset outbalances α with regard to both sets.

For instance, in the example above, it would be possible for Test 4.1 to be satisfied even when \emptyset outbalances α with regard to $\{privacy, security\}$, i.e., when Test 4 fails to be satisfied. This would happen when the outcome of the comparison would change by also including the goal of *cost-cutting*. In other terms, while under Test 4, the only condition that needs to be met in order for a legislative determination α to be struck down is that \emptyset outbalances α with regard to $\{privacy, security\}$, Test 4.1 also requires that \emptyset outbalances α with regard to $\{privacy, security, cost-cutting\}$.

A different, more intrusive variation of Test 4 would consist in substituting the requirement that inaction (\emptyset) not outbalance α with the requirement that there be

no alternative determination β outbalancing α : the reviewer would strike down α not only when α worsens the preexisting combined achievement of constitutional values but also when α , while resulting in a combined achievement of constitutional values higher than (or equal to) the outcome afforded by \emptyset , falls short of a maximal combined achievement of the constitutional values at stake, since there is an alternative determination β that would provide an even better outcome. Let us consider the following hypothetical example (which follows to some extent the case *S. and Marper v. the United Kingdom*, decided by the European Court of Human Rights on 4 December 2008). Suppose that non-voluntary storing of genetic data was prohibited under a preexisting legal framework r_1 , and that a new rule is issued making it possible to store genetic data collected in the course of a criminal investigation: this would yield a new regulatory framework r_2 . Suppose now that a reviewer agrees that framework r_2 , while sacrificing privacy to security, yields an outcome (a combined satisfaction of the two values of privacy and security) better than the outcome yielded by r_1 (the loss of privacy being outweighed by the advance in security). And suppose, finally, that the reviewer also believes that a different framework r_3 (e.g., making it possible to store data but requiring deletion in case charges are dropped) would more suitably balance privacy and security. The reviewer will thus conclude that that r_3 outbalances r_2 , and that r_2 outbalances r_1 ($r_3 \gg r_2 \gg r_1$). However, r_3 is not comparatively-superior to r_2 , since r_2 satisfies security more than r_3 does, though, in the reviewer's judgment, r_3 provides an advantage in privacy that outweighs the advantage in security provided by r_2 . In such a case, then, the reviewer's decision to strike down r_2 would not pass any of the previously listed proportionality tests (it will fail Test 3, since r_3 is not Pareto-superior to r_2 , and it will fail Test 4, since r_2 is not comparatively-inferior to r_1 , which would have resulted from inaction). If we are to justify striking down r_2 , we have to introduce the following additional test.

Test 5: Comparative counterfactual balancing. A legislative determination sacrificing a constitutional value must not be outbalanced, with regard to the set of all constitutional values by any alternative determination the legislature could have taken. A legislative determination α violates this requirement when α sacrifices a constitutional value C and there exists an alternative determination β that would produce a lesser sacrifice of C and would outbalance β with regard to the set of all constitutional values. This would be the case of the last example, where r_2 sacrifices privacy advancing security, and r_3 would provide a lesser sacrifice in privacy and a better compound achievement of all constitutional values at stake (including both privacy and security).

The application of this last test seem to me particularly problematic in the cases where Test 4 is not satisfied, i.e., in the cases where the contested decision α satisfies the set of all constitutional values more than the preexisting state of affairs (the outcome of inaction), though less than the alternative measure β being considered. If the reviewing court can only act as a negative legislator, that is, its only power

is to remove α from the legal system on the basis of Test 5, the court would bring back the preexisting state of affair, worsening the compound achievement of the constitutional values (as would happen in the previous example, if r_2 was cancelled, reinstating r_1). This paradoxical effect can be avoided if the court can strike down α without cancelling all of its effects (e.g., it can impose β as a particular interpretation of the language of text α , as has happened with certain interpretive decisions of the Italian Constitutional Court, or it can rule that the government pay out compensation for the injury owed to by α , all the while preserving α 's legal validity, as has happened with decisions of the European Court of Human Rights). However, it seems that deference to legislative authority requires that such interventions only take place in extreme cases: β 's advantage over α must be truly uncontroversial (or at least there must be broad support for this view in public opinion), and β must be obtained through a modification of α (by introducing an exception or extension to it), reframing α 's content rather than going to the extreme measure of striking down α . A variant of Test 5 could be obtained by also including non-constitutional values, as in Test 4.1.

Let us now go back to Test 3, namely, Pareto-necessity. As we have observed above, the idea of Pareto necessity does not involve an assessment of tradeoffs between impacts on different values (as included in Test 4). This matches the use of the term "necessity" in some legal context, but does not correspond to the way in which this term is used in other contexts. For clarifying this issue, I shall identify, besides the Pareto necessity a different notion of necessity, which I shall call *balanced-necessity*. We must firstly consider that for the purpose of proportionality—in assessing whether a measure α , sacrificing a constitutional value C , is necessary to achieve a goal G —we cannot use the notion of necessity in its common sense, namely, as meaning that α is a *conditio sine qua non* of G , i.e., that unless α is adopted, then G will not be achieved (at a level equal or higher to that which it would be achieved though α), i.e., that there is no alternative measure β such that, if β had been taken instead of α than G would have been achieved to the same extent. This understanding of necessity would be too restrictive for the purpose of proportionality: it would lead us to conclude that α fails to be necessary to achieve G whenever there exists another measure β that achieves G , even though β sacrifices C more than α does. It could then could be argued, for instance, that body scanning is not necessary for security in airports since there is an alternative measure—namely, having people stripped of all their clothes—which would achieve the same level of security (even though the latter measure would sacrifice privacy more than body-scanning). To avoid such absurdities, when evaluating whether α , involving C 's sacrifice, is necessary in order to achieve G , we must only consider those alternative measures that, while achieving G entail a lower sacrifice of C . This is done with the notion of Pareto-necessity as characterised in Test 3 above, which extends considerably the scope of necessity. When evaluating the Pareto-necessity of a measure α sacrificing value C , the alternative measures to be considered are restricted to those that would not entail a lesser satisfaction nor of the goal been pursued nor of any other constitutional value: α fails to be Pareto-necessary only if there exists any alternative measure β that besides

sacrificing C less than α , also satisfies no less than α does the pursued goal as well as all other constitutional values.

The notion of Pareto-necessity, however, is too permissive to match the way in which the notion of necessity is used in certain legal contexts. Consider for instance Art. 8 of the European convention on human rights, stating that limitations of the right to privacy must be necessary “for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”. In the application of this norm, necessity has been denied even with regard to legislative choices that would satisfy Pareto-necessity (since the alternative choices available to the legislator were indeed inferior, under certain regards, to the legislative choice considered non-necessary by the judges). For a certain measure α to be necessary for achieving a goal G , in the sense assumed by Art. 8, it seems indeed that there must be no alternative measure β that, while achieving G to a satisfactory extent (though possibly less than α would do), sacrifices C to a lesser extent, and provides better combined impact on all relevant values at stake (including C and G). In other words, this decision β must be such that the advantage it gives with regard to the sacrificed value C is not offset by α 's advantage with regard to G and other relevant values.

Test 3.1 Balanced necessity. A legislative determination α sacrificing a constitutional value C to achieve a goal G , must be such that there exists no alternative determination β , such that β satisfies G to a satisfactory extent, sacrifices C less than α does, and outbalances α with regard to the set including all constitutional values and goal G .

So, the balanced-necessity test seems to be an instance of Test 5 (comparative balancing), qualified by the additional requirement that the alternative determination β still satisfies the legislative goal up to a satisfactory level, while sacrificing less the value diminished by α . This seems the idea of necessity adopted by the European Court of Human Rights adopted in case *Marper v. the United Kingdom*. In fact the attacked measure (preserving all DNA samples taken from suspects, even after acquittal), provides a higher level of security (maintaining more data potentially useful for future investigations) as compared with the alternative measure considered by the Court (preserving only the samples taken from convicted persons), and thus appear to meet Pareto-necessity. By excluding that the preservation of all samples is necessary for security, the Court assumes that necessity may fail even when the less interfering measure satisfies the legislative goal (security) less than the contested legislative measure does. Obviously, this understanding of necessity allows for a more intrusive judicial control than mere Pareto-necessity, a control that is based on assessing tradeoffs between different values. Thus review based on violation of the standard of balanced-necessity needs to be constrained appropriately though sufficientist considerations (by requiring that the legislative goal to which the legislative measure α was directed really is satisfactorily achieved also by the alternative measure β , that the advantage provided by β with regard to other values

at stake strongly outweighs β 's lower achievement of the legislative goal, that β is obtained by conveniently extending or restricting α 's content).

17 Constitutional Teleology and Implied Constitutional Norms

Constitutional rights, as inputs of legal reasoning, can be viewed in two complementary ways. The first view understands them as entitlements directly deriving from the unqualified recognition of the corresponding (individualised) values. Accordingly, a constitutional right primarily operates, with respect to the legislature, as a guide for the legislature's teleological reasoning: the legislature has the goal-duty advance the corresponding value (freedom of speech, privacy, participation in science and culture, etc.) taking it into account in legislative determinations. And so, where judicial review is concerned, rights operate as criteria (values) for assessing the reasonableness (proportionality) of legislative choices.

The second view understands constitutional rights as articulating a set of normative positions established by more-specific norms, which are not expressly set forth in the constitution but whose implied existence can be teleologically argued for with reference the rights (values) explicitly so recognised: given the constitutional values, their relative importance, and the social and institutional conditions for their implementation, more detailed right-conferring norms are extracted through interpretative arguments affirming that the application of these norms is likely to provide an appropriate balance of the values at stake. In particular, norms can be devised that unconditionally prohibit certain interferences with a right (these being interferences encroaching upon the core of the right, interferences that consequently cannot normally be balanced by the need to satisfy other values) the, or norms can be devised stating that a right may not be limited by certain values (whose increased satisfaction is unlikely to justify a limitation of that right). In this way, a right's normative content can be characterized in a more casuistic way (but still in general terms, concerning classes of cases) by introducing norms to be used as "trumps" against competing values, it being assumed that the protected right outbalances the competing values in the cases identified in these norms themselves (e.g., "The right to private and family life includes self-determination as concerns sexual orientation and reproductive choices, within the following limitations: . . . This right includes in particular . . . and can only be constrained with respect to the following cases: . . . It also includes the right to exercise control over one's personal data, specifically as it pertains to . . . under the following limitations: . . . This right includes the right to access pornographic materials, with the exclusion of child pornography," and so on).

Different legal systems may place a different emphasis on the two perspectives I have described. Some systems may focus directly on constitutional rights in the abstract, thus entrusting the judges with the task of directly evaluating particular legislative decisions in view of their impact on those constitutional values. Other systems may rely instead on the judicial and doctrinal definition of lower-level rules constraining legislative decision-making, thus entrusting the judges with the

task of framing and applying such rules, and then evaluating the legislative decisions on that basis (see Nimmer 1968, who introduced the term “definitional balancing” to describe this idea; for some criticism, see Aleinikoff 1987, 979). The first approach seems to correspond to some extent to the practice of European constitutional courts, while the second is more often used by the U.S. Supreme Court.

Which strategy (or which combination of them) is most appropriate depends on different institutional structures and legal traditions, but these two strategies may be considered to some extent as functionally equivalent. In common-law jurisdictions, based on the idea that judicial decisions produce binding *rationes decidendi*, constitutional judges may feel conformable with explicit rule-making. Consequently, rather than attacking a legislative determination for its failure to appropriately balance constitutional values, common law judges may prefer to extract from the constitutional recognition of such values (e.g., the right to free speech) some general rules (e.g., the rule that no content-based restrictions on speech are admissible, unless conditions of strict scrutiny are met; or the rule that child pornography is not covered by freedom of speech) whose application will likely lead them to strike down the legislative determinations failing to effect an appropriate balance. They will then be able to decide cases (e.g., striking down a law that establishes a content-based limitation on free speech, or not striking down a law that makes child pornography illegal) by evaluating legislation in light of implied constitutional rules rather than in light of the underlying values to be balanced.

But it will still be necessary to rely on the underlying values in justifying and interpreting the implied constitutional rules or in working out conflicts between them (by giving priority to the rule whose application, in the case at hand, leads to a higher combined satisfaction of the values at stake: for instance, in cases involving hate speech, freedom of speech can prevail on dignity and non-discrimination, or vice versa). Moreover, when application of the implied rules fails to provide an appropriate outcome (it would lead to striking down a legislative norm providing an appropriate balance, or to preserve an unbearably unbalanced one), the judges would need to reformulate such rules or to supplement them with exceptions.

I cannot consider here advantages and disadvantages of the two approaches (greater contextual flexibility as against greater predictability, a clearer perception of the interests at issue as against an incremental refinement of precedent-based choices), for this would in turn have us compare rule-based decision-making with a more casuistic style of decision and weigh the pros and cons (see Schauer 1991; and for a discussion of some problems involved in case by case balancing, see Kumm 2007). We should bear in mind, finally, that both perspectives recognise the important role that teleological reasoning plays where constitutional values are concerned, and that this role is framed in different ways in the two approaches, which in this respect can be considered complementary (the constitutional judge/interpreter can go back to goal-norms when implied rules are not applicable, or can revise rules when they fail to appropriately balance the constitutional goals).

18 Conclusion

This contribution has presented two main theses. The first concerns the correspondence between in which the general notion of rationality in decision-making and rationality in legislation: the argument here was that legislative decision-making is guided at its core by teleological reasoning, and that such reasoning can be analysed and evaluated according to general patterns of rationality. Moreover, a correspondence has been established between the way in which individual rationality is guided and constrained by commitments (intentions) and the way in which legislation is guided by constitutional norms. Combining the ideas of teleology and of norms made it possible to argue that goal-norms play a key role in legislative decision-making, and so we looked at their particular structure and function.

The second thesis concerns the development of a sufficientist understanding of reasonableness conceived as a standard for the constitutional evaluation of legislation: in order for reasonableness to be achieved, a sufficient level of rationality and morality is required, and this is a lower level than that of cognitive and moral optimality. This idea, introduced in Section 2, was applied to the complexity of legislative decision-making and modelled after the proportionality test: it says that constitutional review must leave the legislature a margin of epistemic and practical appreciation, even when constitutional values are at issue.

In conclusion, the achievement of constitutional values through legislation is a difficult, uncertain, and complex task, open to reasonable disagreement, and this appreciation requires that constitutional review of legislation be based on a modest (sufficientist) understanding of reasonableness.

References

- Aarnio, A. 1987. *The Rational as Reasonable*. Dordrecht: Reidel.
- Aleinikoff, T. 1987. Constitutional Law in the Age of Balancing. *Yale Law Journal* 96: 943–1005.
- Alexy, R. 2002a. On Balancing and Subsumption: A Structural Comparison. *Ratio Juris* 16: 33–49.
- Alexy, R. 2002b. *A Theory of Constitutional Rights*. Oxford: Oxford University Press.
- Alexy, R. 2003. Constitutional Rights, Balancing, and Rationality. *Ratio Juris* 16, 131–40.
- Aristotle. 1912. *On the Motion of Animals (De motu animalium)*. Oxford: Clarendon.
- Aristotle. 1924. *Metaphysics*. Oxford: Oxford University Press.
- Bench-Capon, T. J. M. and H. Prakken. 2006. Justifying Actions by Accuring Arguments. In *Computational Models of Argument*. Eds. P. E. Dunne and T. J. M., Bench-Capon, 247–258. Amsterdam: IOS Press.
- Blackburn, S. 1998. *Ruling Passions: A Theory of Practical Reasoning*. Oxford: Clarendon.
- Bratman, M. 1987. *Intentions, Plans and Practical Reasoning*. Cambridge, Mass.: Harvard University Press.
- Brentano, F. 1973. *Psychology from an Empirical Standpoint*. London: McAlister.
- Fodor, J. 1983. *The Modularity of Mind*. Cambridge, Mass.: MIT Press.
- Goldman, A. 1999. *Knowledge in the Social World*. Oxford: Oxford University Press.
- Goldman, A. 2006. Social Epistemology. In *Stanford Encyclopedia of Philosophy*. Stanford University.
- Habermas, J. 1999. *Between Facts and Norms*. Cambridge, Mass.: MIT Press. (1st ed. in German 1992.)
- Hart, H. L. A. 1982. *Essays on Bentham*. Oxford: Clarendon.

- Jeffrey, R. 1983. *The Logic of Decision*. Chicago, Ill.: University of Chicago Press.
- Kant, I. 1996. Groundwork of the Metaphysics of Morals. In *Practical Philosophy*. Ed. M. J. Gre-
gor, 37–107. Cambridge: Cambridge University Press.
- Keeney, R. and H. Raiffa. 1993. *Decisions with Multiple Objectives: Preferences and Trade Offs*.
Cambridge, Mass.: Cambridge University Press.
- Kelsen, H. 1967. *The Pure Theory of Law*. Berkeley, Cal.: University of California Press. (1st ed.
in German 1960.)
- Kumm, M. 2007. Political Liberalism and the Structure of Rights. In *Law, Rights and Discourse*.
Themes from the Legal Philosophy of Robert Alexy. Ed. G. Pavlakos, 131–66. Oxford: Hart.
- Luhmann, N. 1973. *Zweckbegriff und Systemrationalität*. Frankfurt am Main: Suhrkamp.
- Luhmann, N. 1974. *Rechtssystem und Rechtsdogmatik*. Stuttgart: Kohlhammer.
- MacCormick, N. 1978. *Legal Reasoning and Legal Theory*. Oxford: Clarendon.
- Mill, J. S. 1991. On Liberty. In *On Liberty and Other Essays*, Ed. J. Gray, 5–130. Oxford: Oxford
University Press. (1st ed. 1859.)
- Nimmer, M. 1968. The Right to Speak from Times to Time: First Amendment Theory Applied to
Libel and Misapplied to Privacy. *California Law Review* 56: 935–67.
- Nozick, R. 1993. *The Nature of Rationality*. Princeton, N.J.: Princeton University Press.
- Pettit, P. 2002. Collective Persons and Power. *Legal Theory* 8, 443–70.
- Pettit, P. 2004. Groups with Minds of Their Own. In *Socializing Metaphysics*. Ed. F. Schmitt,
167–93. New York, N.Y.: Rowman and Littlefield.
- Pinker, S. 1999. *How the Mind Works*. London: Penguin. (1st ed. 1997.)
- Pollock, J. L. 1995. *Cognitive Carpentry: A Blueprint for How to Build a Person*. New York, N.Y.:
MIT Press.
- Pollock, J. L. and J. Cruz. 1999. *Contemporary Theories of Knowledge*. Totowa, N.Y.: Rowman
and Littlefield. (1st ed. 1986.)
- Postema, G. 1995. Morality in the First Person Plural. *Law and Philosophy* 14: 35–64.
- Raz, J. 1978. Reasons for Action, Decisions and Norms. In J. Raz, ed., *Practical Reasoning*,
pp. 128–43. Oxford: Oxford University Press.
- Ripstein, A. 2001. *Equality, Responsibility and the Law*. Cambridge, Mass.: Cambridge University
Press.
- Sadurski, W. 2008. *Equality and Legitimacy*. Oxford: Oxford University Press.
- Sartor, G. 2005. *Legal Reasoning: A Cognitive Approach to the Law*, Volume 5 of *Treatise on Legal
Philosophy and General Jurisprudence*. Berlin: Springer.
- Sartor, G. 2006. Fundamental Legal Concepts: A Formal and Teleological Characterisation. *Artifi-
cial Intelligence and Law* 21: 101–42.
- Sartre, J. P. 1993. *Being and Nothingness*. New York, N.Y.: Washington Square Press. (1st ed. in
French 1943.)
- Schauer, F. 1991. *Playing by the Rules*. Oxford: Clarendon.
- Seidman, A. and R. Seidman. 2001. *Legislative Drafting for Democratic Social Change: A Manual
for Drafters*. London: Kluwer.
- Sen, A. 2004a. Elements of a Theory of Human Rights. *Philosophy and Public Affairs* 32: 315–56.
- Sen, A. 2004b. *Rationality and Freedom*. Cambridge, Mass.: Belknap.
- Simon, H. A. 1965. *Administrative Behaviour: A Study of Decision-Making Processes in Adminis-
trative Organisations*. 2nd ed. New York, N.Y.: MacMillan.
- Simon, H. A. 1983. *Reason in Human Affairs*. Stanford, Cal.: Stanford University Press.
- Soper, P. 2002. *The Ethics of Deference*. Cambridge: Cambridge University Press.
- Stone Sweet, A. and J. Mathews 2008. Proportionality Balancing and Global Constitutionalism.
Columbia Journal of Transnational Law 47.
- Thagard, P. 2000. *How to Make Decisions: Coherence, Emotion, and Practical Inference*. Cam-
bridge, Mass.: MIT Press.
- Thagard, P. 2001. *Coherence in Thought and Action*. Cambridge, Mass.: MIT Press.
- Tuomela, R. 2000. *Cooperation: A Philosophical Study*. Dordrecht: Kluwer.
- Waldron, J. 1999. *Law and Disagreement*. Oxford: Oxford University Press.
- Walton, D. N., C. Reed, and F. Macagno. 2008. *Argumentation Schemes*. Cambridge, Mass.: Cam-
bridge University Press.

Reasonableness, Common Sense, and Science

Alberto Artosi

After all, in a democracy “reason” has just as much right to be heard and to be expressed as “unreason” especially in view of the fact that one man’s “reason” is the other man’s insanity.
Feyerabend (1978, 217)

1 Introduction

Reasonableness is not a philosopher’s term. Nowhere in philosophical literature will you find such clear-cut definitions of reasonableness as you find for the twin concept of rationality. Indeed, even on the handful of occasions on which the concept of “reasonableness” is taken up, there is hardly more than a partial characterization that can be found of its traits. What, then, does it mean to be “reasonable”? The reasonable person makes a rare appearance on the philosophical scene as a great moral character displaying in every circumstance, and especially where others are concerned, many “amiable and respectable virtues”.¹ Very little, if anything, is said about the reasonable person’s epistemic features. For example, on one place reasonable people are portrayed as having the Baconian virtues of cautious reasoning and careful consideration of evidence.² That is all. To find further insights we must turn to Rawls. Though it seems exaggerated to speak of a “theory” of reasonableness in Rawls (as Maffettone 2004 does) he is certainly the one who more than any other contemporary philosopher has made an extensive and significant use of the idea. In his work, reasonableness comes in as “an element of the idea of society as a system of fair cooperation” (Rawls 1996, 49–50) and as a “particular form of moral sensibility” (ibid., 51). Indeed, Rawls is clear in warning us that the idea of “being reasonable” which we find at the heart of his construction “is not an epistemological idea” though, he adds in parentheses, “it has epistemological elements” (ibid., 62).

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¹ See Sibley 1953; Finnis 1980, Chapter 5; Rawls 1996, Part I, Lecture II (“The Powers of Citizens and Their Representation”); MacCormick 2005, Chapter 9 (“Being Reasonable”). Rawls acknowledges his debt to Sibley. Finnis draw on Aristotles and Aquinas. MacCormick draws on Finnis. “Amiable and respectable virtues” alludes to the Smithian background of the reasonable person: see Finnis and MacCormick, and Smith 1976, Part I, Section I, Chapter V.

² Reasonable people, MacCormick notes, “do not jump to conclusions, but consider the evidence” (2005, 166).

Hence the question: Can these elements be detected in Rawls's account of reasonableness? I believe they can. It is this paper's modest aim to identify them and fill the epistemic gaps in the picture of the reasonable person.

2 Fallibilism Not Skepticism

The epistemic traits of the reasonable emerge from Rawls's discussion of the "burdens of judgment." These are called into play in an attempt to answer the question: How might reasonable disagreement come about? (ibid., 55). Reasonable people disagree: this is a fact. And they do so in ways that do not affect their reasonableness; that is, they disagree for causes other than bias and prejudice; personal or group interests; mere obstinacy and wilfulness, ignorance and perversity—all these are causes of *unreasonable* disagreement (ibid., 58). To be sure, reasonable people—Rawls assumes—share basic epistemic equipment: "[g]iven their moral powers, they share a common human reason, similar powers of thought and judgment: they can draw inferences, weigh evidence, and balance competing considerations" (ibid., 55). But in any event, even the most correct and conscientious exercise of these powers will not ensure that reasonable people will reach agreement in judgment. The burdens of judgment are "the many hazards involved in the correct (and conscientious) exercise of our powers of reason and judgment" (ibid., 56) that cause reasonable people to reasonably disagree. Here are some obvious sources of disagreement as they "apply mainly to the theoretical uses of our reason" (ibid.):

- a. The evidence—empirical and scientific—bearing on the case is conflicting and complex, and thus hard to assess and evaluate.
- b. Even where we agree fully about the kinds of considerations that are relevant, we may disagree about their weight, and so arrive at different judgments.
- c. To some extent all our concepts, and not only moral and political concepts, are vague and subject to hard cases; and this indeterminacy means that we must rely on judgment and interpretation (and on judgments about interpretation) within some range (not sharply specifiable) where reasonable persons may differ.
- d. To some extent (how great we cannot tell) the way we assess evidence and weigh moral and political values is shaped by our total experience, our whole course of life up to now; and our total experience must always differ. Thus, in a modern society with its numerous offices and positions, its various division of labor, its many social groups and their ethnic variety, citizens' total experiences are disparate enough for their judgments to diverge, at least to some degree, on many if not most cases of any significant complexity. (Ibid., 56–7)

(a)–(d) identify some inherent and inescapable limitations in the use of our epistemic powers. Through (a)–(d) considerable uncertainty enters our cognitive lives. With this recognition,³ reasonable people also recognize that "[s]ome conflicting

³ Reasonable people recognize and are willing to bear the consequences of the burdens of judgment. This is Rawls' second basic sense of the reasonable (Rawls 1996, 54). The first sense is that

reasonable judgments [. . .] may be true, others false; conceivably, all may be false” (ibid., 58); that even all of our most cherished comprehensive views may be false; and “that the burdens of judgment set limits on what can be reasonably justified to others” (ibid., 61). It turns out, in a word, that reasonable people are fallibilists.

Fallibilism is a respectable philosophical stance—most epistemologists are fallibilists—concerning the extent of our cognitive powers. Fallibilism takes the view that no rational justification can raise the truth of our beliefs to the level of absolute certainty: after all, any belief may be false, and ultimately all beliefs might be false. Such an opinion seems to open the door to all manner of sceptical worries about knowledge. Indeed, fallibilism is often regarded as posing a skeptical challenge to the legitimacy of having beliefs. Most fallibilists reject this charge, and rightly so. In fact, reasonable people are not skeptics. They do “not argue that we should be hesitant and uncertain, much less skeptical, about our own beliefs” (ibid., 63). They only make the modest claim that “we are to recognize the practical impossibility of reaching reasonable [. . .] agreement in judgment on the truth of comprehensive doctrines” (ibid.). Skepticism, in fact, would not permit any “overlapping consensus” among espousers of different reasonable comprehensive views (the views that reasonable people espouse; of course, reasonable people endorse only reasonable comprehensive views: ibid., 36 and 59). For which reason the burdens of judgment cannot be characterized as skeptical arguments.⁴ They do no more than lay out some of the ways (misevaluation of evidence, conceptual indeterminacy, and idiosyncratic experience) in which fallibility may affect our judgments, especially our “judgments about comprehensive doctrines” (ibid., 63).

Another reason why reasonable people are not skeptics lies in their being citizens of a “well-ordered society.” Such a society is subject to what Rawls calls the “publicity condition.” This requires, at a first level, that citizens accept the principles of justice governing the basic institutions of society, and that they “do so on the basis of commonly shared beliefs confirmed by methods of inquiry and ways of reasoning generally accepted as appropriate” (ibid., 66). At a second level, the publicity condition requires that citizens agree on the general beliefs which support the accepted principles of justice and that these beliefs “be supported (as at the first level) by publicly shared methods of inquiry and forms of reasoning” (ibid., 67); these methods

people are reasonable when “they are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so” (ibid., 49).

⁴ As Rawls points out, the burdens of judgment do not proceed from “a philosophical analysis of the conditions of knowledge [. . .] to the conclusion that we cannot know [. . .] because one or more of the necessary conditions of knowledge can never be satisfied” (ibid., 63). Maffettone contends that “[t]he question of scepticism—which underlies the theory of reasonableness—cannot [. . .] be resolved so simply” and that “Rawls can insist all he wants that his stressing of the burdens of judgment is not based on an epistemological or metaphysical theory inspired by philosophical scepticism,” but “[t]here remains the doubt that he is pursuing what amounts to an ‘abstinence’ from the truth, at least as regards the realm of politics” (Maffettone 2004, 563). The charge of “abstinence” from the truth is made in Raz (1990), but it will not be discussed here. What is beyond doubt is that Rawls is right in holding that the burdens of judgment do not outline a skeptical scenario—one in which we are *never* justified in having any belief.

are assumed “to be familiar from common sense and to include the procedures and conclusions of science and social thought, when these are well established and not controversial” (ibid.). That this is a crucial point in Rawls’s conception of a well-ordered society is confirmed by the fact that later on, in his discussion of public reason, he insists that in providing justifications for the basic institutions of society “we are to appeal only to presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial” (ibid., 224). For example, “we are not to appeal [. . .] to elaborate economic theories of general equilibrium [. . .] if these are in dispute”; instead, “[a]s far as possible, the knowledge and ways of reasoning that ground our affirming the principles of justice and their application [. . .] are to rest on the plain truths now widely accepted, or available, to citizens generally” (ibid., 224–25). This brings out two additional features of the reasonable person’s epistemic makeup: faith in the reliability of the precepts and arguments of common sense, and allegiance to the methods and conclusions of science.

3 Common Sense Virtues

Common sense has often been appealed to as an antidote to skepticism. Where the demands of public reason are to be met, common sense also plays a role as a remedy to reasonable people’s cognitive fallibilities. Moreover, common sense informs the reasonable person’s attitude in the public domain. For, as Clifford Geertz comments, “[b]eing common, common sense is open to all, the general property of at least, as we would put it, all solid citizens” (Geertz 1983, 91). Reasonable people are such citizens and they are accordingly expected to have all the attitudes peculiar to common sense. They view matters “as being what they are in the simple nature of the case,” with an “air of ‘of-courseness,’” and as “a sense of ‘it figures’ ” suggests, that is, “as inherent in the situation, intrinsic aspects of reality, the way things go” (ibid., 85). These commonsensical, and hence reasonable, citizens are practical, not “in the narrowly pragmatical sense of the useful but in the broader, folk-philosophical sense of sagacity”: the sense in which “[t]o tell someone, ‘be sensible’, is less to tell him to cling to the utilitarian than to tell him, as we say, to wise up: to be prudent, levelheaded, keep his eye on the ball, not buy any wooden nickels, stay away from slow horses and fast women, let the dead bury the dead” (ibid., 87). They perceive things at face value, “as being precisely what they seem to be,” that is, as being “what the wide-awake, uncomplicated person takes [them] to be” (ibid., 89). They like sobriety and realism and despise subtlety and imagination; they think it wise not to go beyond “the obviousness of the obvious,” and to instead accept that “[t]ruth is as plain, as the Dutch proverb has it, as a pikestaff over water” (ibid.). Reasonable people embrace the kind of unsystematic, ad hoc wisdom that “comes in epigrams, proverbs, *obiter dicta*, jokes, anecdotes, *contes morales*,” and the wisdom so encapsulated they enjoy just because of its inconsistency: “‘Look before you leap’, but ‘He who hesitates is lost’; ‘A stitch in time saves nine’, but ‘Seize the day’” (ibid., 90). Finally, reasonable people are confident “that any person

with faculties reasonably intact can grasp common-sense conclusions, and indeed, once they are unequivocally enough stated, will not only grasp but embrace them” (ibid., 91).

Being endowed with these virtues, reasonable people bow to the authority of common sense, which they take to be the source of all our most obvious and most unassailable certitudes. They defer to common sense upholding “its tenets [as] immediate deliverances of experience,” and its truths they understand as “comprising one large realm of the given and undeniable, a catalog of in-the-grain-of-nature realities so peremptory as to force themselves upon any mind sufficiently unclouded to receive them” (ibid., 75). No wonder they are prone to endorse all sorts of “plain truths,” including those “now widely accepted, or available.” Common sense wants reasonable people to be down-to-earth and anti-intellectualistic; it wants them to nourish a puritan contempt for both expert knowledge and pure, disinterested speculation; and, most importantly, in Cardinal Newman’s words, it wants them to abide by “the prejudice which exists against logic in the popular mind, and [. . .] the animadversions which are levelled against it, as that its formulas make a pedant and *doctinaire*, that it never converts, that it leads to rationalism, that Englishmen are too practical to be logical, that an ounce of common-sense goes further than many cartloads of logic, that Laputa is the land of logicians, and the like” (Newman 2005, 1355–56).

Such maxims, cast in the sententious style distinctive to common sense, express the common sense awareness of the multifariousness of reasoning as opposed to the uniform canons of logic. Such maxims “mean, when analyzed, that the processes of reasoning which legitimately lead to assent, to action, to certitude, are in fact too multiform, subtle, omnigenous, too implicit, to allow of being measured by rule” (ibid., 1356). An illustration of this is the story of “the Judge who, when asked for his advice by a friend, on his being called to important duties which were new to him, bade him always lay down the law boldly, but never give his reasons, for his decision was likely to be right, but his reasons sure to be unsatisfactory” (ibid.). Good advice—and ever more so an illustration of how much common sense recommends itself as a guide to *public* standards of reasoning.⁵

⁵ If you suspect that Cardinal Newman’s judge is just an eccentric character out of a quaint Victorian story, you might want to refer to Wright 2006. Commenting on some courts’ tendency to “speak of intuition [. . .] as valid, even if [. . .] the intuition does not justify itself in any publicly accessible fashion,” and on the fact that “[c]ourts often vaguely link or even identify judicial intuition with the similarly humble idea of ‘common sense,’” Wright mentions *United States v. Reyes*, 87 F.3d 676, 681 n. 7 (5th Cir. 1996), finding “that ‘our judicial intuition—or common sense—tells us that the result is foreordained’ ” and “that ‘[o]ften in such situations it is preferable to simply announce the conclusion, rather than to attempt to explicate its doctrinal basis’ [. . .] This,” he comments, “raises the issue of the cost and benefits of reason-giving or explanation in the law, which in turn affects the proper scope of more or less unexplainable judicial intuitions” (ibid., 1386).

4 Good, Solid Science

Besides the axioms and arguments of common sense, reasonable people have to rely, in offering public justifications, on the procedures and conclusions of science, provided (as Rawls says) that these are well established and not controversial. This, indeed, is a highly reasonable requirement, since relying on scientific methods and results which are not well established and controversial could shake the confidence that reasonable persons have in those features of science that are best suited to their being citizens of a well-ordered society—and, in particular, to they themselves being standards of objectivity.⁶ In fact, science can provide for all the “widely recognized” (Rawls 1996, 110) elements of objectivity to a greater extent than any other human enterprise. With the universally acknowledged power of its methods, science “establish[es] a public framework of thought sufficient for the concept of judgment to apply and for conclusions to be reached on the basis of reasons and evidence after discussion and due reflection”; it specifies criteria of correct (i.e., true or reasonable) judgment and “an order of reasons as given by its principles and criteria”; it “distinguish[es] the objective point of view [...] from the point of view of any particular agent [...] or [...] group of agents” (ibid.); it “has an account of agreement in judgment among reasonable agents” (ibid., 112); and it is “able to explain the failure of our judgments to converge by such things as the burdens of judgment” (ibid., 121).

As reasonable people strongly believe that science does establish such an objective “framework of thought, reasoning, and judgment” (ibid., 112), they do not doubt for a moment that scientists make judgments and draw inferences “on the basis of mutually recognized criteria and evidence” and “reach agreement by the free exercise of [their] powers of judgment” rather than “by mere rhetoric and persuasion” (ibid., 111)⁷; nor do they doubt that scientists’ claims to correctness are “supported by the preponderance of reasons as given by an appropriate procedure” (ibid., 115), or that scientists are guided by objective reasons that they “distinguish from the reasons they have from their own point of view” (ibid.). Reasonable people “never suppose that [the scientists’] thinking something is [true] [...] makes it so”

⁶ See Rawls 1996, 119: “Political convictions [...] are objective [...] if reasonable and rational persons, who are sufficiently intelligent and conscientious in exercising their powers of practical reason, and whose reasoning exhibits none of the familiar defects of reasoning, would eventually endorse those convictions, or significantly narrow their differences about them, provided that these persons know the relevant facts and have sufficiently surveyed the grounds that bear on the matter under conditions favorable to due reflection [...] To say that a political conviction is objective is to say that there are reasons [...] sufficient to convince all reasonable persons that it is reasonable”.

⁷ Like rationalists in general, Rawls feels uncomfortable about rhetoric and persuasion which he see as the exact opposite of sound (i.e., rule-governed) reasoning. As he writes, “all ways of reasoning [...] must acknowledge certain common elements: the concept of judgment, principles of inference, and rules of evidence, and much else, otherwise they would not be ways of reasoning but perhaps rhetoric or means of persuasion” (ibid., 220). Onrhetoric and persuasion see note 10 below and corresponding text. For a more balanced view and a rehabilitation of rhetoric see Toulmin, 2001. Toulmin’s book is an immensely valuable contribution to the understanding of reasonableness.

(*ibid.*, 111), or that scientists do not possess principles and methods which, when correctly applied, allow them “on the same (true) information [to] reach the same (or similar) conclusion” (*ibid.*). And they whole-heartedly believe that scientists, having firm standards and definite procedures, fail to converge only insofar as their “disagreement is consistent with objectivity, as the burdens of judgment allow” (*ibid.*, 121). As champions of science, reasonable people consider outrageous, even absurd, the idea that a closer look may reveal that no scientific result can ever be said to be so “well established and not controversial” that it cannot run into serious objections, or that does not clash with other “well established and not controversial” results; that subjective elements affect the very foundation of scientific research (many kinds of “facts,” for example, cannot be detected without the assistance of some idiosyncratic, though rarely transparent, point of view); that there are no settled and generally agreed-upon criteria either of method or of fact, but these criteria vary widely with the subject of research (those of physics are not those of political science)⁸ and are affected by the circumstances in which they arise⁹; that skilled rhetoric, effective persuasion, and clever propaganda (including the appeal to “shared” and “objective” criteria) are much more relevant to science than philosophers like Rawls have ever imagined, and they are effective as well in building consensus¹⁰; that scientists adhere to any sort of idea for any sort of reason including (though not primarily) its being “supported by the preponderance of reasons.” Who among reasonable people would lend credence to the story that scientists hold hypotheses for no other reason than that they bring a theory into agreement with the facts¹¹, or that scientists retain hypotheses in the face of contrary evidence and incorrect predictions, or that they maintain hypotheses which are at variance with theoretical and experimental results that are “well established and not controversial”?¹² No reasonable person believes this. Nor maneuvering they believe that a scientist’s objective reasons are often so little objective as to be undistinguishable “from the reasons they have from their own point of view,” their “objectivity” resulting more from shrewd than from an objective “order of reasons”¹³; or that what is true in science is often simply what

⁸ As Berlin has often emphasized: see, for example, Berlin 1996, 50–51.

⁹ As Toulmin (2001, 99) puts it, such methods and criteria are “OK in their own way.”

¹⁰ Feyerabend (1978, 157) has made this point as eloquently as anyone ever has: “Propaganda of this kind,” Feyerabend writes, “is not a marginal affair that may or may not be added to allegedly more substantial means of defence, and that should perhaps be avoided by the ‘professional honest scientist.’ In the circumstances we are considering now [i.e., Galileo’s struggle in favour of Copernicus], *propaganda is of the essence*. It is of the essence because interest must be created at a time when the usual methodological prescriptions have no point of attack; and because this interest must be maintained, perhaps for centuries, until ‘new reasons arrive.’” Those who feel uncomfortable with Feyerabend can refer to Pera and Shea, eds. 1991.

¹¹ While ad hoc hypotheses of this sort abound in science, from Galileo and Newton to elementary particle physicists, they are the stuff of deep disagreement among philosophers: Popper condemns them, Lakatos praises them. Scientists simply introduce, elaborate on, and *use* them. For a discussion and examples see Lakatos 1978.

¹² For a discussion and examples see Feyerabend 1978, 59–62.

¹³ “Even experimental ‘facts’ turned out to depend on compromises between different groups with different experiences, different philosophies, different financial backing, and different bits of high theory” (Feyerabend 1999, 132).

scientists think to be so; or that agreement among scientists, far from coming about “by the free exercise of [their] powers of judgment” results from disparate factors, inclusive of propaganda, political interference, institutional influence, authoritarian pressure, lobbying, case-by-case negotiations,¹⁴ mere orthodoxy, and the backroom deals of “the mysterious anonymous class of referees”.¹⁵ Nor, finally, will reasonable people ever come to believe that “true” information often comes by highly specific, idiosyncratic, ad hoc processes leading to different, often conflicting conclusions¹⁶; or that, as the most crucial scientific debates show, there is more to scientists’ disagreement than “the burdens of judgment allow” (for example, fundamental disagreement among comprehensive views of the kind Rawls would like reasonable people to give up in the public sphere). All this talk about science is so plainly senseless that it will never induce reasonable people to realize that their good, solid science may turn out to be so disreputable.

5 Conclusion

Reasonable people cease to be fallibilist where common-sense views and science’s most well-established claims come into play, at which point they take up all the plain wisdom of the plain man: a combination of “mere matter-of-fact apprehension of reality” (Geertz 1983, 75); straightforward reliance on “the sheer actualities of experience” (ibid., 76); a preference for simple immediate facts and self-evident claims; a disregard for logic and an endorsement of popular views, habitual judgments, accepted beliefs, received ideas, and “widely shared” mistakes. At the same time, reasonable people are expected to have a distorting intellectual creed requiring them to believe in science’s universal applicability, strict objectivity, ideological purity, uncontroversial tenets, single method, all-embracing principles, indisputable facts, and other pious frauds, and also to accept as “well established and not controversial” anything falling under the rubric of “science” and “scientific.”¹⁷

¹⁴ See note 13 above.

¹⁵ Hoyle (1982), quoted in Feyerabend (1999, 149). Despite overwhelming evidence to this effect, philosophers remain unflaggingly attached to science as a model of rational agreement. Thus, for example, Rawls asks: “Why does not our conscientious attempt to reason with one another lead to reasonable agreement?” And he comments: “It seems to do so in natural science, at least in the long run” (Rawls 1996, 55). Maffettone elaborates on this point: “The burdens of judgments,” he says, “explain why reasonable disagreement persists, contrary to what takes place, on occasion, in the field of scientific research” (Maffettone 2004, 561). It may just be the case, however, that reasonable agreement of the Rawls-Maffettone type takes place in science, whether “in the long run” or “on occasion,” whenever science eases into a period of *stagnation*, through a combination of dogmatic sleep and a dearth of new fundamental ideas.

¹⁶ Notice that this is quite different from Rawls’s obvious contention that our experience is inevitably subjective and differs from person to person: idiosyncratic processes of the kind just referred to are *essential* in gaining information and do *not* pose a hindrance to “the way we assess evidence.”

¹⁷ A wicked effect of this creed is that even the most liberal and most tolerant attitude will cease to be so once it reaches the portal of science. A striking example is found in MacPherson and

But common sense is deceptive¹⁸ and science contains many things that reasonable people would find contemptible. So we are left with the following alternative: we can be reasonable in the way Rawls (and other sober writers) would have us be, thereby championing an unenlightened conformism deferential to the judgments of authority¹⁹; or we can follow open-minded, imaginative researchers in defending the most trite views or the most outlandish speculations, as the case may be, working out

Kelly (2001), who on the one hand take a remarkable inclusive view of the public forum—by arguing, against Rawls, that even the unreasonable among us should have a part in public reasoning—but at the same time they concede that “[r]estricting toleration [...] will sometimes be required when persons would make demands on public resources in order to promote unreasonable doctrines. *Creationists, for instance, cannot make a legitimate claim on public schools for time and materials to balance their teachings against the teaching of evolution in science classes*” (ibid., 45, italics added). Why not? Because of the overriding authority of science in liberal-democratic societies where, as Feyerabend wrote over thirty years ago (though the observation still applies today) “only those citizens count who were subjected to the pressures of scientific institutions (they have undergone a long process of education), who succumbed to these pressures (they have passed their examinations), and who are now firmly convinced of the truth of the fairy-tale” (Feyerabend 1978, 303–04). This “fairy-tale” is the reasonable person’s intellectual creed described in the text.

¹⁸ Take, for example, common-sense ideas “of ‘the normal and natural’ ” (Geertz 1983, 81). Common lawyers have bravely shown how discriminatory is the “reasonable person” standard—with its reference to an absolutely neutral character, devoid (like Rawls’ reasonable person) of gender, sex, class, race and other characteristics—when grounded in common-sense views of what is normal, and how these views are liable to fall short of a fair—“objective”—standard of reasonableness. See Moran’s (2003) very instructive book arguing that the reasonable-person standard needs to be revised. Other lawyers would like to give up it altogether: see, for example, Gordon 2007.

¹⁹ Establishment philosophers lay special emphasis on this aspect. The latitude of the reasonable, MacCormick writes: “is itself strongly persuasive in favour of establishing authorities charged with decision-making. Provided those holding authority are experienced and wise persons, and provided there is some way of controlling or checking their decisions (e.g., by appeal, or by answerability before some representative body, or the like), there seems to be no better way than this of dealing with the problem of the non-univocal character of the reasonable” (MacCormick 2005, 169). MacCormick is cryptic about the source of “those holding authority”’s authority as well as the nature of their experience and wisdom. In the absence of further details we are left to wonder about whether these charismatic persons are more like Aristotle’s men of good judgment and virtuous character, or more like Oakeshott’s men of genuine education and solid tradition (see Oakeshott 1962). However that may be, MacCormick insists on the need to restrict such enlightened authorities by “the use of proper procedures” and also of ensuring “the discursive and deliberative quality of the search for final decisions” by granting “authority [...] to a group, committee, assembly, or bench of several persons” in which case, he says, “there have to be voting procedures to make possible final decisions on finely balanced questions” (MacCormick 2005, 169). Notice that, while this undoubtedly recommends itself as a good method for deciding among different opinions, MacCormick wants it to apply only “within the range of reasonable opinions”, thus excluding opinions “so eccentric or idiosyncratic that they are not accepted as valid judgments at all” (ibid., 173). Fortunately this is not how it works when the free exercise of our powers of reason is involved. Scientists use no voting procedure (science is not democratic in that sense) but they have no presumption against any idea and are ready to submit to critical scrutiny even the most “eccentric or idiosyncratic” opinions. Moreover, they know and bear in mind that ideas “within the range of reasonable opinions” may be useless. As John Bell once said, commenting on the intellectual exchange between Einstein and Bohr, “it is a pity that Einstein’s idea does not work. The reasonable thing just does not work” (quoted in Bernstein 1991, 84).

their implications and supporting them with the most diverse and the most exquisite arguments that “a reason slave of the passions” can suggest.

References

- Berlin, I. 1996. *The Sense of Reality*. Ed. H. Hardy. New York, N.Y.: Farrar, Straus, Giroux.
- Bernstein, J. 1991. *Quantum Profiles*. Princeton, N.J.: Princeton University Press.
- Feyerabend, P.K. 1978. *Against Method. Outline of an Anarchistic Theory of Knowledge*. London: Verso.
- Feyerabend, P.K. 1999. *Conquest of Abundance. A Tale of Abstraction versus the Richness of Being*. Chicago, Il: The University of Chicago Press.
- Finnis, J. 1980. *Natural Law and Natural Rights*. Oxford: Clarendon Press.
- Geertz, C. 1983. *Local Knowledge. Further Essays in Interpretive Anthropology*. New York: Basic Books.
- Gordon, B.J. 2007. Rejecting “Reasonableness”: A New Look at Title VII’s Anti-Retaliation Provision. *American University Law Review* 56: 1469–1523.
- Hoyle, F. 1982. Steady State Cosmology. In *Cosmology and Astrophysics*. Ed. Y. Terzian and S.M. Bilson. Ithaca, N.Y.: Cornell University Press.
- Lakatos, I. 1978. *The Methodology of Scientific Research Programmes*. Ed. J. Worrall and G. Currie. Cambridge: Cambridge University Press.
- MacCormick, N. 2005. *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*. Oxford: Oxford University Press.
- MacPherson, L., and E. Kelly. 2001. On Tolerating the Unreasonable. *Journal of Political Philosophy* 9: 38–55.
- Maffettone, S. 2004. Political Liberalism: Reasonableness and Democratic Practice. *Philosophy & Social Criticism* 30: 541–77.
- Moran, M. 2003. *Rethinking the Reasonable Persons. An Egalitarian Reconstruction of the Objective Standard*. Oxford: Oxford University Press.
- Newman, J.H. (Cardinal). 2005. An Essay in Aid of A Grammar of Assent. In J.H. Newman, *Scritti filosofici*. Ed. M. Marchetto. Milan: Bompiani. (1st ed. 1870.)
- Oakeshott, M. 1962. *Rationalism in Politics and Other Essays*. London: Methuen.
- Pera, M., and W.R. Shea, eds. 1991. *Persuading Science. The Art of Scientific Rhetoric*. Canton: Science History Publications.
- Rawls, J. 1996. *Political Liberalism*. 2nd ed. New York, N.Y.: Columbia University Press.
- Raz, J. 1990. Facing Diversity: The Case of Epistemic Abstinence. *Philosophy & Public Affairs* 19: 3–46.
- Sibley, W.M. 1953. The Rational Versus the Reasonable. *The Philosophical Review* 62: 554–60.
- Smith, A. 1976. *The Theory of Moral Sentiments*. Oxford: Oxford University Press. (1st ed. 1759.)
- Toulmin, S. 2001. *Return to Reason*. Cambridge, Mass.: Harvard University Press.
- Wright, R.G. 2006. The Role of Intuition in Judicial Decisionmaking. *Houston Law Review* 42: 1381–424.

Part Ib
The Moral and Political Dimension
of Reasonableness

Reciprocity, Balancing and Proportionality: Rawls and Habermas on Moral and Political Reasonableness

Giorgio Bongiovanni and Chiara Valentini

1 Premise

Part of the legacy that John Rawls has left with us in political and moral philosophy lies in his idea of reasonableness. This is an idea that grows increasingly important as we pass from *A Theory of Justice* (Rawls 1971) to *Political Liberalism* (Rawls 1993). Specifically, it plays a decisive role when it comes to reframing the theory of justice as fairness in light of a constructivist reading of Kant's moral philosophy (Rawls 1999a, 2000); likewise, the same idea subsequently figures centrally among the elements required for a stable liberal society (Rawls 1993, 140–44), in a context marked by multiple conceptions of the good, and reasonableness in these conceptions becomes the starting point for the possibility of an overlapping consensus.

The revised theory marks a shift in the role and status of the idea of reasonableness: initially, the idea is used to model an intersubjective account of Kant's categorical imperative (Habermas 1999a, 49); subsequently, it becomes a moral capacity and a component to be fit into individual conceptions of the good. These are two different formulations of the idea: on the one hand, reasonableness is being used to frame principles of justice, where it comes directly into play in the deontological foundation of morality by establishing the primacy of the right over the good; on the other hand, reasonableness is being used to justify a political conception, by delimiting the sphere of the political and separating it from that of morality at large (or metaphysics). In the first formulation, the idea of reasonableness issues from a constructivist reading of the Kantian foundation of morality: it proceeds from a conception of the person as an autonomous moral agent and works out the implications that follow from such a conception. In the second formulation, in which the constructivist account turns exclusively political (Rawls 1993, 89ff.), reasonableness gets used to define the conditions for a stable consensus on the principles of justice. What also seems to change from the first formulation to the second is that which reasonableness is predicated of. In the first formulation, reasonableness seems to

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be about the (reflective) constraints placed on the intersubjective procedure through which a conception of justice is founded: reasonableness accordingly describes here the metaethical objectivity of such a process (it describes its outcome as an objective one). In the second formulation, by contrast, reasonableness seems to come in as a precondition: it is what citizens and moral conceptions have to be *before* they can engage in a public debate and yield an acceptable outcome.

It is Jürgen Habermas who has called attention to this dual status of reasonableness in Rawls: Habermas has questioned whether the two formulations are compatible, and has in particular pointed out the limitations of the second formulation. To be sure, Habermas does say he accepts the basic essentials of Rawls's theory—for which reason he describes the exchange between them as a “family quarrel” (Habermas 1999a, 50)—but he nonetheless sees much in this theory that is open to question. The main problem is identified in the difficulty involved in making private autonomy compatible with public autonomy (*ibid.*, 67ff.), but the criticism goes further than that and touches many parts of the theory. In pointing out these weaknesses, Habermas offers his own idea of reasonableness, an idea that fits into a different view of the way law, morality, and politics come together and relate to one another.

In this essay, we will discuss the idea of reasonableness as it emerges from this debate, considering what this entails for the domain and criteria of reasonableness and in what way it all comes to bear on legal discourse. The specific question we will take up is whether or not it is admissible to balance goods and principles, since on this question hinges the whole legal-theoretical debate on reasonableness (see Alexy 2002a; Morrone 2001). We will attempt to show on this basis that as much as Rawls may base his theory on different foundations, the idea of reasonableness put forth in his theory is grounded in a unitary package of criteria and indirectly, at least, it admits of procedures for balancing goods and principles, this in contrast to Habermas's theory, which reduces the criteria of reasonableness to the single consideration of whether moral judgments are amenable to post-metaphysical justification, and which accordingly denies the possibility of any balancing procedures. But in order to make this argument, we will have to simplify the two views down to the core: we will argue that Rawls's theory proceeds on the basic assumption under which, despite all the foundational difficulties involved in developing a moral or political conception, the conception finally worked out invokes substantially unitary spheres and criteria of reasonableness, thereby suggesting, however indirectly, that we do need to balance different goods against one another, on the basis of rules establishing priorities among such goods; Habermas, by contrast, denies such a necessity and views reasonableness as merely an attribute of post-metaphysical objectivity in practical discourse.

Of course, in the attempt to single out the unitary traits of Rawls's idea of reasonableness, we will have to reckon with the fact that this idea “is so frustratingly difficult to define,” for it stretches across a vast array of subjects, applying as it does “to persons, judgments, institutions, conceptions of justice, religious and philosophical views, social conditions such as pluralism, and forms of agreement and disagreement” (Boettcher 2004, 597). Even so, we will argue that while Rawls does rest his

idea of reasonableness on different foundations, the moral and political requisites of reasonableness he sets out revolve around a single core, in that they find their basic field of application in the effort to balance the primary goods against one another on the basis of criteria by which to evaluate such goods and give them a ranking from highest to lowest.

2 Two Foundations of Reasonableness: A Moral One and a Political One

The dual role or status of reasonableness in Rawls descends directly from his effort to remedy the shortcomings of *A Theory of Justice*. As is known, Rawls came to realize that the first statement of his theory, called justice as fairness, could not adequately solve the problem of achieving a stable political consensus given the fact of pluralism in a liberal society. This made it necessary to work out a revised theory having two foundations, one for each of the two stages through which the theory develops (Rawls 1993, 140–41): the first stage is devoted to laying out the principles of justice that might be selected as a basis on which to frame a fair and stable society; the second stage is instead devoted to laying out the conditions subject to which the principles so chosen can become the focus of a consensus. At both of these stages, the theory brings to bear the idea of reasonableness: at the first stage, this idea serves as a criterion for the objectivity of a moral foundation having no need to rely on any form of moral realism (whether naturalistic or otherwise; Rawls 1999a, 306–07), whereas at the second stage it figures as a precondition that people and conceptions have to satisfy before any political conception of justice can be accepted.

The first use of reasonableness is for a constructivist foundation of morality that proceeds on an intersubjective reading of Kant's categorical imperative and so sets morality on a procedural foundation. Constructivism, as Rawls explains it, "specifies a particular conception of the person as an element in a reasonable procedure of construction, the outcome of which determines the content of the first principles of justice." The point, then, is to set up "a certain procedure of construction which answers to certain reasonable requirements" (ibid., 304). At the core of this construction we find a conception of the person as a moral agent, which serves as a basis for modelling an idea of moral autonomy and for framing a procedure responsive to that idea. In the outcome of this procedure we will have principles of justice that we can all share, and that can make sense within a well-ordered society. The constructivist way to go about specifying the distinctive features of moral personality consists in drawing on our total "experience of morality" (Bagnoli 2007, 264) through a process designed to achieve what Rawls calls a reflective equilibrium. The starting point, in other words, is not constructed from scratch, *in vacuo*: it rather derives from our reflection on what we understand to be our common moral experience (ibid., 264–66). Rawls specifies on this basis a conception of the person as a moral agent, characterizing such an agent as having two powers and three related interests. "The first power is a capacity for an effective sense of justice, that is, the capacity

to understand, to apply and to act from (and not merely in accordance with) the principles of justice. The second moral power is the capacity to form, to revise, and rationally to pursue a conception of the good” (Rawls 1999a, 312). Now, these moral powers would be inert without any accompanying moral interests, understood as motives of moral behaviour. So we have two highest-order interests in securing and realizing the exercise of the two moral powers, plus a third, higher-order interest implicit in the first two and further qualifying them: this is an interest of moral agents “in protecting and advancing their conception of the good as best they can, whatever it may be” (ibid., 313). These three interests correspond to a concept of moral autonomy that takes a “rational” form and a “full” one. And even though Rawls’s foundation may not flow linearly, the two forms of autonomy can be said to issue directly from the powers and interests of moral persons. Rational autonomy issues from a “desire of persons to realize and to exercise their moral powers and to secure the advancement of their conception of the good” (ibid., 316); full autonomy, for its part, takes this process to a higher level by making it a public and cooperative enterprise. These two forms of autonomy are largely entailed by the conception of the person as a moral agent: the moral capacity to pursue a conception of the good yields rational autonomy, so called because efficient with respect to an end, while the moral capacity for a sense of justice (even if only formal justice is understood), coupled with an interest in furthering the good being pursued, makes it so that moral persons should view it as a necessity to cooperate (through reciprocity) and so to make the process a public one. Reciprocity and publicity are thus two related conditions that follow directly from the sense of justice characterizing moral persons, who by virtue of that very power are free and equal: reciprocity means that “all who cooperate” will accept the outcome of a procedure only on condition that everyone “must benefit, or share in common burdens, in some appropriate fashion as judged by a suitable benchmark of comparison” (ibid., 316)¹; publicity means that such cooperation must proceed from an agreement among moral persons who as such will only accept an outcome publicly recognized by all as having a moral value, a condition ensuring that the outcome is autonomous, rather than heteronomous,² and making it possible for everyone involved to pursue whatever conception of the good is consistent with the terms of the agreement itself. These two conditions ensure the full autonomy of moral persons, and in order to model this autonomy, Rawls introduces limitations constraining the process by which the parties reach an agreement: these limitations—in the form of what Rawls calls a veil of ignorance—deprive the parties of any information that would enable them to gain an unfair advantage over one another. So we have here a device by which to express the “formal conditions implicit in the moral powers of the members of a well-ordered society” (ibid., 319),

¹ Habermas (1999a, 59) argues in this regard that the idea of fair cooperation rests on that of moral person.

² This means that the parties will not take any antecedent principles as their guide in deliberation. See Rawls 1999a, 315.

and modelling in particular what Rawls calls the reasonable, which encapsulates the full meaning and realization of moral personality.³

Clearly, Rawls is advancing here a Kantian conception of autonomy, central to which is the idea of moral persons as having a capacity to bind themselves to the rules of conduct which they establish through the exercise of their practical reasoning and which everyone understands to be just. What is distinctive about this concept is the intersubjective framework within which it is developed, and what determines it is a procedure of construction framed around certain limiting conditions expressed through the original position with its veil of ignorance, understood as a device by which to embody a conception of the person as an autonomous moral agent. Thus, moral personality is essentially defined in Rawls by the conditions subject to which free and equal moral agents set up terms of fair cooperation among themselves. If moral persons are to reach an agreement expressive of their moral personality, they must proceed under “pure” procedural constraints framing conditions that make such an agreement possible. These constraints model an idea of the reasonable: they do so by defining the circumstances subject to which the parties (symmetrically situated relatively to one another) are to proceed in carrying out their deliberations toward an agreement (*ibid.*, 316). As has been observed, the reasonable conditions, deriving from the ideas of moral autonomy and of a moral person, make it so that “the role of the categorical imperative is taken over by an intersubjective applied procedure which is embodied in participation conditions such as the equality of parties and in situational features such as the veil of ignorance” (Habermas 1999a, 57). “The Reasonable,” says Rawls, “presupposes and subordinates the Rational,” in that, on the one hand, “without conceptions of the good that move members of the group, there is no point to social cooperation” and, on the other hand, the reasonable “defines the fair terms of cooperation acceptable to all” (Rawls 1999a, 317).

We have, then, a construction in which moral autonomy is modelled as both rational and reasonable, and this explains several other essential features of Rawls’s theory of justice. First, justice is set on a “pure procedural” foundation (*ibid.*, 310–11), meaning that what is just is defined by the outcome of the very procedure by which the parties seek to understand what justice requires: the principles of justice are defined by a process of deliberation admitting of no “external” point of view. Second, the agreement reached by the parties replaces the attempt to seek out “moral truth interpreted as fixed by a prior and independent order of objects and relations, whether natural or divine,” in such a way that “moral objectivity is to be understood in terms of a suitably constructed social point of view that all can accept” (*ibid.*, 306–07). Third, this agreement carries a moral force built directly into it: “The fairness of the circumstances under which agreement is reached transfers to the principles of justice agreed to” (*ibid.*, 310). Fourth, the purpose of the agreement (or its subject matter) is to establish principles on which basis to distribute so-called

³ This is typical of the constructivist procedure: as was mentioned earlier, this procedure is framed around restrictions deriving from our moral self-reflection and self-representation. See Bagnoli 2007.

primary goods, understood as what people necessarily need if they are “to realize and exercise their moral powers”—these goods therefore express the needs present in a society based on an idea of fair cooperation (*ibid.*, 314). Finally, an agreement so framed makes it possible to establish two principles of justice—the first one realizing liberty and the second one equality—and in this way a basic design is framed for a well-ordered society, well ordered precisely because it sets up a system of cooperation among people who conceive themselves as free and equal moral agents⁴. Thus, through the constraining conditions delimiting the original position, Rawls models an idea of the reasonable that sets on a normative foundation the principles (or content) by which to shape a fair system of social cooperation.⁵

The second foundation of reasonableness is offered in *Political Liberalism* and, as was mentioned earlier, it derives from this work’s construction of justice as fairness in two stages. As Rawls explains, “in the first stage [justice as fairness] it is worked out as a freestanding political [...] conception for the basic structure of society. Only with this done and its contents—its principles of justice and ideals—provisionally on hand do we take up, in the second stage, the problem whether justice as fairness is sufficiently stable” (Rawls 1993, 141). This is now being framed as a “freestanding” political conception of justice,⁶ yet the main tool in this construction, the original position, is understood as a “device of representation.” The original position is now being used to model fair conditions that we would accept not as moral agents but as citizens: “It models what we regard—here and now—as fair conditions under which the representatives of free and equal citizens are to specify the terms of social cooperation in the case of the basic structure of society; and [...] it also models what [...] we regard as acceptable restrictions on reasons available to the parties for favoring one political conception of justice over another” (*ibid.*, 25–26).⁷ What also changes with respect to justice as fairness in its original formulation is a specific recognition that the principles obtained through this procedure may turn out to be incorrect or not accepted. As Rawls puts it: “That the principles so agreed to are indeed the most reasonable ones is a *conjecture*, since it may of

⁴ In this sense, Rawls (1999a, 319) understands that the principles of justice are “lexically prior in their application in a well-ordered society to claims of the good.”

⁵ The original position acts in this sense as a connective device, serving at the same time to model the reasonable and to extract from that idea the principles for a well-ordered society understood as a form of cooperation. See Rawls 1999a, 308.

⁶ A political conception of justice is understood by Rawls (1995, 134–35) as defined by three features: “(a) it applies in the first instance to the basic structure of society [...]. This structure consists of the main political, economic, and social institutions, and how they fit together as one unified system of social cooperation. (b) It can be formulated independently of any particular comprehensive doctrine, religious, philosophical, or moral. While we suppose that it may be derived from, or supported by, or otherwise related to one or more comprehensive doctrines [...], it is not presented as dependent upon, or presupposing, any such view. (c) Its fundamental ideas [...] all belongs to the category of the political and are familiar from the public political culture of a democratic society and its tradition.”

⁷ Rawls (1995, 139) describes the parties as “situated in reasonable conditions and constrained by these conditions absolutely [...], reaching agreement about these political principles under conditions that represent those citizens as both rational and reasonable.”

course be *incorrect*. We must check it against the fixed points of our considered judgments at different levels of generality. We also must examine how well these principles can be applied to democratic institutions and what their results would be, and hence ascertain how well they fit in practice with our considered judgments on due reflection: that is, we may be led to revise our judgments” (Rawls 1995, 139; italics added).

Where does this new awareness come from? We have to simplify matters to a good extent here, but it can be said to have its root in two sources. The first one has to do with the constructivist procedure of the original position: for Rawls, “at the first stage, justice as fairness abstracts from the knowledge of citizens’ determinate conceptions of the good and proceeds from shared political conceptions of society and person that are required in applying the ideals and principles of practical reason” (Rawls 1993, 141–42). This reference to practical reason brings out an important aspect of the construction, which is to say that the original position is built proceeding from a self-representation rooted in our moral experience, and this means that the position itself and the principles issuing from it must be such that they “find support in our common experience” (Bagnoli 2007, 266). As Habermas (1999a, 61) has observed, this should prompt us to inquire whether “the central concept of the person on which the theory ultimately rests” is “sufficiently neutral to be acceptable from the interpretive perspectives of different worldviews.” The second reason why Rawls now views it as only a conjecture that the principles selected in the original position are the most reasonable choice has to do instead with what Rawls calls the “burdens of judgment,” which he brings into play to explain the fact of reasonable pluralism. The burdens of judgment, in other words, are “sources of reasonable disagreement,” accounting for “the many hazards involved in the correct (and conscientious) exercise of our powers of reason and judgment in the ordinary course of political life” (Rawls 1993, 55–56)—and a willingness to appreciate the difficulties involved in the public use of reason, and to accept the consequences this entails for such a use of reason, therefore accounts in part for what it means to be reasonable according to a political conception of justice. Indeed, these difficulties affect not only the use of “theoretical” reason but also, and more importantly, the use of practical reason: they affect us in our practical and moral capacities as rational and reasonable agents. As examples of such burdens, Rawls mentions the difficulties involved in arriving at “an overall assessment” of an issue because “there are normative considerations of different force on both sides” of the issue, or because we are “forced to select among cherished values,” or again because we have to figure out priorities and make adjustments among different values, restricting each based on what the others require (*ibid.*, 57).

Both of these considerations tie in with the fact of a pluralist society: the plural comprehensive conceptions in it are sources of reasonable disagreement (whence the need to keep them out of the original position) and so are the burdens of judgment (recognizing which is part of what makes us reasonable). This brings up the problem of how—given such a society, one whose pluralism is very real and concrete—we might come to accept the outcome of a construction framed, by contrast, on the basis of an abstraction, an ideal rendering of our common experience

as autonomous moral agents. Rawls argues that the way to go about securing such an acceptance is to look for a common ground, a core set of ideas that everyone may come to accept regardless of whatever other values they may cherish and whatever deep conceptions of the good they may be committed to. This can be achieved by distinguishing the political from the metaphysical: the metaphysical pertains to the conceptions of the good that citizens espouse in a pluralist society, and it includes an account of truth in moral judgment; the political, by contrast, marks out a sphere in which such conceptions are neither challenged nor upheld, and in which no attempt is made to formulate true moral judgments. This narrower sphere delimits the problem of justice, considering which we instead concern ourselves exclusively with the institutional framework of society understood as a basis of coexistence: the principles worked out within this sphere are moral principles only insofar as they address the problem of what a fair society should look like, which means that they do not cover the whole of morality, for otherwise they would have to pick up content that would turn them into comprehensive conceptions of the highest good. The strategy, therefore, is to confine justice within the bounds of the political, and this envelopment (by separation from the metaphysical) makes possible what Rawls calls an “overlapping consensus”: the political conception can then function as a “module” that can fit into the different metaphysical conceptions of the good, thus enabling people holding these conceptions to endorse principles framed for a fair and well-ordered society. In short, we have here a strategy that consists delimiting the domain of the political in such a way that it does not spill over into the metaphysical, where a variety of conceptions exist that cannot be made to cohere. This way, by building on a common fund of ideas not rooted in any of the deep conceptions of the good, principles can be worked out that may become a focus of agreement on the part of all these conceptions, precisely because such an endorsement does not require accepting deep propositions about moral truth (such as only some, though certainly not all, conceptions of the good could possibly subscribe to).

The method involved in working out such principles based on our common moral and political experience is that of reflective equilibrium, which in this process plays a twofold role: on the one hand, it serves to build moral content into the original position and, on the other hand, it serves to evaluate the principles deriving from that construction. In this second role, the method can be used to settle the question of whether the principles of justice are acceptable and can become the focus of an overlapping consensus.⁸ Equilibrium is achieved once the intuitions used in constructing the original position “can no longer” be rejected “with good reasons” by the members of a given society. In this process, “the concept of justice *worked out* on this basis must nonetheless be examined once again as to whether it can expect to meet with acceptance in a pluralistic society” (Habermas 1999a, 60–61). It is a process that unfolds as “the veil of ignorance is gradually raised during the

⁸ Habermas (1999a, 59–61) accordingly argues in this regard that two different criteria guide the process toward a reflective equilibrium; that is, there is involved not only a test of “consistency” but also one of “acceptability.”

successive steps of framing the constitution, of legislation, and of applying law” (ibid., 58). In the course of all this activity, we witness a progressive justification and validation of the principles of justice that ultimately leads to an overlapping consensus, at which point we will have a shared political conception backed by a full justification. Rawls envisions three stages toward reflective equilibrium, and hence three stages toward an overlapping consensus: at the first stage (pro tanto justification), the political conception is assessed on its own merits without taking into account the fuller conceptions of the good through which it may be filtered, the idea being to see whether a freestanding political conception is really “complete” enough to stand on its own;⁹ at the second stage, the focus shifts instead to the citizens, who will each fit a number of alternative conceptions of justice into their “own comprehensive doctrine” of the good, this to see which of those political conceptions makes the best fit within the enclosing worldview, and so which of them receives the strongest justification¹⁰; there is finally the stage that Rawls calls a “wide” reflective equilibrium, where we all take up the other’s point of view, and together we all try to hammer out a conception of justice that everyone can fit into their own comprehensive doctrine, the idea being, in this case, to see whether that single conception can receive public and mutual support. It is at this third, public stage that we get an overlapping consensus (Rawls 1995, 143–44).

But this procedure can not be carried through unless its different participants, and the conceptions of the good they carry along with them, are reasonable—which means that these people are committed to the single conception of justice they worked out together, and will therefore consider it as having an overriding force should it come into conflict with their individual conceptions of the good.¹¹ At this point we have a functional overlapping consensus, which unfolds in the open space of public reason. This is a forum framed by an agreement on basic principles and guidelines on which basis we proceed to thrash out “questions of fundamental political justice.” These divide into “constitutional essentials” and “matters of basic justice,” the former concerning the question of “what political rights and liberties [. . .] may reasonably be included in a written constitution,” and the latter concerning “the basic structure of society, and so [. . .] questions of basic economic and social

⁹ For Rawls (1995, 142–43), a “political conception [. . .] is complete” when “the political values specified by it can be suitably ordered, or balanced, so that those values alone give a reasonable answer by public reason to all, or nearly all, questions concerning constitutional essentials and basic justice.”

¹⁰ Habermas (1999b, 89–90) considers this second passage as “similar to the Golden Rule: it filters out anything that does not appear *from my viewpoint* to qualify for equal acceptance by all reasonable persons. Precisely those principles [. . .] which [. . .] are in the equal interest of everybody *given my understanding of the political sphere*.”

¹¹ As Habermas (1999b, 91) observes, the types of conflicts (or disagreement) that may emerge are actually three: “those concerning (a) the definition of the domain of the political matters, (b) the ranking and reasonable balancing of political values, and finally and most importantly (c) the priority of political over nonpolitical values”.

justice and other things not covered by a constitution.”¹² Public reason might be described in this sense as the reasonable *in action*, as it were, since it embodies “the underlying ideas of citizens as free and equal persons and of society as a fair system of cooperation over time,” and it comes alive when people so conceived undertake to figure out how “these ideas can be interpreted” and “how to [. . .] order, or balance, political principles and values.” The reason for such balancing is that the open space of public reason is framed by “a family of political conceptions of justice, and not by a single one,” that is, “a family of reasonable political conceptions” (Rawls 1999b, 581–82).

Now, what are the features of the reasonable that account for public reason and make it possible? There are three features in particular, which can be described as attributes of citizens, of conceptions of the good, and of political conceptions respectively. Let us consider each of these three cases in turn. Where citizens are concerned, “reasonableness consists in the willingness to propose and honour fair terms of cooperation, to treat others as free and equal citizens capable of and interested in exercising the moral powers, and to recognize the burdens of judgment.”¹³ We can appreciate from this description that reasonableness is a threefold “virtue or disposition” of citizens, and it can be amplified as follows. (a) “The first feature of this disposition is the willingness to propose and honour fair terms of cooperation”: this means that “a reasonable citizen is willing to propose terms that she believes others could accept, and to abide by those terms, provided that others are willing to do so as well.” For this reason “fair terms of cooperation minimally involve relations between citizens that are more than mutual advantage but less than altruistic promotion of the general good.” As has been pointed out, these fair terms of cooperation “correspond to an idea of reciprocity: all persons involved are ‘to benefit in an appropriate way as assessed by suitable benchmark of comparison.’”¹⁴ (b) Second, “reasonable citizens propose principles, laws and institutions that are consistent with a consideration of others as free and equal [. . .] on the basis of their having the capacity for the two moral powers, at least to a minimal degree.” (c) And third, there is a “willingness to recognize and accept the consequences of what Rawls calls the burdens of judgment.” In sum, “the terms of social cooperation must be fair as judged by a suitable benchmark of comparison,” in keeping with the basic idea that “citizens must be treated as free and equal” (Boettcher 2004, 604–07).

¹² For Rawls (1999b, 575), questions of basic justice refer “only to discussions of those questions in [. . .] the public political forum.”

¹³ That is how Boettcher (2004, 606) paraphrases this statement by Rawls (1995, 134): “When attributed to persons, the two basic elements of the reasonable are, first, a willingness to propose fair terms of social cooperation that others as free and equal may endorse, and to act on these terms, provided others do, even contrary to one’s own interest; and, second, a recognition of the burdens of judgment and accepting their consequences for one’s attitude (including toleration) toward other comprehensive doctrines.”

¹⁴ Boettcher (2004, 604): “This benchmark must based on a moral standard [. . .] which treats persons with equal concern and respect.”

The same three criteria apply as well to comprehensive doctrines and to political conceptions. Where comprehensive doctrines are concerned, this means that they must include a “principle of toleration”: “Reasonable doctrines are comprised of beliefs not inconsistent with the ongoing willingness to accept a fair distribution of social benefits and burdens, to regard others as free and equal, and to recognize the burdens of judgment” (ibid., 607–08).

Finally, we have what Rawls calls a “family of reasonable political conceptions.” A conception in this family “must satisfy three criteria. It must (1) include a list of basic rights, liberties, and opportunities, (2) prioritize these rights, liberties, and opportunities over concerns for the general good and perfectionist values, and (3) provide ‘measures ensuring for all citizens adequate all-purpose means to make effective use of their freedom’.” Rawls specifies here a “criterion of reciprocity as the ‘limiting feature’ of this family, suggesting that reasonable political conceptions justify constitutions that meet this criterion.” This means that “the balance of political values that our nonpolitical beliefs support must not only be reasonable. This balance must also be ‘one that can be seen to be reasonable by other citizens’” (ibid., 609–11).

3 The Judgment of Reasonableness According to Rawls: Aims and Criteria

3.1 Reasonableness as Reciprocity and as Proportionality

The idea of reasonableness in Rawls lies in the domain of practical reason and is aimed at outlining a “perspective from which moral norms and principles can be judged in an impartial manner.” The way to go about making this judgment of impartiality about norms and principles is to proceed under conditions imposing “suitable constraints on the rational choice of participants” (Habermas 1999b, 81). As the idea of a contract under specially framed constraints makes clear, this is part of Rawls’s intersubjective reading of Kantian autonomy, and we have in the agreement (in the parties’ consent) a procedural criterion for deciding when a norm or principle is impartial; in other words, we can tell that an outcome (a principle) is impartial if it is agreed to under procedural conditions preventing the parties from making partial judgments. And the tool for modelling such procedural conditions is the idea of the reasonable: this is the idea in light of which to understand what conditions can guarantee an impartial outcome. We do this by setting up the procedure as a limitation on the parties’ rational autonomy: it is through this limitation that we can model the reasonable; the reasonable, in other words, is seen in this procedural framework as a guideline narrowing down our range of possibilities whenever we find ourselves moving about in a social or public context. By establishing such a procedural guideline, we give the reasonable a unitary structure consisting in its unique function, which is to make possible a consensus constructed as the outcome of an impartial procedure.

That, in summary, is the account of the reasonable put forward by Rawls in *A Theory of Justice* and in *Kantian Constructivism in Moral Theory*. The difference in comparison to *Political Liberalism* lies in the different method of construction (with its accompanying conception) and in the greater extension of the reasonable. In the first account, the reasonable is constructed through a reflective equilibrium whose main ingredient is a conception of the person understood as an autonomous moral agent¹⁵: the aim, therefore, is to set out a foundation for morality; in the second account, by contrast, the discussion is all about exploring the possibility of social cooperation, which is envisioned as happening by way of a political agreement, and the focus accordingly shifts to the use of public reason, which now serves as a basic vehicle toward that possibility. In the former case, we are looking to frame an impartial procedure, and we do that by bringing into the procedure what we understand to be the essential capacities and interests of moral persons; in the latter case, where our main interest is instead the possibility of social cooperation, we consider what the least demanding requisites are for such cooperation to succeed, and we condense them in the idea of public reason: at the core of this idea we find a conception of reasonableness, which serves as the basic tool of social cooperation, enabling such cooperation by way of what Rawls calls the idea of reciprocity. Reasonableness-as-reciprocity thus becomes the minimum requisite for enabling cooperation in pluralistic societies. In this role, reasonableness (nested into which is an idea of reciprocity) ceases to act as a moral foundation of justice and serves instead as the basic criterion of public reason, a criterion understood both as a tool of social cooperation and as a political value having its own inherent worth.

This change is clear when Rawls (1999b, 614) compares his two formulations of public reason: “In the first, public reason is given by a comprehensive liberal doctrine, while in the second, public reason is a *way of reasoning* about political values shared by free and equal citizens.” Hence public reason, formerly a component in a moral doctrine, now takes on the guise of a constraining argumentation and decision-making scheme whose basic criterion is a conception of reasonableness as reciprocity, which means that reasonableness now serves as a limitation on argumentation, limiting in light of the idea of reciprocity the range of substantive views that can be brought to the table in the process of argumentation. Let us break this down as follows: we have the idea of reciprocity understood as the minimum *enabling* condition of social cooperation; and around this idea we build a conception of reasonableness, serving in its own turn as a *limiting* condition selecting the kinds of arguments (the conceptions of the good and of justice) that individuals can conceivably offer for consideration in the attempt to reach a consensus, one which

¹⁵ As Rawls (1999c, 42–45) himself emphasizes, a theory of justice is built by drawing on the main moral conceptions available: these provide the raw material that we bring in at the top end of a reflective equilibrium. Which also suggests that equilibrium, as a rational device by which to align “principles and judgments” on due reflection, also acts to filter out those basic moral conceptions in history that prove inadequate with respect to the aims of justice, thus serving in this dual role: not only as a constraint on rationality, but also as a condenser of such moral conceptions as are available to us from history.

is qualified (or constrained at source) and which for this reason can back with the force of legitimacy the decisions that will be made (*ibid.*, 578).

This whole scheme can be considered through the lens of argumentation, and reasonableness can be understood from this perspective as a criterion of proportionality by which to gauge the values brought into the discussion. This argumentative perspective is lined out in *The Idea of Public Reason Revisited* (Rawls 1999b). Here public reason is presented as an argumentative practice framed around the nested idea of reciprocity, which serves as a criterion by which to assess comprehensive doctrines and political conceptions (to see if they pass the test of reasonableness) as well as to assess the kinds of arguments that can be used in argumentation, as well as the solutions worked out through those arguments. As Rawls (*ibid.*, 574–75, 581) puts it, “when fundamental political questions are at stake [...] the family of reasonable conceptions of political justice” must “satisfy the criterion of reciprocity,” which thereby serves as “the limiting feature of these forms.”¹⁶ Again: “When political liberalism speaks of a reasonable overlapping consensus of comprehensive doctrines, it means that all of these doctrines, both religious and nonreligious, support a political conception of justice underwriting a constitutional democratic society whose principles, ideals, and standards satisfy the criterion of reciprocity.”¹⁷ As we discussed earlier, this criterion can also be formulated as a requirement to pretend from “others what I would regard as acceptable behaviour according to my *moral convictions* if I were in their situation” (Alexy 1989, 75): we are being asked, in other words, to evaluate a situation by “changing roles” with our partner in discussion and to accept the consequences that a decision from that role would entail.¹⁸ Rawls supports the argumentative idea of reciprocity by pointing out that it helps us clarify the political idea of equal citizenship, this being the idea that citizens are equal insofar as they can exercise their two moral powers to a minimum degree. It all fits together: reciprocity strongly suggests “a consideration of others as free and equal,” thereby suggesting that “*citizens* must be treated as free [and] equal” (Boettcher 2004, 604, 607), which is the basic understanding of citizenship on which fair cooperation is founded.

Let us consider now how the idea of reciprocity ties in with that of reasonableness as proportionality. Here, too, the point is to see what claims and arguments can reasonably be put forward in the course of argumentation and decision-making, especially in regard to “constitutional essentials and matters of basic justice.” The forum in which this activity unfolds is that of public reason, which serves to evaluate “what kinds of reasons [citizens] may reasonably give one another when fundamental political questions are at stake” (Rawls 1999b, 577, 574). We work, therefore, from the basic assumption that “public justification is not simply valid reasoning,

¹⁶ As was just mentioned, the idea of reasonableness applies across the board, describing not only political conceptions but also conceptions of the good. Rawls (1999b, 592), speaks of “reasonable comprehensive doctrines that support society’s reasonable political conceptions.”

¹⁷ Conversely, comprehensive doctrines are *not* reasonable if “their principles and ideals do not satisfy the criterion of reciprocity” (Rawls 1999b, 608–09).

¹⁸ See, in this regard, Alexy (1989, 69–79) with reference to Hare’s principle of prescriptivity.

but argument addressed to others: it proceeds correctly from premises we accept and think others could reasonably accept to conclusions we think they could also reasonably accept” (ibid., 594). And that really clinches the point about the kinds of arguments that can be introduced under “the criterion of reciprocity”: we can only introduce arguments and reasons that “citizens must *reasonably* think that others might *reasonably* accept” (Boettcher 2004, 612). This applies as well to the interpretation of political values such as “liberty, equality, and opportunity”: we are called on to balance these values against one another and work out their meaning, and the appropriate place for this is the public forum, where we “seek claims and arguments that are both reasonable and capable of being widely appreciated as reasonable” (ibid., 612). This can be achieved only on the condition that we “combine valid reasoning [...] and the most accurate survey of the facts and circumstances relevant to the case at hand” (ibid., 614). But there is also a discursive and relational element involved, whereby “a citizen provides what, from her own perspective, is the *most* reasonable claim or argument and what, from the perspective of an addressee, may be considered *at least* reasonable” (ibid., 615). In other words, we are involved here in the activity of assessing political conceptions by balancing the political values they take as their basic constituents (for Rawls, 1993, 241, a conception of justice entails “some combination and balance of political values”), and it is the criterion of reciprocity that we rely on to work out this balance in the public forum, where we engage one another in proposing fair terms of cooperation: “The criterion of reciprocity requires that when those terms are proposed as the *most* reasonable terms of fair cooperation, those proposing them must also think it *at least* reasonable for others to accept them, as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position” (Rawls 1999b, 578, italics added). For Rawls, when we are faced with “different combinations of values, or the same values weighed differently” and “disagreement occurs in balancing values”, “what public reason asks is that citizens be able to explain their vote to one another in terms of a reasonable balance of political values”: Indeed, “the balance of political values a citizen holds must be reasonable, and one that can be seen to be reasonable by other citizens.”¹⁹ As Rawls observes with respect to the issue of abortion and the doctrines that can be brought to bear in such a discussion: “the only comprehensive doctrines that run afoul of public reason are those that cannot support a reasonable balance of political values” (Rawls 1993, 240–43). So, then, claims and arguments can be judged reasonable in this sense only on the condition that they appropriately balance goods and values: we are working out together a way to place goods and values on a scale that ranks them from *most* to *least* reasonable, which involves an effort to achieve a kind of proportionality between such goods and values, a proportionality sought by working from the perspective of what can be presented as reasonable to others, and in doing so we are guided by the idea of

¹⁹ Rawls (1993, 244) notes that, “we want a political conception of justice to be complete: its political values should admit of a balance giving a reasonable answer for all or nearly all fundamental questions.”

reciprocity among equals. Here too, then, reciprocity figures centrally, for it serves as the theoretical foundation on which to balance goods and values and make them proportional to one another.

3.2 Reasonableness and the Basic Liberties

3.2.1 The Priority and Foundation of the Basic Liberties

The idea of the reasonable becomes all-important in *Political Liberalism*, in which Rawls undertakes to shift onto a *political* basis the theory he had earlier developed disregarding the distinction between the domain of the political and the wider domain of morality at large. In consequence of this distinction, the idea of the reasonable comes to play a bigger and more central role, not only in providing a foundation for the basic liberties but also in showing how they apply. Let us turn first, in this section, to the question of their foundation.

In the initial account offered in *A Theory of Justice*, the basic liberties were set on a foundation that fell short in one important respect as discussed by H. L. A. Hart (1973, 534–35). That is to say, the theory failed to convincingly explain why the parties to the agreement (the parties in the original position) should choose the basic liberties as primary goods and should agree to make these liberties prior to all other goods.

To fill this gap, Rawls proceeded in the first place by rephrasing his first principle of justice, describing the whole system of the basic liberties no longer as “the most extensive total system,” but as “a fully adequate scheme” (Rawls 1993, 291).

Two closely bound-up ideas can be found at the core of such a revision: the first of these is the idea of a list of basic liberties understood as having priority over all other sorts of goods, and the second idea is that the liberties in this list are tied by a relation of mutual adjustment, making it possible to work out between them an equilibrium and to fit them into a “fully adequate scheme,” as the revised formulation reads.

The full list comprises “freedom of thought and liberty of conscience, the political liberties and freedom of association, as well as the freedoms specified by the liberty and integrity of the person; and finally, the rights and liberties covered by the rule of law” (ibid., 290). These liberties are now understood as forming a “family,” and it is this family which is now given priority, rather than liberty as such or any single liberty in the list.

The foundation on which Rawls rests this priority is a liberal conception of the person: “The basic liberties and the grounds for their priority can be founded on the conception of citizens as free and equal persons in conjunction with an improved account of primary goods” (Rawls 1982, 4).

Rawls uses this conception to establish a connection between the basic liberties (with their priority as a family) and the fair terms of cooperation among equals. In other words, the basic liberties are made to fit into the conception setting out fair terms of cooperation among equal persons, and the problem of justifying the priority of the basic liberties can therefore be recast as the problem of setting out

the reasonable conditions making it possible for such equals (the citizens in a liberal society) to agree on the terms of their cooperation in society.

The greater weight of this justification falls on the liberal conception of the person, which proves essential in two important respects: in framing the conditions subject to which the parties in the original position are to reach an agreement (understood as offering a *provisional* justification), as well as in showing the possibility of an overlapping consensus (understood as offering a *final* justification).

The liberal conception of the person in the original position describes not the parties but the people they represent, namely, the free and equal citizens of a well-ordered society. This conception of the person enters the original position through the constraints modelling the reasonable. Indeed, these constraints are designed to ensure impartial deliberation among rational parties, so they express a conception of persons as both rational and reasonable, that is, as persons exercising their full moral powers: their rational autonomy in deliberation and their full autonomy as representatives of citizens in a liberal society.

The parties decide on principles of justice and choose primary goods on the basis of what the people they represent would want as free and equal citizens: the goods someone will want depend on the kind of person he or she is. For a person conceived as Rawls does, the primary goods are not “all-purpose means” but the basic liberties, which enable people to exercise their two moral powers as free and equal citizens.

It is, therefore, this conception of the person, along with its companion conception of society, which explains the basic liberties—freedom of speech, thought, association, and so on—and which accounts for their absolute priority over all other primary goods. It is the liberal conception of the person, and of a person’s rational interests, which explains why someone should not want to trade off the basic liberties with other kinds of primary goods. This answers Hart’s objection: the reason why no tradeoffs are possible is that a *citizen* in a well-ordered liberal society has a higher-order interest in exercising his or her two moral powers (which is what the basic liberties and their priority are for).

There is, too, the question of stability. The basic liberties and their priority become stable once the conception of the person on which they are founded—a conception now understood as a normative and political ideal—becomes the focus of an overlapping consensus. An overlapping consensus should not be mistaken for a mere compromise among rational people seeking to maximize their personal utility; it is rather something that citizens achieve if they can reach an agreement on basic matters of justice despite the different conceptions of the good that shape the other areas of their lives. It is therefore an agreement among people in a liberal society, and in the result it will make stable the choice made in the original position with respect to the primary goods, understood as goods necessary for the citizens’ exercise of their two moral powers: “Citizens are thought to have and want to exercise these (moral) powers whatever their more comprehensive religious, philosophical, or moral doctrine” (Rawls 1999a, 517). We thus have different conceptions of the good held by people who, as citizens, regard one another as free and equal, and who—despite their diversity—are willing to come together and see if they can agree on the terms of their future cooperation. They are willing to do so precisely because

they are acting on a conception of themselves as liberal citizens bound by a sense of mutual respect, and the consensus they will attempt to reach will cover the basic liberties: these are viewed as indispensable to citizens exercising their capacity for a sense of justice and their capacity for a conception of the good under reasonable conditions of fair social cooperation, and the priority of the basic liberties (a priority understood as an enabling condition) therefore makes full sense and gets its final justification in light of the need to bring stability to a social arrangement so construed. This sets the basic liberties and their priority on a twofold foundation: on the one hand, we have here a way to enable people to realize their two moral powers as free and equal, rational and reasonable, members of a liberal society conceived as a fair scheme of cooperation among citizens who respect one another; on the other hand, by making this scheme with its embedded priorities the subject of an agreement, the citizens bring stability to their cooperation. In short, the primacy of the basic liberties has a dual foundation in a conception of the person as a reasonable member of a liberal society and in a need to make this a stable and feasible scheme of cooperation.

3.2.2 The Status and Application of the Basic Liberties

In the “political” account of justice as fairness, Rawls justifies the priority of the basic liberties by drawing on the two companion ideas of the person as “liberal” citizen and of social cooperation as based on a reasonable agreement.

In *Political Liberalism*, Rawls (1993, 294–99) ascribes a special status to the basic liberties and points out three features of their priority: first, they take priority as a family of liberties, and as such they carry absolute weight over the public good and over perfectionist values; second, none of these liberties can be limited except for the sake of other basic liberties; which brings in the third feature, namely, none of the basic liberties can be said to carry absolute weight with respect to any of the others, in the sense that if they should come into conflict, we should adjust them to one another until we achieve a coherent, adequate, scheme secured as such (as a scheme) for all citizens equally.

This last point is further clarified through the distinction between restricting the basic liberties and regulating them: only their restriction is ruled out; their regulation, by contrast, is permitted and indeed may even prove necessary in order to combine them into a coherent scheme or to make them practicable (as when a format is established for a public debate). The only sort of regulation that is disallowed is the kind that would undermine what Rawls refers to as the “central range of application” (*ibid.*, 297), understood as that core part of their application which enables citizens to adequately develop and fully exercise the two moral powers.

The basic liberties, then, get adjusted to one another until they form into a fully adequate scheme. And they get specified by degrees at different stages: in the original position at first, and then at the constitutional, legislative, and judicial stages. Yet this process of specification is not left to happenstance: it must instead be guided by clarifying, in the original position, the basic liberties special role and central range of application (*ibid.*, 334–40).

There are three matters to be addressed in this process of specification. (a) First, as discussed, we have to fix the criteria by which to guide the mutual adjustment of the basic liberties into a fully adequate scheme: these criteria will have to be substantive enough to guide the specification, yet not so stringent as to compromise the absolute priority the basic liberties have as a whole. (b) Second, we have to consider the proper attitude by which rational agents should go about blocking out the basic liberties and their interrelation at the four consecutive stages of specification (original position, constitutional convention, legislation, and judicial decision-making), gauging as well, for each of these stages, the admissible degree of specification. (c) And third, we have to consider the role of constitutional justice. Let us take up each of these three questions in turn.

(a) The Criteria of Specification

In *A Theory of Justice*, Rawls suggested two criteria by which to specify the basic liberties: first, we should seek to achieve the most extensive scheme of these liberties; and second, the basic liberties should satisfy the rational interest of the representative equal citizen (Rawls 1971, 250). Both of these criteria became a focus of Hart's criticism: the first criterion is merely quantitative and does not apply to the most significant cases of conflict among the basic liberties; and the second criterion is simply too vague for application, since it is unclear what the representative equal citizens' rational interest should consist in.

This twofold applicative gap is one that Rawls, in response to Hart, filled in the first place by acknowledging that it would indeed be absurd to think of the specification criteria as quantitative, for that would entail that we should maximize something, and yet there is nothing in the system of basic liberties that could conceivably be maximized: certainly, we cannot maximize the liberties themselves, nor can we maximize the moral powers, since we lack a notion of their "maximum development."

In the second place, Rawls pointed out that, as much as there may be the focus of a higher-order interest in exercising the two moral powers, these powers do not fully account for the person, since the person is also assumed to have put these powers to use in developing a conception of the good and to have an interest in pursuing such a conception. Stated otherwise, our interest in exercising the two moral powers may be primary, but this exercise is certainly not our only form of good or even its highest form: it is rather a condition of that highest good. It thus makes more sense to think of the two moral powers as goods to be secured to a minimum indispensable degree rather than as goods to be maximized: in this way, we recognize that each person has a higher interest in fulfilling a conception of the good or plan of life by using those two powers.

This suggests a criterion for specifying the basic liberties: these should be so adjusted to one another as to enable not the maximum development of the two moral powers but an *adequate* development of them. And there are "two fundamental cases" to which the liberties apply, corresponding to the two moral powers, that is, a capacity for a sense of justice and a capacity for a conception of

the good. The idea is that we have to guarantee for all citizens the essential conditions for the adequate development of these two powers (the two fundamental cases). This means that the test of adequacy splits into two criteria, one for each of the two moral powers, and that the two criteria are closely bound up: we have a sense of justice, and the political liberties that go along with it; and we have a capacity for a conception of the good, with another set of liberties especially suited to serving our rational interest in developing such a conception. The two criteria are thus made to cohere, “for it is clear from the grounds on which the parties in the original position adopt the two principles of justice that these interests, as seen from the appropriate stage, are best served by a fully adequate scheme” (Rawls 1993, 333).

Rawls thus sets up an ordering for the basic liberties on the basis of their connection with the two moral powers and the two corresponding fundamental cases. The freedom of thought and the political liberties make possible the full and effective exercise of our sense of justice, securing the application of the principles of justice to the basic structure of society; liberty of conscience and freedom of association make it possible to form, revise, and pursue a conception of the good over a complete life, making sure that citizens can make a full, informed, and effective use of their powers of deliberative reason; the remaining basic liberties—relating to the integrity of the person and the rule of law—serve as a necessary support in guaranteeing the preceding basic liberties, and in this way they connect with the two fundamental cases.

Rawls also suggests at this point a further criterion that can help us make sense of the basic liberties so arranged. This consists in the notion of the *significance* that each liberty has in the arrangement: “A liberty is more or less significant depending on whether it is more or less essentially involved in [...] the full and informed and effective exercise of the moral powers in one (or both) of the two fundamental cases” (ibid., 335). This notion of significance plays an essential role when it comes to applying the basic liberties, because it guides us in assessing the weight of the claims asserted on the basis of this or that basic liberty—it therefore helps us figure out how each of these liberties is best protected.

We can see, then, that the mutual adjustment of the basic liberties and their specification proceeds on the basis of different criteria, all of them closely connected: the fulfilment of our interest in developing the moral powers, without thereby sacrificing our interest in pursuing a conception of the good; an interest in securing the liberties’ central range of application, the indispensable core needed to secure the two preceding interests; the significance of the basic liberties in assessing the claims made on the basis of these liberties in exercising the two moral powers in the two fundamental cases; and the adequacy of the scheme of liberties with respect to the rational interests of the equal representative citizens.

This scheme of liberties thus responds to a unitary logic, by which the liberties are specified and applied in accordance with the reasons for their priority and the meaning ascribed to such a priority. Which is to say that all the specification and application criteria descend from the conception of the person as a free and equal citizen and from the companion conception of a reasonable and fair scheme

of social cooperation—which conceptions also help Rawls establish a line of continuity between the foundation and the application of the basic liberties.

The overarching idea, in short, is that we have to keep specifying the basic liberties and adjusting them to one another until we achieve an equilibrium in which the arrangement or scheme they compose is fully adequate, in such a way that the scheme so modelled will secure, with its priority, a reasonable system of social cooperation, namely, a system central to which is the idea of reciprocity, and which offers a public space where our interest in exercising the two moral powers can thrive in conjunction with our interest in pursuing a conception of the good.

(b) Stages of Specification

The basic liberties are specified at three consecutive stages, these being the constitutional convention, where the liberties are modelled as constitutional rights, followed by the legislative and the judicial stage.

At each of these stages, “the reasonable frames and subordinates the rational” (ibid., 340). What change are the tasks assigned to the “rational agents” (delegates, legislators, and judges as rational representatives of the free and equal citizens) and the constraints to which they are subject. These constraints are all based on the subordinating idea of the reasonable, and they become increasingly strong with each successive stage as the veil of ignorance becomes thinner and thinner. Thus, at the first stage, in the original position, the reasonable is weakest and the veil of ignorance thickest, whereas at the last stage, of judicial decision-making, the inverse is true, with the reasonable carrying the greatest weight and the veil of ignorance almost entirely lifted.

This sequential process is designed to shape the basic liberties through a fair and effective procedure in which the reasonable plays a stronger and stronger role, but the transition from one stage to the next is not described exhaustively: as Alexy (Alexy 2002b, 7) points out, we have to look at the kinds of considerations made in the original position before we can specify the leeway afforded to the delegates to the constitutional convention, whose job it is to fashion the family of the basic liberties into an adequate scheme of constitutional rights. The point of the constitution is to frame a just political procedure in such a way as to incorporate the basic liberties and ensure their priority: the parties in the original position are tasked with selecting the principles of justice and the liberties on which rests the basic structure of society, and the delegates will then have to apply these liberties through the constitution, in keeping with the constraints imposed by the reasonable and in view of the equal citizens’ rational interest in an adequate scheme of basic liberties.

The main focus at the constitutional stage will be on the first principle of justice. Which means that the delegates will be concerned in the first place with securing freedom of thought and the equal political liberties. This is an essential task in the process of framing a just political procedure, and it should proceed without thinking ahead and trying to fix the outcome of the subsequent legislative and judicial stages. Indeed, the constitutional convention should provide only a rough sketch or basic skeleton, to be fleshed out in full only later at the judicial stage, when

new constitutional constraints will be established in the continuing and closer-to-experience effort to protect freedom of association and liberty of conscience.

Overall, the constitutional constraints for the protection of the basic liberties must be aimed at ensuring the possibility of social cooperation for free and equal citizens. On the sequential rationale, the constitution is entrusted with the task of framing a just political procedure incorporating constraints designed to protect the basic liberties, with the rest of the job being left to the legislative stage. The constraints of the reasonable are therefore stronger at the constitutional stage than they were in the original position, since the scheme of the liberties worked out at that earlier stage must now be recast as a scheme of constitutional rights; and then at the subsequent stages the constraints become stronger still, with the legislators having less leeway and the judges the least—indeed, the latter have to proceed under the constraints placed by the veil of ignorance and the constitution, and the former under those two constraints plus those that come by way of legislation.

This four-stage sequence can be described in this sense as incremental, for it keeps piling on “layers of reasonableness” in the process of shaping and interpreting the basic liberties. And, on the reading we are offering here, the stronger the reasonable, the greater the protection of the basic liberties, which in a constitutional democracy function as a condition enabling free and equal citizens to cooperate on the basis of an idea of reciprocity.

And as the constraints of the reasonable become stronger, so does the specification and application of the basic liberties come to depend more and more on the use of public reason—itself essentially defined by the idea of reciprocity. We can appreciate, then, how pervasive the idea of reciprocity is, which guides the process of specifying and mutually adjusting the basic liberties, understood as political values, and which also guides, in a broader way, the activity of evaluating principles and values in the forum of public reason.

(c) The Role of the Courts

We have discussed the use of public reason to work out the meaning of political values and the basic liberties, but we should also note that a sizable part of this continuing effort is bound occupy itself with matters of constitutional justice. Indeed, in a dualist constitutional democracy—distinguishing constitutional power from legislative and executive power, the supreme law of the land from the public laws—the supreme court, along with all constitutional courts generally, functions as the principal institutional tool for upholding the constitution, and this consequently involves the task of protecting the system of constitutionally guaranteed basic rights through the constraints based on the principles of justice. And in addition to serving in this protective capacity, the Supreme Court must also uphold public reason, by giving it a lasting and adequate form and substance, indeed acting as its “institutional exemplar” (Rawls 1993, 235).

Clearly, then, constitutional justice plays a key role in specifying not only the constitutional essentials but also the basic liberties: the idea of public reason applies in the strictest way to judges, who along with the executive, the legislature, and

those running for public office are part of the political public forum, where political discussions are held on matters of basic importance.

Public reason, on Rawls's conception, defines at the deepest level the basic moral and political values of democratic constitutional systems: it does so by providing a forum for discussions and decisions that develop and get justified in light of the criterion of reciprocity. The idea of public reason is applied in different ways depending on who is using it. Where the judges are concerned, the decisions they make and the justifications they provide for these decisions are framed by public reason alone, that is, on the sole basis of political values that, in their judgment, offer the most reasonable understanding of the public conception of justice and its constituent ideas.

The Supreme Court is a product and a tool of public reason. In this sense, the court stands as the emblem of a constitutional democratic system that depends on reasonable choices for all questions of political justice. And in the forum of constitutional justice, these questions are debated in terms of principles, because principles make up the subject of the court's reason and serve at the same time as its only tool of judgment and justification.

It seems, then, that the constraints the reasonable places on constitutional justice account for the whole of judicial decision-making, exhausting all of the conditions subject to which this activity unfolds: the courts invoke no other values than political values and make no other decisions than political decisions—political by virtue of their connection with constitutional principles expressing basic political values. Which means that the courts use no other reason than public reason, and so that they proceed solely within the bounds of the reasonable and its nested criterion of reciprocity.

4 Habermas's Criticism and the Epistemic Mode of Reasonableness

We will now briefly reconstruct Habermas's view of reasonableness and his criticism of Rawls's theory, but only as concerns the question whether it is admissible to balance goods against one another. The first thing Habermas does in reading Rawls is to underscore the background assumptions the two theories equally proceed from. Briefly stated, both theories reject moral realism and moral scepticism alike, finding a third way that seeks to ascribe a cognitive content to normative propositions through an account of intersubjectivity in practical reason based on the device of a consensus among equals. Habermas feels at the same time, however, that several features of Rawls's foundation call for critical comment in both its first account in *A Theory of Justice* and its second account in *Political Liberalism*. The focus of Habermas's criticism is on *Political Liberalism*, to be sure, but he also looks critically at the original position. He finds that the original position in *A Theory of Justice* embeds substantive content lacking its own independent justification, and that the construction in *Political Liberalism* "involves a weakening" (Habermas 1999b,

83) of the Kantian perspective and fails to specify an authentic “moral point of view.” This last point of criticism also applies to the first construction, and is framed differently in that case as compared to the second construction, but the underlying theme is the same: Rawls’s perspective fails to identify a moral point of view capable of establishing effective conditions of impartiality. This prompts Habermas to critically question the use of reasonableness in support of an overlapping consensus and to consider only its use in the foundation of morality as a criterion alternative to truth. As we will see, Habermas draws from this analysis the conclusion that reasonableness cannot be used as a criterion by which to balance disparate sorts of goods and values against one another.

Habermas takes up the foundation of morality offered in *A Theory of Justice* and in *Kantian Constructivism in Moral Theory* and criticizes reflective equilibrium as a method of construction. Rawls constructs the original position by building into it “substantive concepts” not set on any deeper foundation, such as is necessary if we are to bring them into that construction. Habermas is referring here to the complex of ideas introduced with the conception of a moral person as having a capacity for a sense of justice and a capacity for a conception of the good: this is all normative content used as such in the process of foundation, without further reasons. The substantive moral content built into the foundational process makes it so that in order to specify a moral point of view (passing from the golden rule to the categorical imperative) we have to remove all such content as is not essentially connected with the moral person—whence the need to resort to a device like the veil of ignorance. But this tends to overload and make static the conditions fixed through the veil of ignorance; that is, as Habermas argues, “the veil of ignorance must extend to all particular viewpoints and interests that could impair an impartial judgment; at the same time, it may extend *only* to such normative matters as can be disqualified without further ado as candidates for the common good to be accepted by free and equal citizens.” It follows that “the impartiality of judgment would only be guaranteed in the original position if the basic normative concepts employed in its construction—those of the political autonomous citizen, of fair cooperation, and of a well-ordered society [. . .] withstand revision in light of morally significant future experiences and learning processes” (Habermas 1999a, 58–59).

So Habermas is criticizing here the method of reflective equilibrium in Rawls’s use of it as a basis for constructing a conception of moral personality. The kind of foundation this method allows—on the basis of historical experience and rational elaboration—ends up having too close a connection with substantive reasons to be able to achieve any authentic impartiality. Habermas proposes his own method for doing so: this is his well-known discourse ethics, which proceeds on the basis of quasi-transcendental rules of discourse to achieve a procedural impartiality unconnected to any substantive presuppositions.

Political Liberalism comes under a broader criticism. Habermas starts out with the argument “that reasonable citizens cannot be expected to develop an overlapping consensus so long as they prevented from jointly adopting a moral point of view independent of, and prior to, the various perspectives they individually adopt from within each of their comprehensive doctrines” (Habermas 1999b, 77). This is

to say that the reasonable cannot be fixed independently of the morally just. The basis for this consideration is that an overlapping consensus as Rawls constructs it cannot be described in any epistemic terms. An overlapping consensus cannot be distinguished from an acceptance as a matter of fact, and it therefore fails to specify any higher vantage point from which to pass in review the principles to be adopted for the basic structure of society. Habermas is basically saying that Rawls's idea of reciprocity cannot adequately serve as a criterion for universalizing decisions. Reciprocity is confined to the two third-person perspectives of the observer and the participant and does not allow the construction of a shared point of view (the first-person *us*) from which the principles of justice may gain rational acceptance. There are two reasons for this failure: the first of these is that the reasonable cannot be defined without reference to independent criteria specific to it; and the second is the difficulty involved in managing conflict. For Habermas, the problem in the first case is that there is no way to describe worldviews as reasonable unless standards of practical reason are available which do not depend on those worldviews; and in the second case the problem is that reasonableness alone seems unable to resolve the most important kinds of conflict. On the one hand, says Habermas, defining the reasonable involves discriminating normative images in the light of specific "normative decisions" (Habermas 1999b, 88–89); at the same time, reasonable conceptions defined by the sole criterion of mutual tolerance make an inadequate basis on which to handle conflicts involving the priority of political values over nonpolitical ones. Rawls's theory, then, fails to specify a moral (impartial) point of view, one that is not circular and does not beg the question: What is moral about an overlapping consensus? Indeed, such a consensus seems to be not a generalizing moment but simply a transient fact, that is, a possible acceptance and not a foundation.

The upshot of this critical reconstruction we just summarized in very broad strokes is that we have to question the distinction between the political and the moral (the metaphysical) set out in *Political Liberalism*. Habermas is saying that Rawls's domain of the political cannot really be a freestanding entity, for it fails to show how we might single out a criterion of political consent capable of securing an authentic impartiality and neutrality. Habermas draws a distinction between ethics and morality that Rawls fails to make, and in consequence of this nondistinction, Rawls's criterion for distinguishing the political from the moral ends up being almost entirely dependent on the conceptions of the good that live in the background of an overlapping consensus. In this sense, Rawls finds himself stuck in a conception whereby moral reasons are not public reasons, and in which consensus relies (à la Hobbes) on a public forum built proceeding from private positions. A public justification so construed may respond to a criterion of reciprocity, to be sure, but as long as it essentially depends on conceptions of the good—as it does when based on reciprocity—it cannot make any claim to universality or impartiality.

For Habermas, as is known, a consensus can have any authentic foundation only if based on "the pragmatic presuppositions of an inclusive and noncoercive rational discourse between free and equal participants" in which "everyone is required to take the perspective of everyone else and thus to project herself into the understanding of self and world of all others" (Habermas 1999a, 58). That makes it possible

to specify a point of view corresponding to the first-person *us*, and there is no other way, on Habermas's conception, to achieve impartiality properly so called. An equality of roles can only be established on the basis of universal pragmatic requisites of discourse as just briefly sketched out: in this way we can achieve a "qualified" consent, thus grounding the validity of normative discourse in what Habermas calls the discourse principle.²⁰

This critique in light of the presuppositions of a discourse ethics suggests two conclusions, one of them concerning the idea of reasonableness and the other the separation between the political and morality. Let us consider the first question first. Reasonableness is understood by Habermas as providing the criterion alternative to truth in the foundation of normative discourse. If consensus can be used as a criterion of validity, then the reasonable can be considered the only idea authentically "synonymous with 'morally true', that is, as a validity concept analogous to truth and on the same plane as propositional truth." Whence Habermas's definition of the reasonable as the "discursive redemption of a validity claim." The reasonable, then, should properly be understood "by analogy with a nonsemantic concept of truth purified of all connotation of correspondence [. . .] as a predicate for the validity of normative statements" (Habermas 1999a, 64–65).²¹

Let us turn now to the second question, concerning the idea marking off a political forum as distinguished from morality, as Rawls proceeds to do in *Political Liberalism*. Habermas argues a separation of this kind should not be based exclusively or even primarily on the distinction between public and private spheres, which has problems of its own, but should take into account the criterion of action necessitated through the "medium of the law" (Habermas 1999b, 98). A justification becomes public not only by virtue of its having to do with the basic elements of a social system, but also because it calls for "legal institutionalization" (*ibid.*, 72). What distinguishes the domain of the political from that of morality, then, is the role of the law²²: this brings about a different application of the discourse principle (which gets specified as a democratic principle), and it makes law complementarily foundational with morality. There are several consequences that follow from this role of the law. Habermas puts this criterion to use in several ways: to argue that Rawls collapses the concept of morality into the "ethical dimension",²³ for example, as well as to question the priority of the negative liberties. But what matters to us here is that the criterion (i.e., action necessitated through the medium of the law) is used

²⁰ Under the discourse principle, or D principle (Habermas 1996, 107), validity can be predicated only of "those action norms [. . .] to which all possibly affected persons could agree as participants in rational discourses."

²¹ Compare Habermas (1999a, 64–65), arguing that Rawls "denies himself the possibility of exploiting the epistemic connotations of the expression 'reasonable.'"

²² Habermas (1999b, 101): "once moral principles must be embodied in the medium of coercive and positive law, the freedom of the moral person splits into the public autonomy of co-legislators and the private autonomy of addressees of the law".

²³ Habermas (1999b, 100): "Rawls's construction [. . .] shifts the accent from the Kantian concept of autonomy to something like ethical-existential self-determination."

by Habermas to illustrate the impossibility of balancing different kinds of goods against one another. Rawls's theory is criticized for adopting an ethics of goods that reduces the deontological meaning of rights and makes these akin to values, understood as "teleological legal interests or goods" (Habermas 1996, 258). This, says Habermas (*ibid.*, 204), is an error owed to a failure to consider that "moral contents, once translated into the legal code, undergo a change in meaning that is specific to the legal form." This sort of translation introduces several important differences between principles and values,²⁴ thus making it so that there is no way to balance. Any attempt to balance (to assess comparative weight and significance) is going to be simply irrational, in that "there are no rational standards for this: weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies" (*ibid.*, 259). On Habermas's view, then, the whole point of engaging in public reason is not so much to balance different claims, goods, or considerations as to judge a "given conflict" and "decide which claim and which action [. . .] is right."

5 Conclusions

We will simply sum up in these closing remarks the three main conclusions we have reached:

- (a) The two statements of Rawls's theory of justice, for all the differences that set them apart, are united by a common thread. This consists in Rawls's use of the reasonable as a constraint on the rational.
- (b) The reasonable as expounded in *Political Liberalism* is crucially centred on the criterion of reciprocity. This yields a conception of the reasonable requiring that decisions be reached by balancing different values against each other under the guiding criterion of proportionality, whereby a view or argument that we offer as *most* reasonable to us must *at least* be reasonable to others (the idea being to achieve some kind of approximation between what *we* think is justified and what can be justified to *others*, thereby narrowing down the gap between most and least reasonable).
- (c) Habermas, by contrast, rejects as unjustified and devoid of any theoretical foundation the idea that the reasonable requires any such balancing. This rejection can be explained by his different way of drawing the distinction between the sphere of the political and that of morality, and he views reasonableness as an exclusively epistemic criterion.

²⁴ Habermas (1996, 255): "Norms and values [. . .] differ, first, in their references to obligatory rule-following versus teleological action; second, in the binary versus graduated coding of their validity; third, in their absolute versus relative bindingness; and fourth, in the coherence criteria that systems of norms and systems of values must respectively satisfy."

References

- Alexy, R. 1989. *A Theory of Legal Argumentation*. Oxford: Clarendon.
- Alexy, R. 2002a. *A Theory of Constitutional Rights*. Oxford: Oxford University Press.
- Alexy, R. 2002b. La teoria delle libertà fondamentali di John Rawls. In *Libertà fondamentali in John Rawls*. Ed. F. Sciaccia. Milan: Giuffrè.
- Bagnoli, C. 2007. Il costruttivismo kantiano. In *Oggettività e morale*. Ed. G. Bongiovanni. Milan: B. Mondadori.
- Boettcher, J.W. 2004. What Is Reasonableness? *Philosophy & Social Criticism* 30, n. 5–6: 597–621.
- Habermas, J. 1996. *Between Facts and Norms*. Cambridge: Polity Press.
- Habermas, J. 1999a. Reconciliation through the Public Use of Reason. In Id., *The Inclusion of the Other*. Cambridge: Polity Press.
- Habermas, J. 1999b. “Reasonable” versus “True,” or the Morality of Worldviews. In Id., *The Inclusion of the Other*. Cambridge: Polity Press.
- Hart, H.L.A. 1973. Rawls on Liberty and its Priority. *University of Chicago Law Review* 40, n. 3: 534–55.
- Morrone, A. 2001. *Il custode della ragionevolezza*. Milan: Giuffrè.
- Rawls, J. 1971. *A Theory of Justice*. Cambridge, Mass.: Harvard University Press.
- Rawls, J. 1982. The Basic Liberties and Their Priority. In *The Tanner Lectures on Human Values* III. Ed. S.M. McMurrin. Salt Lake City: University of Utah Press.
- Rawls, J. 1993. *Political Liberalism*. New York: Columbia University Press.
- Rawls, J. 1995. Political Liberalism. Reply to Habermas. *The Journal of Philosophy* 92, n. 3: 132–180.
- Rawls, J. 1999a. Kantian Constructivism in Moral Theory. In Id., *Collected Papers*. Cambridge, Mass.: Harvard University Press.
- Rawls, J. 1999b. The Idea of Public Reason Revisited. In Id., *Collected Papers*. Cambridge, Mass.: Harvard University Press.
- Rawls, J. 1999c. *A Theory of Justice. Revised Edition*. Oxford: Oxford University Press.
- Rawls, J. 2000. *Lectures on the History of Moral Philosophy*. Cambridge, Mass.: Harvard University Press.

Law, Liberty and Reason

Philip Pettit

1 Introduction

Do laws always restrict the liberty of the people who live under them? Or, if some laws are thought to be non-coercive—for example, laws that make voting possible—is this at least true of coercive laws? Does the coercion involved in threatening to impose penalties mean that the subjects of the laws thereby suffer a loss of freedom?

The answer that appears to have a nearly universal hold on the minds of legal theorists and philosophers today is that yes, coercive law does always reduce people's freedom. The canonical text is from Jeremy Bentham.

As against the coercion applicable by individual to individual, no liberty can be given to one man but in proportion as it is taken from another. All coercive laws, therefore [...] and in particular all laws creative of liberty, are, as far as they go, abrogative of liberty. (Bentham 1962, 503)

There are two recognized, if not often endorsed, ways of avoiding Bentham's stricture. But one does not offer a real alternative and the other is decidedly unattractive.

The approach that fails to offer a real alternative would say that it is only the prevention of choice—not just the threat of a penalty—that takes away someone's freedom, thus suggesting that only the imposition of a penalty will affect freedom (see Steiner 1993). But this is an implausibly narrow conception of interference and, as a number of authors have noticed, it will not turn the required trick. A coercive law against X-ing may not prevent someone from X-ing, only make it more hazardous, but it will prevent agents from X-ing and avoiding the prospect of hazard; it will deny them access to that more complex alternative (see Carter 1999; Kramer 2003).

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The second approach offers a real alternative but not an attractive one. It would say that it is only illegitimate or unjust penalties that take away someone's freedom and that if a coercive law is legitimate or just it need not satisfy Bentham's stricture. This approach moralizes the notion of freedom, however, in a way that makes it less useful in normative theory and not many will give the approach their support. Suppose that we want to assess a law on the basis of its impact on the freedom of subjects. If we cannot know whether the law reduces people's freedom until we know whether it is legitimate or just, we won't be able to invoke considerations of freedom to determine how far it is indeed legitimate or just. And that means that we will be very restricted in the use that we can make of the notion of freedom within normative theory.

Are we stuck with Bentham's stricture, then? Does every coercive law reduce people's freedom, so that no matter what compensating benefits it brings in its wake—even the benefit of protecting liberty on other fronts—it always imposes this initial cost? I want to argue for a negative answer, on the grounds that there is a third, much more plausible way of responding to Bentham. This becomes available, once we reject the classical liberal assumptions that he endorsed and adopt a viewpoint with roots in the neo-Roman republicanism that such assumptions displaced (see Pettit 1997b; Skinner 1998).

Why is the issue between these approaches important? If law need not be itself an infringement on liberty, as in the republican way of thinking, then there will be grounds in considerations of liberty alone for requiring a constitution to assume a certain form: a form under which law is indeed consistent with liberty. If law infringes liberty as a matter of necessity, however, then all that liberty clearly requires of law and of the constitutional framework as a whole is that it does better in preventing offences against liberty than in perpetrating them. But that means that liberty will be consistent with a variety of what we naturally regard as constitutional abuses, so that a case cannot be made against such abuses on the grounds of liberty alone. William Paley, one of Bentham's most clear-headed and influential followers, embraced the point when he noted as early as 1785 that the cause of classical liberal liberty might be as well served, in some circumstances, by "the edicts of a despotic prince, as by the resolutions of popular assembly"; in such conditions "would an absolute form of government be no less free than the purest democracy."¹

The paper is in two main sections. First, I lay out the essential features of the republican way of thinking about freedom, setting it in contrast to Bentham's view. Then in the second section I show how coercive laws might not represent an assault—not at least the worst sort of assault—on freedom in that sense. I return in a brief conclusion to the issue of why the debate is important and why we should find the republican viewpoint appealing.

¹ See Paley (1825). Notoriously, this point is admitted in Isaiah Berlin's (1958) defence of negative liberty: in effect, liberty as non-interference, see Berlin (1958). For arguments to the effect that, under plausible empirical assumptions, negative liberty of this kind may make further constitutional demands, see Habermas (1995), Holmes (1995).

2 Liberty

2.1 *Bentham on Interference and Freedom*

The assumptions that Bentham and other members of his circle put in play suggested that the one and only danger for a person's social freedom is the interference of others: specifically, a form of interference that imposes obstacles or burdens intentionally or, perhaps, negligently (see Miller 1984, 66). I do not intend to quarrel with the requirement of intentionality or, allowing for negligence, "quasi-intentionality." But I do find fault with the exclusive focus on interference. Bentham's circle made a dramatic break with more established ways of thinking—this was most clearly emphasized in the 1780s by William Paley²—when they insisted, first, that people were not deprived of freedom by anything other than interference and, second, that every instance of interference did indeed deprive people of their freedom.

What sorts of activities count as interference? Bentham appears to endorse a broad conception and we can go along with him in this. To be specific, let us agree that I interfere with you in a given choice between options x, y, and z, if I treat you in any of the following ways.

- I manipulate your capacity to choose deliberately, say by overloading you with information, subjecting you to powerful rhetoric, or resorting to hypnotism.
- With or without your awareness, I remove one of the options from the domain of your deliberative choice, putting a block in the way of its selection.
- With or without your awareness, I replace one of the options by a burdened counterpart, establishing a penalty that will attend its choice.
- I deceive you into thinking that you lack deliberative capacity or, more plausibly, that an option has been removed or replaced, whether by me or another agency.

The complaint that I make against Bentham is not that he misconceives interference, and not that he is wrong in thinking that interference may get in the way of freedom. What I reject is rather the claim that freedom is only removed by interference—the interference-alone thesis—and that freedom is always removed by interference—the interference-always thesis. Both claims passed almost without saying in his circle, though they were highly original; amongst earlier theorists, only Thomas Hobbes had come close to defending them (see Pettit 2008b, Chapter 8). Take John Lind, a close follower of Bentham's who was well known for his pamphlets against the American case for independence. To him it seemed obvious, as he acknowledged learning from his master (see Pettit 1997b, Chapter 1), that freedom requires "nothing more or less than the absence of coercion" (see Lind 1776) where coercion may be physical or moral: may involve physical restraint or constraint, or the restraint or constraint associated with "the threat of some painful event" (ibid., 18).

² It should be noted, however, that while Paley went along with Bentham in his emphasis on interference, he did suggest that it was only interference in a moralized sense—illegitimate interference—that was inimical to freedom. See Paley (1825, 23–24).

The republican opposition to Bentham is best charted, I think, by first introducing a claim that all sides are likely to find acceptable: that someone's freedom to choose between certain options is reduced by what I call the alien control of another over that choice. The republican claim is that once alien control is indicted as the antonym of freedom, it becomes clear that the interference-alone and the interference-always theses are just false. Others may impose alien control via interference but equally they may do so via the enjoyment of a power of interference, even unexercised interference, in relation to that choice (see Pettit 2008c; Skinner 2008).

2.2 *Freedom and Alien Control*

One person, A, controls the choice of another person, B, when A does something that has the intentional or quasi-intentional effect of raising the probability that B will choose according to A's taste or judgment—raising it beyond the probability that this would have had in A's absence (see Pettit 2008c). Or A does something that has this effect, at any rate, so long as B is not defiant or otherwise counter-suggestible: so long as B is not willing to suffer extra costs just for the sake of thwarting A's wishes or advice.

Control of this kind may be alien or non-alien. It will be alien if it makes some assumptions presupposed by the choice untrue, or if it leads B to think that they are untrue. In any choice between options, x, y, and z, B has to be able to think, and think rightly, of each option: I can do that. Any form of control will be alien if it makes such an assumption untrue—it may undermine the agent's capacity for choice, or remove or replace an option—or if it leads the agent to think such an assumption is untrue: it may lead the agent to think, for example, that an option has been removed or replaced when this is not in fact so.

The primary example of non-alien control is provided by the case where A deliberates sincerely with B and leaves it up to B to act on or against any advice given. In this case, B retains the capacity to choose deliberately, none of the options facing B is removed or replaced, and B is not intentionally misled by A. That will be so even if A provides B with the information that apart from x, y, and z there is the option of seeking a reward from C for doing x, which C would like A to do, and then choosing x in the assurance of being able to claim a reward. In this case, B will retain the options, x, y, and z and also enjoy the option x+: that is, the option of doing x and claiming the reward. A may control B's choice in each of these cases, raising the probability that B will choose according to A's taste or judgment. But A will not control B in an alien way, undermining B's choice. A will not do this indeed, even if it is A who is in the position of C and the information provided amounts to an offer to reward the choice of x. If the offer is not mesmerizing, then it will not undermine B's choice between x, y, and z; it will merely add the extra option, x+.³

³ What if the offer is exploitative, in the sense that it overtly exploits the relative weakness of B and represents an intuitively unfair bargain? If the exploitative offer has no other effects, and is voluntarily accepted by B, then it is better than the refusal to make such an offer. But usually

With the conception of alien control in hand, it seems plausible to say that A will reduce B's freedom to choose between x, y, and z to the extent that A exercises alien control over that choice. Someone who thinks with Bentham that freedom just is the absence of interference may agree with this linkage, on the grounds that the idea of alien control and the idea of interference go naturally together. A may exercise alien control over B's choice by interfering with B, as indeed my characterization of interference makes clear. A may actively manipulate B so as to undermine B's capacity for choice, A may actively remove or replace one of B's options, or A may actively deceive B about the choice situation.

If it is accepted that the antonym of freedom is alien control, however, then there is a plausible case to be made against both the interference-alone and the interference-always thesis. This, as I reconstruct it, is a case that would have made perfect sense to the republican tradition that Bentham spurned.

2.3 *The Inteference-Alone Thesis*

From the earliest Roman days, the republican tradition insisted that being under the power of a master—in *potestate domini*—meant being un-free, even if that master was quite benevolent and allowed you a great deal of leeway. The kindly master might give you free rein, as a rider might give a horse free rein. But the very fact that there was a rider in the saddle meant that you were not free. Everything you did within the domain of the master's power you did by his leave and under his control; you might make this or that choice and enact it successfully but you could do so only *cum permissu*: only by his leave, only with his permission. The theme is well summarized by the eighteenth century thinker, Richard Price: "Individuals in private life, while held under the power of masters, cannot be denominated free however equitably and kindly they may be treated" (Price 1991, 77).

This republican rejection of the interference-alone thesis becomes intelligible once it is granted that alien control is hostile to freedom. For A may exercise alien control over B's choice even in a case where A does not practice interference. There are two cases where this happens. One involves what I call invigilation, the other inhibition or intimidation.

A will invigilate B's choice between x, y, and z, as I use that term, if A has a power of interfering in the choice, if A intentionally monitors what B is doing or shows signs of doing, and if A is disposed to interfere in the event that B decides to act in an uncongenial way and only in that event. Take the case, then, where invigilation occurs, B decides on a pattern that is congenial to A, and A does not actually interfere. It turns out that even in this case A exercises a form of alien control over B's choice. A exercises alien control over the choice, in other words, without actually interfering in the choice.

an offer of this kind—say, the offer of a harsh employment contract—will set up a relationship between A and B that is objectionable insofar as it allows the domination that I go on to discuss in the text.

Invigilation without interference represents a form of control because it makes it more probable, absent defiance, that B will choose according to A's taste or judgment; it guards against the possibility, un-actualized but not impossible, that B's disposition will change. And invigilation without interference represents an alien form of control because it means that at least one of the options of which B had thought "I can do that" has been replaced by a provisioned counterpart; one of the original options, say x, has been replaced by x-provided-A-allows-it.

This shows that for any form of interference that involves alien control—more in a moment on interference that does not involve alien control—there is a sort of invigilation that involves alien control even when it does not lead to such interference. But just as invigilation can instantiate alien control, so can something that I describe as intimidation.

Suppose that B becomes aware of A's power of interfering in B's choice between x, y, and z and, more specifically, of A's invigilation of that choice. And now imagine that B does not want to trigger A's interference and believes—we may assume, correctly⁴—that A will interfere only in the event of B's choosing x. Then B may respond in one of at least two ways, each of which reinforces A's alien control. B may self-censor or self-ingratiate. In self-censorship B takes a self-denying decision to avoid x, thereby ensuring that B acts according to A's taste or judgment. In self-ingratiation B fawns and toadies in a manner that is designed to change A's taste or judgment; while B may thereby manage to choose x, B does so in a manner that makes it certain that the choice will accord with A's (changed) taste or judgment.

As invigilation may occur without interference, so intimidation may occur without invigilation. For suppose that A does not have the invigilatory power to interfere in B's choice but successfully pretends to such power. In that case A may still succeed in raising the probability that B will choose according to A's taste or judgment—at least absent defiance—and A will do so in an alien manner that deceives B. If the option that B takes A to find uncongenial is x, then B will be deceived into believing that it has been replaced by the option x-provided-A-allows-it.

These observations show that the interference-alone thesis is false. For any form of interference that perpetrates alien control, there will be two corresponding ways of exercising alien control without actually practicing interference. One will involve invigilation, the other intimidation.

2.4 *The Interference-Always Thesis*

If the republican opposition to the interference-alone thesis is associated with the idea that the kindly master is still a master or *dominus*, the opposition to the

⁴ Let this assumption be incorrect and what is ensured is that B will choose, not according to A's taste or judgment, but according to the taste or judgment imputed by B to A. In order to cater for this case, we would strictly need to extend the notion of alien control so that what is made more likely is that B will choose according to A's real or imputed taste or judgment. In order to keep things manageable, I have not introduced this complexity in the text.

interference-always thesis comes out in a common refrain to the effect that the empire of law, unlike the empire of men, is not a dominating regime. Law may impose taxation on all, coerce all with the threat of punishment for disobedience, and impose penalties on those who actually disobey. But still, so the idea goes, such interference may not be arbitrary, and on that account it may not reduce the freedom of those on whom it is imposed.

Blackstone's *Commentaries on the Laws of England*, published in 1765, sums up this long tradition—soon to be challenged by Bentham—in the remark: “laws, when prudently framed, are by no means subversive but rather introductive of liberty” (Blackstone 1978, 126). The tradition had recognized that natural liberty, sometimes described as license, might be reduced by laws. But the liberty that mattered, civil liberty, was established by the laws, and not put in jeopardy by them (see Reid 1988). Or at least this was taken to be so when the law is not driven by the private passion or interest of particular factions or tyrants: that is, when it does not represent what Locke and others routinely described as an “arbitrary power” (Locke 1965, 325). Thus Locke himself can comment that “the end of Law is not to abolish or restrain, but to preserve and enlarge Freedom” (ibid., 348).

There were many strands of thought bound up in the received, republican idea that good laws do not reduce the freedom of those who live under them, and it had many antecedents, reaching back to Aristotle and Livy. But I think we can make very good sense of the idea, and stay broadly faithful to the tradition, if we start from the equation between freedom and the absence of alien control. Let B's freedom to choose between x, y, and z require that no one, in particular not A, have alien control over that choice. A may interfere in B's choice and yet not enjoy such alien control, for A's interference may be subject to B's permission. And in that case A's actual interference with B will not detract from B's freedom. It will not impose A's will on B's behaviour, being ultimately an expression of B's own will.

This scenario is classically portrayed in the story of Ulysses and the sirens, when Ulysses gives a power of interference to his sailors—they are allowed to keep him bound while the ship passes the island of the siren voices—and they exercise this power in accordance with his wishes. The interference practiced by the sailors is not arbitrary or uncontrolled. On the contrary it is a form of interference that is subject to the check or control of Ulysses himself. Thus the sailors are not his masters, and he does not operate under their power; rather they are his servants, the means by which he imposes his own will upon himself. The sailors operate as devices whereby B exercises self-control, enabling the reason with which he identifies to triumph over the unwelcome passions that he expects the sirens to excite. The sailors are the conduits of that self-control, not the channels whereby an alien will might be given control in his life.

The idea that the laws of a country might be the means whereby the citizens control themselves, and not a means whereby alien control is imposed upon them, recurs in a range of republican writers. James Harrington, the republican opponent of Hobbes, puts the thought as follows: “if the liberty of a man consists in the empire of his reason, the absence whereof would betray him to the bondage of his passions, then the liberty of a commonwealth consists in the empire of her laws, the absence whereof would betray her to the lusts of tyrants” (Harrington 1977, 170). The empire

of laws, in this image, relates to the empire of men—the empire of individuals who pursue their personal advantage or judgment—in the way that the empire of reason relates to the empire of unwelcome passion. Thus the interference of law in the lives of citizens need be no more injurious to their freedom than the interference of his sailors in the life of Ulysses. As the sailors are ultimately controlled by Ulysses, so the laws may be ultimately controlled by the citizens. And as the controlled interference of the sailors does not impose an alien will or control on Ulysses, so the controlled interference of the laws need not impose an alien will or control on the citizens. The regime of laws may be the means whereby the citizens give control to their long-term will for how their affairs should be organized. It may be the means whereby they protect themselves as a body against the threat of personal and factional interests, as the interference of the sailors is the means whereby Ulysses protects himself against the voices of the sirens.

This move from the individual case of Ulysses to the collective case of the citizens is too swift and we return to it in the following section. But I hope that the equation between freedom and the absence of alien control will at least make sense of why the republican tradition should have rejected the interference-always thesis. Alien control will always reduce someone's freedom of choice. But to the extent that interference is subject to the ultimate control of the interferee—to the extent that interference is in that sense non-arbitrary—it will represent a form of self-control, not a form of alien control. And so interference will not always reduce someone's freedom; only arbitrary interference will have that effect.

2.5 The Freedom of the Person

We have been discussing freedom in particular choices and have argued for three distinctive theses: first, that freedom is a function of how far alien control is absent; second, that alien control may be present without the presence of interference, as in the case of invigilation or intimidation; and third, that interference may be present without the presence of alien control, as when the interferee is in ultimate control of the process. A given choice will be free just to the extent that it escapes alien control: just to the extent that the agent is not exposed to the exercised or unexercised power of arbitrary interference on the part of another; just to the extent that the agent is not dominated in that choice by that other.

In rounding out the republican view of freedom, we need to add one more element. The tradition did not focus, as I have focused so far, on the freedom of one or another choice but rather on the freedom of a person or a citizen as a whole: on freedom in the sense in which it is the status enjoyed by the “freeman” of traditional terminology (see Skinner 2006, 156; Pettit 2007, 709). How does the republican idea of the un-dominated person relate, then, to the idea of the un-dominated choice?

There are three claims that enable us to build up a notion of the free person from that of the free choice. The first is that however freedom of the person is understood, it should be a status that is available equally to all citizens. In traditional

republicanism, this would have meant a status that is available to all propertied, mainstream males; in neo-republicanism it is bound to mean a status that is available on a more inclusive basis. Take any status that can be made available, then, only to a proper subset of the citizenry. That status may define the privileged status of an elite but it cannot define what it means to be a free person. Freedom in a republic may not be perfectly provided for all members—the society may be less than perfect—but at least it should be a status that is capable in principle of being provided equally for all.

The first claim gives expression to the fact that republicanism is a theory of freedom for people in society—in traditional terms, a theory of civil rather than natural liberty—and that it conceptualizes freedom as something that can be equally enjoyed by all. The second and third claims spell out the implications of that first claim, on intuitively plausible lines. The second says that the free person must be protected in the same choices as others and the third that the free person must be protected on the same basis as others.

The second claim, more specifically, is that the freedom of the person has to involve a freedom to exercise choice over a domain where others can be simultaneously and equally free to exercise choice and, plausibly, over a domain that is not unnecessarily restricted. Assuming that the choices in this commonly protected domain are rich enough to provide the basis of a full life, they can be described, in a traditional phrase, as the basic liberties (see Pettit 2008a). The specification of the basic liberties may vary somewhat from society to society, since local, variable conventions—for example, conventions governing titles to property and rights of ownership—may play a role in identifying choices that can be protected equally for all. But in any society that can claim to provide for the freedom of persons, there has to be an identified domain of choice, and one that is not unnecessarily restricted, in which each can expect to be equally protected with others.

The third claim that relates the notion of the free, un-dominated person to the free, un-dominated choice is that not only must the free person be protected in the same basic choices as others, he or she must also be protected on the same, robust basis. Did the basis of protection vary between individuals, then the equality that is built into the notion of the free person would be jeopardized. There might be equal protection provided at a given time but the equality of the protection would be highly contingent. The common basis of protection in the republican tradition is provided, of course, by the rule of law as exercised by an impartial government, operating under the control of the citizens. In Harrington's words, it is a law "framed by every private man unto no other end (or they may thank themselves) than to protect the liberty of every private man, which by that means comes to be the liberty of the commonwealth" (Harrington 1992, 8).

One final query. A choice will be free insofar as it is not subject to the alien control of another. A person will be free, I have just suggested, insofar as he or she is protected on the same basis and in the same choices as others. But what do we say, then, of the person who enjoys that same protection but is exposed, by sheer bad luck, to the alien control of another: say, the control of the criminal offender? The obvious response will be to say that while the victim may continue to count as a free

person, even as the criminal imposes an alien will, still the freedom of that particular choice is certainly compromised. The victim will continue to count as a free person to the extent that it can seem like bad luck, not the result of poor protection, that the offence took place. The status of the victim as a free person may only be fully vindicated, of course, if the offender can be apprehended and exposed to measures that help to rectify the crime (see Braithwaite and Pettit 1990; Pettit 1997a, 59).

3 Law

3.1 *The Question*

On a theory of liberty as non-interference, such as Bentham adopted and popularized, it is inevitable that law will detract from the liberty of citizens; it will interfere with them in coercing them to do or not to do certain things, in imposing levies and taxes, and in applying sanctions to offenders. The benefits it creates by these means may compensate for the fact that it itself represents a form of interference but they cannot cancel it out. On a theory of liberty as non-domination, however, there is a possibility that law may not assume this hostile profile. Law may help to secure for people the sort of protection that establishes them as free persons or citizens. And in doing this it may not detract from their freedom of choice. It will interfere and restrict people's freedom of choice, of course—most dramatically in the case of imprisonment. But it may do this without imposing an alien will; it may restrict choice on a controlled and non-arbitrary basis, and may not represent a form of domination.

Abstract possibilities are one thing, however, realistic prospects another. And the question that we must face in this section is whether there is a realistic possibility that law might not be arbitrary and dominating.

The discussion so far may seem to make this unlikely. Under republican theory laws are given the task, no doubt in combination with suitable norms, of providing for the freedom of the persons who live under them. They are meant to protect citizens on the same basis and in the same domain of choice and to protect them, not just against uncontrolled interference, but also against the corresponding forms of invigilatory and intimidatory control. But if laws are to achieve such an end, they have to be highly intrusive.

The protection that has to be provided will establish a dispensation of enforceable rights, like any legal system, but it is also likely to require a regime in which people are assured of certain powers and options that might otherwise be unavailable. The cause of protecting workers in the sort of labour market associated with industrial capitalism, for example, is likely to require not just the right not to be fired at will but also the power of organizing in unions and the option of leaving an abusive workplace and living on social security. The cause of protecting women in a masculinist culture is going to require not just the right to divorce a husband but also the power to call in the police against a violent partner and the option of living in a

refuge for victims of abuse. The cause of protecting an ethnic minority is likely to require not just the right to lodge a case against discrimination but also the power of organizing as a group and, in some cases, the option of living under a special form of jurisdiction or government.

Given that the law is expected to achieve ends of these kinds, the question as to whether it can be expected to avoid domination becomes quite pressing. How might law adopt such an interventionist profile and yet not be arbitrary and dominating?

3.2 Two Inadequate Answers

One answer that may seem to be supported in the older republican literature is that law cannot be dominating because it is not the work of an intentional agent but the product of an impersonal process. The idea would be that whatever restrictions it imposes, therefore, are as non-intentional and so as un-dominating as the restrictions imposed by natural obstacles. That, it may be said, is the message of Harrington's insistence that the empire of laws is not an empire of men. And it may be taken to be the lesson underlined by the contrast that is often drawn, as for example in Mary Astell, between the "standing rule" of the law and the "inconstant, uncertain, unknown, arbitrary will of men."⁵

I do not think that this answer is ever seriously entertained in the republican literature. Although he makes much of the empire of law as distinct from the empire of men, for example, Harrington still insists, as we saw, that the law is framed by private men (see Harrington 1992, 8). But in any case the answer will not work. The problem is that while laws may emerge as a result of rivalry between houses of parliament, or as a precipitate of custom and court interpretation, still they are by all accounts the achievements of a State. And the State is an agent, albeit of a corporate kind. Thus it is held accountable to a discipline of reason, both internationally and by its own citizens, in a manner that will make no sense unless it is treated as having the status of a legal person and, a fortiori, an agent (see McLean 1999, 123, 2004, 173). In particular, it is an agent that can be held accountable for the laws it maintains. If those laws are uncontrolled by those on whom they are imposed—if, in that sense, they are arbitrary—then they represent the domination of the State in the lives of its citizens.

The failure of this first answer, however, may suggest another. It may seem that if the citizenry or people as a whole control the laws that the State imposes, then those laws, being controlled by those on whom they are imposed, will not be arbitrary. Like the intrusions of the sailors that Ulysses licenses, they will be restrictions that the relevant interferences themselves authorize and welcome.

But this answer isn't satisfactory either. It supposes that the people is itself a corporate agent and that, as such, it controls the interference in the lives of

⁵ See Hill (1986, 76). The view, applied to common law, also surfaces in the writings of some libertarian authors. See for example Hayek (1988).

individual members that the State perpetrates; it will do this, most obviously, if State and people are taken to be one and the same body. But even if the people are an incorporated agent, the fact that that body licenses the laws imposed on members does not necessarily protect members themselves against domination and does not ensure their individual liberty; at most it ensures the liberty of that corporate body as a whole. The challenge was to show why the laws imposed by a State need not count as uncontrolled and arbitrary from the point of view of the people, taken severally. It is no response to that challenge to argue that from the point of view of the people, taken collectively, they need not count as uncontrolled and arbitrary.

3.3 Breaking Down the Question

In order to confront the challenge raised, it may be useful to break down the question into more specific issues. A first issue, then, is this. Does the very fact that people are born into a coercive State, without any question of choice on their part, mean that they are subject to domination, having to undergo a regime of coercion that they don't control? No, clearly, it does not. No one is forced to live under any form of dispensation just by virtue of not having chosen to enter it. All that will be required for membership to be voluntary is that people can choose to exit. Indeed the right of exit looks to be the crucial thing. A choice of entry without a choice of exit, as in the slave contract, is consistent with a regime of unqualified domination. A choice of exit is necessary as well as sufficient (it seems) to establish membership as voluntary.

To turn to a second issue, then, can the members of a coercive State have the right of exit? To this question the answer is clearly, yes. The bulk of democratic States already give their members the choice of exit, as in allowing them to emigrate. And that might seem to establish that those who do not choose to emigrate choose instead to stay where they are.

But this, of course, is wrong. For while democratic States routinely give their members a right of exit, this right amounts to little in practice. Other States need not give those who want to leave one State a right to enter them. And, worse still, there is no possibility of emigrating to a State-less territory that is free of coercive law. The Earth's habitable surface has been divided up without remainder between States. Rousseau said that man is born free and is everywhere in chains—everywhere bound in the chains of law. The truth is that not only are people everywhere in chains, they are everywhere born in chains; there is no such thing as a State-less, uncoerced existence. Call this the fact of territorial scarcity.

Does this fact mean, to turn to a third issue, that people are dominated by other agencies, even as their own State gives them the choice of exiting? Surely not. It is a brute fact or historical necessity—an obstacle created by nature—that there is no State-less territory available, and people cannot be dominated by such an obstacle; it is not one that is intentionally or quasi-intentionally imposed by any agent or

agency. Nor are people dominated by the States that do not give them a right of entry. Entering another State is not a default option that is taken away from them by the State's boundary, at least not under realistic assumptions about people's baseline alternatives.

But now, to turn to a fourth issue, does the fact of territorial scarcity mean that more is required of the non-dominating State than just that it should provide a right of exit to its members? And the answer to this question is certainly, yes. For a coercive State might exploit the fact that other States are loathe to grant entry to its own citizens—or that other States are even less attractive destinations for emigrants—to impose laws that are quite arbitrary and dominating. So the non-dominating State must do something to establish its credentials over and beyond granting a right of exit.

What then, to raise the next issue, should the State do? I shall assume that it cannot feasibly exempt unwilling members from its laws, dealing in a different way with those in the territory who identify sufficiently to endorse membership, and those who don't. And I shall assume that, consistently with caring about freedom as non-domination, it cannot give special privileges to those who seek such a status; this would mean that the privileged were well placed to dominate the underprivileged. So what can the State hope to do, then, in order to vindicate a claim not to dominate its citizens?

3.4 The Abstract Answer

Once the question is cast in this specific way, the answer becomes fairly clear. In order for the State's coercive laws not to be dominating, it must be the case that the people collectively control the formation of law; that is what gives appeal to the second inadequate answer that I mentioned earlier. But it must also be the case that this collective control of the law does not leave any members of the collectivity out. Assuming that membership is inclusive—by whatever intuitive criterion of inclusion is preferred—all members must share equally in this collective control. An equal share in collective control will give each member the highest possible level of control over the law, consistently with no one being given less than that level. Thus it will give members a level of control such that no one can complain of being treated in a way that neglects their will, as dominating overtures neglect their will. It will enable them each to think that in this less than perfect world—in this world of territorial scarcity—they have all the control over law that is required for them to regard the law as a form of interference that is non-arbitrary and un-dominating.

This way of developing republican thought fits quite well with the established points of emphasis in the tradition. It respects the emphasis on the role of the people as the source of political power and the unflagging disdain for colonial or dictatorial forms of government. And equally it respects the view that giving the people power does not mean opening up the gates to a tyranny of the majority, an elective despotism. But the abstract answer may prove unsatisfying in itself. It will mean nothing unless we can say something about how it might be institutionally realized.

3.5 Making the Answer Concrete: Invoking the Public Interest

There are a number of conceivable ways in which the collective people might be given an equally shared power over the laws, and more generally the policies, its government implements. But one salient candidate, and one with a powerful republican pedigree, would be to identify a common good or public interest, avowed in common by all, and to establish a process whereby that interest would dictate the policies to be put in force. If there is a plausible conception of the public interest, and a feasible means of giving the public interest the required control over law-making, then there will be some hope of establishing a regime where the laws are not arbitrary and government does not represent a form of domination over individual citizens.

The notion of the public interest or the common good has not had a very good press in recent thought. But this is mainly because it is assumed that if there is such an interest, then it has to consist in an overlap between antecedent private interests. It has to consist in the X-interest shared amongst individuals who have different bundles of interests that they might want the State to satisfy, all of which include an interest in X. No matter how we conceive of interests, there is no guarantee that there will be a substantive overlap between private interests amongst the members of a pluralistic society. And even if there is such an overlap at any moment, there is no guarantee that it won't oscillate over time, as individuals change their tastes or views, or as the collection of individuals who constitute the society alters with birth, death, and migration.

The overlap conception may seem to be supported by the fact that the public interest, on any plausible account, has to involve something that affects the concerns of individuals. There can't be a difference, intuitively, between the public interest of a society at two different moments without a difference in how members are likely to be affected at those two times. This observation applies a principle of normative individualism according to which something makes for an improvement in social and political life only if it makes for an improvement in the lives of individuals (see Kukathas and Pettit 1990). But normative individualism or personalism does not give exclusive support to the overlap conception of the public interest. There is an alternative family of conceptions that is equally satisfactory on this score. They represent a convergence as distinct from an overlap conception of the public interest.

According to a convergence conception, there will be a public interest defined for any society under three plausible assumptions.

1. There are certain domains where everyone would prefer that a single policy be collectively and coercively implemented to nothing's being done by government.
2. There is a constraint such that, special interests aside, everyone would prefer that of the candidate policies in any domain, only one of those that satisfy it be implemented.
3. There is a procedure such that, special interests aside, everyone would prefer that of the policies still remaining in any domain, only the one that satisfies it be implemented.

There are many different potential areas of policy-making and law-making, and the idea here is that in at least a number of those domains, there will be grounds for why some will count as universally acceptable policies and laws. Or at least as policies and laws that are acceptable to everyone, special interests aside. I shall assume that special interests will be put aside amongst individuals who refuse to claim special exemptions and privileges under the laws to be established—amongst individuals, in effect, who are reasonable enough to be willing to deal with others on equal terms (see Rawls 1993). This qualification will not block some people from claiming that there is a reason why they should be treated differently in some respect, provided that that reason can be recognized by all, even those whom it does not favour, as having a certain relevance. But it will block them from making a claim to special treatment on grounds that others cannot be expected to countenance.

All convergence conceptions of the public interest have to agree in assuming, as in the first clause, that in certain domains, everyone prefers that there be a collectively, coercively enforced policy than that nothing is centrally done. This assumption posits the reality of what, altering standard usage, I shall call public goods: specifically, goods that the market cannot be expected to generate on a decentralized basis and—this is where I introduce an alteration—goods that can be produced at a satisfactory level by government. Plausibly, these will include goods like external protection, internal order, and a property dispensation: goods, as we can see them, that are required for ensuring the enjoyment of freedom as non-domination amongst the populace.

Different convergence conceptions of the public interest may differ in their vision of public goods and in their version of the first, public-goods assumption. But, more likely, they will differ in the versions of the second and third assumptions that they defend. Here I shall sketch and support a convergence conception of the public interest that we might describe as deliberative, since it draws on a core idea in theories of deliberative democracy.

3.6 The Deliberative Conception of the Public Interest

The core idea, endorsed amongst a wide range of contemporary thinkers, is that there are certain considerations bearing on matters of public policy that all can recognize as relevant to the question of which policy should be implemented, even if the considerations are given different weightings in different circles (see Bohman and Rehg 1997; Elster 1998). According to Gutmann and Thompson “we can define deliberative democracy as a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future” (Gutmann and Thompson 2004, 7). The idea that I borrow from this approach is that there are mutually acceptable reasons—reasons that prove in deliberative practice to be mutual acceptable—that can be invoked on all sides in the democratic discussion of government policy.

The deliberative idea is not outlandish, since the existence of mutually acceptable reasons for policy-making is evident in the fact that even as we build dissensus in democratic societies, we do not come to blows or just resign ourselves to difference.⁶ We continue to find considerations that we put before our opponents, confident that even if those reasons do not carry the day, they will not be laughed out of court as simply irrelevant. Those reasons will have much in common across democratic societies, since democracy requires inclusive and equal membership, but they may still vary significantly from one democratic culture to another; they may reflect differences in historical traditions and tastes, say in respect of the rights associated with ownership, or the titles on which ownership may be claimed.

I apply the deliberative idea in developing a version of the convergence approach to the public interest that casts the assumptions as follows:

1. There are public-goods policies in any domain such that everyone would prefer that one of them be collectively and coercively implemented to nothing's being done by government.
2. Only a proper subset of public-goods policies will satisfy the constraint of mutually acceptable reasons in any domain and, special interests aside, everyone would prefer that one of those policies should be implemented there rather than one of the policies that fail it.
3. Only a certain number of procedures for choosing between remaining policies will satisfy the constraint of mutually acceptable reasons and, special interests aside, everyone would prefer that one such procedure be established—on a similarly acceptable basis—and that a policy that is selected by that procedure should be implemented rather than an alternative.

Is this a plausible conception of the public interest? The question divides two. First, are the individual assumptions it incorporates likely to be true? And second, is the conception of the public interest they define one that fits naturally with our intuitions?

To the first sub-question, I think that the answer is, yes, though I cannot argue for it in full. The first public-goods assumption is almost universally endorsed in contemporary political thought. And among those who endorse that assumption no one is likely to lodge a complaint about the idea embodied in the other two: that is, about the proposal to implement all and only those public-goods policies that are consistent with mutually acceptable reasons and that are selected from among

⁶ Rawls (1999) may often have such reasons in mind when he speaks of public reasons and my ideas have clearly been influenced by his discussion. See Cohen (1989, 17). I prefer to speak of commonly accepted reasons, emphasizing points that are not made in Rawls and might even be rejected by him: first, that they are generated as a by-product of ongoing debate; second, that they are relevant to such debate, no matter at what site it occurs, private or public, informal or formal; and third that in principle common reasons that operate in a society, or even in the international public world, may not be reasons that carry independent moral force: we may disapprove of their having the role they are given in debate. The language of common reasons, as used here, may be more in the spirit of Habermas than Rawls. See Habermas (1984, vol. 1, 1989, vol. 2), Moon (2003, 257). I am grateful to Tim Scanlon for discussion on this point.

other such policies by a procedure that is itself consistent with mutually acceptable reasons. Since mutually acceptable reasons are the very reasons that people must and do invoke in complaints about government policy—or at least in complaints that they may expect to command a hearing—it is hard to imagine that they might not prefer, special interests aside, that policy-making be directly or indirectly shaped by such reasons.

What to do, it may be asked, when there are a number of procedures that might be used to select the winning policy in a given domain, when all are consistent with mutually acceptable reasons, but when one suits one faction, one another? Here too there is a fairly compelling answer, encoded in the assumption about “a similarly acceptable basis.” This is that there will be a further procedure available for choosing between those procedures—at the limit, this may be a lottery⁷—which is itself consistent with mutually acceptable reasons.

To turn now to the second sub-question, do the three assumptions give us an intuitive conception of the public interest? I believe they do, though once again I cannot argue for that answer in full. Disagreement is inherently associated with pluralistic democracy, so that there is little or no hope of finding a stable overlap between people’s private interests. Nevertheless, people do continue to argue with one another about what they ought to do together—they do not just come to blows or resign themselves to their differences—finding considerations that they equally recognize as relevant. And yet people do not themselves manage to generate consensus out of that argument, since they may weight those considerations differently or apply them on the basis of different empirical assumptions. In these circumstances—the circumstances of democratic politics (see Waldron 1999)—the only possible basis on which to identify public-interest policies is as those policies that are not ruled out by mutually acceptable, commonly accepted reasons and that are selected for implementation by procedures that are not ruled out by such mutually acceptable, commonly accepted reasons.

3.7 The Answer in Public-Interest Terms

I have said absolutely nothing about the institutional means—the democratic and constitutional means—whereby the public interest, deliberatively understood, might be given a significant degree of control over public policy-making. All that I have assumed is something built into the way the deliberative conception is developed: that the public interest has to be defined on the basis of an active enterprise of democratic discussion and contestation amongst the citizenry and so that it requires institutions that make room for such deliberative processes. On this conception, there is no question as to whether people are likely to stand behind the public interest

⁷ A more plausible alternative might derive from the pre-established understanding that it is reasonable to have a parliamentary majority decide which procedure to use, thereby privileging the party or parties in power. Other alternatives include referral to an independent committee, or to a statistically representative body assembled for the purpose, or to a popular referendum.

and seek to have it imposed on government. The public interest is identified with those policies that are supported by criteria of selection—the commonly accepted reasons—that are implicitly ratified in the basis on which people question and assess the doings of government.

But though I have said nothing substantive on how to institutionalize the public interest, deliberately understood, it does not seem outlandishly utopian to assume that things might be organized so that a polity does quite well in this regard. And the final issue, then, is this. Does the fact that a polity empowers the public interest in this way mean that the laws and other measures it imposes on the citizenry are controlled by them on an equally shared basis? Assuming that our abstract answer to the question about law is correct, does it mean that those laws and measures are non-arbitrary and non-dominating?

I claim that it does. Let the public interest rule, and we let an interest rule in which each member of an equally inclusive, contestatory democracy is invested; it is an interest implicit, after all, in the way that discussion and contestation is conducted amongst such members. Let the public interest rule, then, and we let the public rule. More specifically, we let a public rule in which each can claim an equal part, being equally party to the acceptance of the reasons by which that interest is defined. If the public rules in this sense, then members of the public can see the laws imposed as the laws selected by criteria in the ratification of which they are fully and equally complicit. They can see the laws, not as affronts to their freedom as non-domination, but rather as constraints that are sourced, like the actions of Ulysses' sailors, in their own will. They will be positioned, in the words quoted earlier from Harrington, to see the laws as “framed by every private man unto no other end (or they may thank themselves) than to protect the liberty of every private man, which by that means comes to be the liberty of the commonwealth” (Harrington 1992, 8).

4 Conclusion

Suppose that the classical liberal view that Bentham put in place is sound. In that case, we may find reasons for thinking that the constitution that operates in a society should be constrained in one or another manner: that it should establish electoral democracy, for example, or entrench certain personal rights. But we may well have to look for such reasons in considerations that derive from other sources than a concern for freedom. All that freedom as non-interference may clearly require of the constitution, and in particular of coercive law, is that it prevent more infringements against freedom as non-interference than the infringements that it itself imposes. It is for this reason that Paley acknowledges that the best constitution for the promotion of liberty as non-interference may be one that establishes a benevolent despot in power.

If the republican view is sound, however, then things look very different. Considerations of liberty will provide a case for a constitutional and legal regime that enables people to claim the status of free persons in relation to one another. And

though the regime required will license quite a rich form of intervention in civic life, providing for the protection of people against all forms of alien control, considerations of liberty will also argue for constraining the regime in important ways. They will make a case for embodying constraints within the regime that help to make its imposition on citizens assume the profile of a controlled, non-arbitrary form of interference in their lives.

Considered in this light, republican theory can be cast as a research program for constitutional and legal design. It holds out the ideal of a regime that protects people from domination without itself being a dominating force in their lives. It offers an account of the desiderata and constraints that such a regime must satisfy. And it does all of this, without requiring us to endorse anything richer than a well-established conception of what freedom involves. These benefits surely argue for rethinking the Benthamite view of law and liberty. It has prevailed too long.⁸

References

- Bentham, J. 1962. Anarchical Fallacies. In *The Works of Jeremy Bentham: Published under the Superintendence of His Executor*. Ed. J. Bowring, vol. 2. New York, N.Y.: Russell & Russell, Inc. (1st edition 1843.)
- Berlin, I. 1958. *Two Concepts of Liberty*. Oxford: Oxford University Press.
- Blackstone, W. 1978. *Commentaries on the Laws of England*. New York: Garland.
- Bohman, J., and W. Rehg, eds. 1997. *Deliberative Democracy: Essays on Reason and Politics*. Cambridge, Mass.: MIT Press.
- Braithwaite, J., and Pettit, P. 1990. *Not Just Deserts: A Republican Theory of Criminal Justice*. Oxford: Oxford University Press.
- Carter, I. 1999. *A Measure of Freedom*. Oxford: Oxford University Press.
- Cohen, J. 1989. Deliberation and Democratic Legitimacy. In *The Good Polity: Normative Analysis of the State*. Ed. A. Hamlin and P. Pettit. New York, N.Y.: Basil Blackwell.
- Elster, J., ed. 1998. *Deliberative Democracy*. Cambridge: Cambridge University Press.
- Gutmann, A., and Thompson, D. 2004. *Why Deliberative Democracy?* Princeton, NJ: Princeton University Press.
- Habermas, J. 1984. *A Theory of Communicative Action*, vol.1. Cambridge: Polity Press.
- Habermas, J. 1989. *A Theory of Communicative Action*, vol. 2. Cambridge: Polity Press.
- Habermas, J. 1995. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Cambridge, Mass.: MIT Press.
- Harrington, J. 1977. *The Political Works of James Harrington*. Ed. J.G.A. Pocock. Cambridge: Cambridge University Press.
- Harrington, J. 1992. *The Commonwealth of Oceana and A System of Politics*. Cambridge: Cambridge University Press.
- Hayek, F.A. 1988. *The Fatal Conceit: The Errors of Socialism*. Chicago, Ill.: University of Chicago Press.
- Hill, B. 1986. *The First English Feminist: Reflections upon Marriage and other writings by Mary Astell*. New York, NY: St. Martin's Press.
- Holmes, S. 1995. *Passions and Constraint: On the Theory of Liberal Democracy*. Chicago, Ill.: University of Chicago Press.
- Kramer, M.H. 2003. *The Quality of Freedom*. Oxford: Oxford University Press.

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- Kukathas, C., and Pettit, P. 1990. *Rawls: A Theory of Justice and its Critics*. Cambridge & Stanford: Polity Press & Stanford University Press.
- Lind, J. 1776. *Three Letters to Dr Price*. London: T. Payne.
- Locke, J. 1965. *Two Treatises of Government*. New York: Mentor.
- McLean, J. 1999. Personality and Public Law Doctrine. *University of Toronto Law Journal* 49: 123–49.
- McLean, J. 2004. Government to State: Globalization, Regulation, and Governments as Legal Persons. *Indiana Journal of Global Legal Studies* 10: 173–97.
- Miller, D. 1984. Constraints on Freedom. *Ethics* 94: 66–86.
- Moon, J.D. 2003. Rawls and Habermas on Public Reason. *Annual Review of Political Science* 6: 257–74.
- Paley, W. 1825. The Principles of Moral and Political Philosophy. In Id., *Collected Works* Vol. 4. London: C. and J. Rivington.
- Pettit, P. 1997a. Republican Theory and Criminal Punishment. *Utilitas* 9: 59–79.
- Pettit, P. 1997b. *Republicanism: A Theory of Freedom and Government*. Oxford: Oxford University Press.
- Pettit, P. 2007. Free Persons and Free Choices. *History of Political Thought* 28: 709–18.
- Pettit, P. 2008a. The Basic Liberties. In *Essays on H. L. A. Hart*. Ed. M. Kramer. Oxford: Oxford University Press.
- Pettit, P. 2008b. *Made with Words: Hobbes on Language, Mind and Politics*. Princeton, NJ: Princeton University Press.
- Pettit, P. 2008c. Republican Liberty: Three Axioms, Four Theorems. In *Republicanism and Political Theory*. Ed. C. Laborde and J. Manor. Oxford: Blackwell.
- Price, R. 1991. *Political Writings*. Cambridge: Cambridge University Press.
- Rawls, J. 1993. *Political Liberalism*. New York, NY: Columbia University Press.
- Rawls, J. 1999. *The Law of Peoples*. Cambridge, Mass: Harvard University Press.
- Reid, J.P. 1988. *The Concept of Liberty in the Age of the American Revolution*. Chicago, Ill.: Chicago University Press.
- Skinner, Q. 1998. *Liberty Before Liberalism*. Cambridge: Cambridge University Press.
- Skinner, Q. 2006. Rethinking Political Liberty. *History Workshop Journal* 61: 56–70.
- Skinner, Q. 2008. Freedom as the Absence of Arbitrary Power. In *Republicanism and Political Theory*. Ed. C. Laborde and J. Maynor. Oxford: Blackwell.
- Steiner, H. 1993. Individual Liberty. In *Liberty*. Ed. D. Miller. Oxford: Oxford University Press.
- Waldron, J. 1999. *Law and Disagreement*. Oxford: Oxford University Press.

Reasonableness and Value Pluralism in Law and Politics

Wojciech Sadurski

The concept of “reasonableness” is deeply engrained both in legal theory and in political philosophy. In the former, jurisprudential arguments about reasonableness are informed by the growing use of this category in international law, in European law, and also in national legal orders, in particular in constitutional and administrative law of many countries. In the latter, i.e. in political philosophy, “reasonableness” is one of the key concepts of contemporary political liberalism where it plays the role of a criterion (or of the set of criteria) of appropriateness of certain rationales for the use of coercion by the state towards individuals, and thereby is a crucial criterion of the limits of legitimacy of the liberal state.

What is puzzling, however, is that these two currents: the arguments about reasonableness in law and in politics, are usually not considered jointly but rather constitute two parallel currents of thought with no common points. As far as I know, there has not been any serious attempt to identify the common denominator(s) of these two types of “reasonableness.” It is surprising given that the literature on reasonableness both in legal theory and in political theory is quite rich, so one would have thought that at least some writers would be tempted to consider them jointly. It can hardly be explained by the disciplinary separation between legal theory and political philosophy, and the inability or unwillingness of the scholars in these two fields to intrude upon each other territories. To the contrary, there have been many edifying and impressive examples of interdisciplinary work of this kind, but not with regard to reasonableness.

It may well be that this has been for good reasons; perhaps indeed, the only thing which is common to reasonableness in law and reasonableness in politics is *the word*, and a supposition that the commonality of the word reveals the commonality of the phenomenon described by the word might be considered to be a case of a nominalist fetishism. (It would be as if someone suspected that there must be some commonality of meaning between “game” as a play and “game” as wild animals because of the identity of the word). A nominalist error of this sort should be avoided.

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And yet, the commonality of words which are meant to describe the *normative* constructs in the areas so close to each other and so inter-connected as law and politics, should create at least a *prima facie* presumption that something similar, if not identical, is at work there. This is at least worth consideration, and the aim of this chapter is to initiate a reflection on this. I will proceed as follows: in the first part, I will review the uses of category of reasonableness in law; in the second part, the role that reasonableness plays in political philosophy, and in conclusion bring these themes together and suggest ways in which reasonableness both in law and in politics can be seen to respond to the common concerns.

1 Reasonableness in Law

I will begin this exploration by an attempt to draw a general “map” of the legal uses of the category of reasonableness. By necessity, it will be an extremely vague and general survey, but I think that such an account is necessary prior to any attempt to identify, in a general way, the main normative consequences of embracing this category in law.

There can be different taxonomies used in order to systematize such an account. The first, and perhaps most obvious taxonomy is based on a distinction between different types of legal orders in which the category of reasonableness appears: say, in international public law, in the European law, and in various national (domestic) legal systems. Just a few examples. In international public law, reasonableness can be found, *inter alia*, in the Vienna Convention on the Law of Treaties: Article 32 states that, were the regular methods of treaty interpretation to lead to “manifestly absurd or unreasonable” outcomes, some “supplementary means of interpretation” may be used.¹ This is, obviously, not the place to consider the matter of substance; all I want to indicate is that here, the category of reasonableness (expressed from the negative angle, that is as unreasonableness) plays a role of a certain safety valve the aim of which is to prevent consequences which are manifestly undesirable, and yet which would be likely to occur if a state used the standard, conventional methods of legal interpretation.²

The second type of legal order where the category of reasonableness is present is the European law, including the law of the European Union, and also the law of the European Convention of Human Rights (ECHR). The very text of the ECHR contains several references to “reasonableness”: for instance Article 6 confers upon the citizens of the member states the right to fair trial which includes, among other things, the right “to a fair and public hearing within a *reasonable* time”; Article 5 provides, as one of the exceptions to the right to liberty and security, the lawful arrest

¹ Vienna Convention on the Law of Treaties of 23 May 1969, entered into force 27 January 1980, UN Treaty Series vol. 1155, p. 331.

² For a detailed analysis of this provision which is congruent with my account of Article 32, see Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer: Dordrecht, 2007) at 334–43.

based on “*reasonable* suspicion” that a person committed an offence or when it can be *reasonably* considered necessary to prevent him committing an offence”, etc.

The third level at which this category appears is the level of national, or domestic, legal orders, and in particular in constitutional and administrative law. In Great Britain, there is a principle in the administrative law, dating back to the 1948 Court of Appeal *Wednesbury* decision,³ where the court established that it would only correct an administrative decision when (*inter alia*) the decision was so *unreasonable* that no *reasonable* authority would ever consider taking it. Another example can be provided by the Canadian Charter of Rights and Freedoms: its Article 1 states that the Charter rights are guaranteed “subject only to such reasonable limits prescribed by law as can be reasonably justified in a free and democratic society.” This formula has been adopted in a number of legal systems; for example in the South African Constitution an equivalent clause (in Article 36) is that any limits on constitutional rights must be “reasonable and justifiable in an open and democratic society.”

The second possible taxonomy is based upon whether the category of reasonableness in a legislative act or legal decision. In other words this becomes a question of authorship—how did the category come about in the legal system, by the act of a legislator or the decision of a judge? As examples of the texts of legislative acts where the category of reasonableness appears is the afore mentioned Vienna Convention, the European Convention on Human Rights, Canadian Charter of Rights and Freedoms,⁴ or the Constitution of South Africa.⁵ In contrast, as examples of judge-introduced category of reasonableness can be provided by the decisions of the European Court of Human Rights and several national constitutional courts, which will be in more detail discussed below. It will be seen that in the constitutional courts’ reasoning the category of reasonableness plays a central role in the analysis of proportionality of the legislative means to the legislative aims pursued (or claimed to be pursued) by the lawmaker.

The third—and the most important from the point of view of this paper—distinction is based on the functions that the category of reasonableness plays in a given legal context. I will distinguish between a “weak” and a “strong” understanding of reasonableness. In the weak sense, reasonableness has a role to exclude manifestly unfair or irrational consequences of the enforcement of a given legal rule; as I put it already before, the reasonableness plays in such circumstances a role of a “safety valve” which prevents the occurrence of consequences which strongly and obviously collide with our basic sense of justice, fairness, decency, etc. I have provided, above, an example of a British administrative-law rule proclaimed

³ Associated Provincial Picture Houses v *Wednesbury* Corporation [1948] 1 K.B. 223.

⁴ “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”, Section I, emphasis added.

⁵ “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is *reasonable* and justifiable in an open and democratic society based on human dignity, equality and freedom”, Section 36.1, emphasis added.

in *Wednesbury* based on which a court may correct an administrative decision for its unreasonableness.

Also, the Italian administrative law knows the category of “*manifesta irragionevolezza*” (see della Cananea in this volume), or “manifest unreasonableness” which corresponds, roughly, to what the US law calls “rational basis scrutiny”: an act can be struck down as unlawful by a judge only when the judge considers that there is no rational connection between the means adopted by the legislators and the aim pursued. The test is very lenient: it requires only *some* connection between the means and the ends, and the law is set aside only if no connection can be found, however remote and cumbersome.

This shows why I call this category of reasonableness a “weak” one: it is weak because, in practice, its use attacks only a very small number of legal acts. Only extremely irrational, arbitrary, unwise legal rules will fall victim to such test of reasonableness: most of them will be immune to its critical edge. The “weak” test expresses a high degree of deference towards the legislative choices of legal measures, and can be seen as relying upon a strong presumption of legality (including of constitutionality) of legislative judgments.

In contrast, “strong” uses of the category of reasonableness have a much harsher critical edge towards the legislation under scrutiny, and impose much more demanding conditions upon the lawmaker. I will be speaking of the “strong” uses when the test is not merely whether the lawmaker has adopted acceptable means related to some legitimate (that is, legally admissible) purpose but, in addition, whether there is a sufficient relation of proportionality between the means and the ends. In the US parlance this would correspond more to the so-called “strict scrutiny”: both the criteria related to the aims and to the means-ends relationship are tougher than under the rational-basis scrutiny. I call it a “strong” sense of reasonableness because its consequence will be to strike down a larger number of laws (*ceteris paribus*) than when a weak test of reasonableness is applied. Hence, this stronger meaning of reasonableness reveals a weaker presumption of legality (constitutionality) of an act, and removes the element of deference of the scrutinizer towards the law maker.

The reasonableness in this sense is related mainly to the weighing and balancing of diverse, often mutually incompatible, values and interests, and consequently, to the proportionality analysis. Perhaps the best-known and the most influential example of such analysis is a doctrine of the German *Bundesverfassungsgericht*, or the Federal Constitutional Court (FCC) which has long held that the proportionality analysis in the process of weighing and balancing of conflicting constitutional values is one of the key guarantees of the protection of constitutional rights. This is because such an analysis is geared towards making sure that the state will not interfere with individual liberties more than absolutely necessary in order to achieve constitutionally legitimate public goals. As explained by Paul Craig in the context of the protection of fundamental rights by the EU courts: “Society might well accept that such rights cannot be regarded as absolute, but the very denomination of certain interests as Community rights means that any interference should be kept to a minimum. *In this sense proportionality is a natural and necessary adjunct to the recognition of such rights*” (Craig 2006, 674, emphasis added).

In order to describe this relationship (crucial, for the purposes of this paper) between the category of reasonableness on the one hand and the analysis of proportionality of legislative means (which may involve some restrictions on constitutional rights) to constitutional valid aims on the other hand, let me suggest a highly stylized and extremely simplified account of a dominant (in contemporary constitutional courts' jurisprudence of restrictions of rights) model of such proportionality analysis. This stylized account is based mainly on the German Court's jurisprudence, but also on a number of other constitutional courts' case law (including the Canadian, South Africa, Polish, etc) and—last but not least—the European Court of Human Rights, with respect to the Articles 8–11 and 14 of the Convention. (This last proviso is informed by the fact that, in my view, it is mainly with respect to these five Convention articles that the ECtHR has conducted a fully-fledged proportionality analysis, due to the textual shape of the Articles, even though the weighing and balancing applies, as the ECtHR has long announced, also to the interpretation of all other articles of the Convention). The account provided below may not fully correspond, pedantically speaking, to any single constitutional court's doctrine, but I believe that it is generally faithful to what I consider to be the dominant model, give and take a few marginal local variations.

The first stage in the reasoning based on proportionality is about the aim (or purpose) of a given rule (or law, or regulation, or decision). Is the aim, first, legitimate (that is, does it belong to the set of purposes that the state is allowed to try to attain through its actions)? Secondly, is it sufficiently important in order to be able to justify the putative restrictions of some constitutional rights? (That the means used may impact negatively upon constitutional rights is adopted here *ex hypothesi*; otherwise, the whole proportionality analysis would be unnecessary).

When the answer to these two questions, related to the aims, is positive (which usually *is* the case because it is rather rare to encounter situations when the legislators attempts to attain inadmissible aims, or even the aims which cannot be deemed important),⁶ a three-tiered test of proportionality is triggered. The first step is to find out whether the means adopted by the lawmaker are suitable (in the Canadian Supreme Court's parlance, "reasonable and demonstrably justified"). Second, the test is whether the means adopted limit the constitutional rights in the least restrictive way ("the least restrictive means test"). Thirdly, it has to be found out whether the advantages of accomplishing the purpose outweigh the disadvantages and costs of restricting the specific constitutional rights. At this point it may be noted that, while the second tier (the least restrictive means test) may be called the "necessity test" (not quite precisely: the point to which I will return below), the third tier

⁶ For a good explication of this proposition, in the context of the scrutiny conducted by the European Court of Justice under the fundamental rights test, see Paul Craig: "The fact that any restrictions on the right must be justified by some objective of general interests pursued by the Community is [. . .] a necessary condition for the legality of the measure. It is, however, difficult to regard this as a significant hurdle. The very fact that this condition is cast in such general terms [. . .] means that it will be rare for a measure not to surmount this hurdle" (Craig 2006, 678).

which consists of the comparison of the costs and benefits of a given legal rule may be labeled “proportionality *sensu stricto*” (we will keep the “proportionality *sensu largo*” label for the entire, three-tiered model of reasoning).

At this point it is necessary to emphasize the link between the category of reasonableness underlying, as it does, the entire proportionality analysis, as sketched above, and the test of “necessity” located at the second tier of the proportionality model *sensu largo*, i.e. at the crucial point of the scrutiny: the question is whether the means used by the lawmaker are indeed the least restrictive ones of all the realistically available means of attaining the legislative purpose. From a purely theoretical, or analytical, point of view, “reasonableness” is not equivalent to “necessity”: reasonableness is a less rigorous requirement which, potentially, admits of a larger number of acceptable measures than the requirement of necessity. This is because, while we can usually think of a number of measures deemed “reasonable”, there is only one measure which we can fairly describe as necessary: if there were more than one alternative measures, then none of them would be properly called a “necessary” one. (I emphasize the logical point which I am making: of course, we can have a number of measures which are necessary in the sense of their *joint* presence being necessary to achieve a certain consequence. But we cannot have a number of *alternative* measures each of which are “necessary”: this would be a logical nonsense. But it is *not* a nonsense to say that we may think of a number of alternative measures which are all *reasonable*). This is because, if we could think of another measure which is also called necessary, then the first measure is not really necessary. The upshot is, while we can think of a number of measures which can be described reasonable, we can always think only of one measure (or of one set of measures, jointly adopted) which can be described as necessary—and in this sense, the test of reasonableness is more lenient than that of necessity.

But this is an excessively abstract argument, and it ignores the obvious truth that constitutional adjudication is not a domain of abstract logical reasoning but of practical reasons and of political practice. In practice, judgments of reasonableness are very close to, if not identical with, those of necessity, and both these requirements are more or less merged into one under the overall umbrella of proportionality analysis by a number of constitutional courts. In the jurisprudence of the ECtHR, the requirement of “necessity” contained in Articles 8–11 of the Convention (namely, that restrictions on these rights must be “necessary in a democratic society”)⁷ has actually acquired a meaning synonymous with “proportionality”, or, to be more precise, the test of “proportionality” has been found to be an important one in establishing that the “necessity” requirement has been met. The ECtHR has established, in a number of decisions, an authoritative interpretation of the Convention’s formula “necessary in a democratic society”: that the interference with a right must

⁷ More precisely, the requirement of necessity is present in: Articles 8–11 of the Convention rights to respect for privacy, to freedom of thought, conscience and religion, to freedom of expression, and to freedom of association and assembly, respectively; Article 2 of Protocol n. 4 (liberty of movement within a state); and Article 1 of the Protocol n. 7 (right of an alien not to be expelled before certain conditions are met).

correspond to a “pressing social need” and be “proportionate to the legitimate aim pursued.”⁸ As one commentator has noted, “from ‘necessity’ to proportionality is but a small step” (Mowbray 2001, 413), and this step has repeatedly been made; indeed, the notion of “pressing social need” has been authoritatively established as a test for “necessity.” Under this interpretation, “necessity” *qua* proportionality is a rather flexible notion that allows for a relatively broad range of measures to be found “necessary”—even if they are not “necessary” in the sense of being “indispensable”, or being *sine qua non*. It is significant that, at times, the ECtHR jurisprudence has held that “necessity” is analogous to the requirement that the reasons for a restriction be “relevant and sufficient” (van Dijk and van Hoof 1998, 81). But the best expression of the connection between these three categories: proportionality, reasonableness and necessity, can be found in this statement by Chief Justice of the South African Supreme Court Arthur Chaskalson, in the 1995 judgment on capital punishment: *The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality.*⁹

It is worth pondering upon this sentence because one can hardly find, in contemporary constitutional jurisprudence, a more lucid and brilliant expression of this connection between the ideal of reasonableness, the test of necessity, and the overall proportionality analysis which triggers this test (of necessity), and which gives meaning to this ideal (of reasonableness). And it is precisely *this* connection which is crucial for the main argument of this paper. It is because it shows in what ways the “strong” sense of reasonableness is fundamentally rights-protective by establishing very rigorous and tough requirements for a legislator who wishes (and is obliged to) promote public goals which nevertheless implicate possible restrictions of individual rights proclaimed by constitutions.

But, of course, the proportionality analysis based on the ideal of “reasonableness” in the strong sense, as just outlined, is not *the only* judicial method of scrutinizing the legislative restrictions of individual constitutional rights known to constitutional judges today, nor is it the only method of subjecting legislators to a tough, robust, critical judicial scrutiny. The proportionality/reasonableness method can be contrasted with (what I will call, with huge simplification) a “US method” which can be called an “absolutist” method of scrutiny. Under one (not the only one!) judicial doctrine elaborated by the US Supreme Court, constitutional rights have a quasi-absolute character; this is because (the argument goes) the US Bill of Rights does not contain (in contrast to the European Convention, Canadian Charter, and most of the recent constitutions in Europe, South Africa etc) any limiting clauses, any constitutionally valid grounds for rights restrictions, and any tests such as “reasonableness”, “proportionality” or “necessity” which would provide a judge with a clear guidance as to the acceptable relationship between a ground of restriction and a law under scrutiny. It does not follow, of course, that judges using this method invalidate any

⁸ See e.g. Goodwin v. United Kingdom 22 E.C.H.R. 123, 143–44 (1996); for discussion see Mowbray (2001, 411–12, 448).

⁹ Constitutional Court Case n. CCT/3/94 (6-6-1995), par. 104.

legislative acts which have negative implications for some constitutional rights but rather that the very structure of their argument is different from the structure of proportionality-oriented analysis. In the case of the “US method”, the restrictions upon rights are not so much *extrinsic* to those rights (as is the case in proportionality analysis) but rather are built *into* those rights.

As an example to illustrate these built-in restrictions on rights, consider the typical structure of judicial argument about restrictions of freedom of speech under the First Amendment. US judges, lacking any constitutional guidance as to the criteria of acceptability of restrictions on this right, must engage in an interpretation of the very concept “freedom of speech” in order to avoid an absurd consequence of constitutionally protecting any speech, no matter what. This interpretation may be based on different methods (textual, originalist, “presentist”, teleological, etc) and it may apply, independently, to each of the terms: “freedom” and “speech.” So, in order to establish some standards for constitutionally acceptable restrictions, one may argue that “freedom” is not equivalent to “license”; that, for instance “*freedom of speech*” does not imply that everyone should be legally protected to say, publicly or privately, whatever s/he wants because the very notion of “freedom” is normatively colored and so to ascertain “freedom of speech” (as opposed to “license to speak”) we need to engage our value judgments in order to sketch the contours of such freedom. An even more fertile ground for such type of rights-limiting interpretation is with regard to the notion of “speech”: it has been a long (and often complex) tradition in the First Amendment jurisprudence to establish and clarify that not every verbal behavior is “speech” in the First Amendment sense, and that there are some non-verbal types of conduct which deserve the rank of “speech” under the First Amendment, even if we conventionally do not describe them as speech: this is the case of symbolic conduct such as marches, parades, picketing, wearing uniforms or armbands, burning flags etc. All this is based on the idea that in order to inquire into the “true” meaning of “speech” as in the “freedom of speech,” one must ascertain the rationale for protecting this right in the first place, and the rationale in this case is connected with the function and meaning of a given expressive conduct, whether under the common usage of language it is conventionally called “speech” or not (Schauer 1982, 89–112).

This example shows that under the US model, even though it is based on ostensibly “absolutist” understanding of constitutional rights, roughly similar restrictions on rights can be justified as under the proportionality analysis. However, the path by which this result is attained is quite different. It may be said (again, in a deliberately simplified way) that the “absolutist” model presupposes (perhaps ironically) that the real meaning of certain constitutional rights (such as “freedom of speech”) is in fact narrower than the conventional, common-usage of language would suggest, and therefore that it is the judge’s task to reveal this narrower, stricter meaning of the right. Hence, it is not necessary to realize (in a proportionality-analysis way) what are the “external” constraints upon a given right, such as related to various constitutional public goods and other people’s rights, because the “true” meaning of a right in question is sufficiently narrow that it will not collide with other constitutional values. Hence, the crucial step consists in ascertaining those

“internal” constraints upon a right, involved as they are in the very meaning of a given concept which figures in the constitutional articulation of that right. The imagery of an “absolutist” understanding may be maintained because the right is indeed “absolute”—but only because it has been already sufficiently restricted in its *scope* of applicability, through the judicial interpretation of its meaning. It is natural that, by restricting the scope of a right we minimize the danger of its collision with other constitutional values while by enlarging the scope, we increase the incidences of such collisions.

The upshot so far is that the *practical* consequences of choosing either of the two main methods of interpreting the restrictions of constitutional rights may be identical. Nevertheless, the moral and political implication of the choice of method may be extremely significant. Consider the consequences of adopting the US-style “absolutist” method first. One of the consequences is a rather clear division between the winners and the losers of any determinate decision (similarly Stone Sweet and Mathews, in this volume). It is because, as I have just shown, the court must conduct a relatively rigid conceptualization of a given right, and by restricting its scope of applicability (in order to avoid collision with other compelling constitutional values) it will at the same time implicitly at least rank this right vis-à-vis other rights and/or other constitutional values. It means that the parties to the constitutional litigations who lost will get a message that their claims were deprived of any constitutional value: they may have been *prima facie* plausible, but after a thorough judicial investigation it has been established that their claims have no constitutional value at all. This means that, even if they defended their claim in good faith, they have been mistaken in believing that their claim is constitutionally worthy. As I have shown above, the judicial act of awarding a priority to a particular right-claim in a quasi-absolute manner is made possible only by a judicial restriction of the scope of the right, and once such a limitation of the scope is conducted, there is no room for the constitutionally valid claims of the opposed party. So the message for the losing party is that it was wrong as to the constitutional worth of its claims, and it is in this sense that, as Alec Sweet Stone put it, this method of constitutional interpretation leads to the constitutionalization of the division into winners and losers (see *ibid.*).

Proportionality analysis leads to different consequences. But before I give account of some *positive* implications of using proportionality/reasonableness method, let me pinpoint what I consider to be the main cost, or negative consequence, of such a method, compared to an “absolutist” one. It should be noted that the “absolutist” method, despite all the negative consequences just described, has at least one fundamental advantage over the alternatives, namely it seems to be perfectly suited to what is a paradigmatically *judicial* function, as contrasted to the legislative function. In a traditional, conventional distinction between legislators who *make* the law and judges who *apply* the law, the use of an absolutist method by a judge seems to be fully justified: all the judge is expected to do is to conduct a thorough interpretation of the true content of a given right in order to rescue it from a conflict with other constitutional values, that is, other rights and other constitutionally recognized public goals. The need to engage in an interpretation is something self-evident and banal, and not even the most ardent opponents of “judicial activism” (whatever the

term may mean) deny the need for the judge to engage in an interpretation, even though, naturally, there may be a wide disagreement as to the proper interpretive methods to be used.

Now let me emphasize that the account provided in the paragraph above is based on quite a deliberate over-simplification. We know, after all, that so-called “judicial activism” may well be reconciled with an “absolutist” approach to the analysis of limitations of constitutional rights, and also, vice versa, that judges who engage in the proportionality analysis may be very deferential (hence, non-activist) towards legislative choices. A great deal, perhaps everything, depends on the actual method of interpretation used by a judge, and *some* choices of interpretive methods must be made both by “absolutist” and by proportionality-oriented judges. So the preceding paragraph does not contain my own judgment that an “absolutist” judge in fact is better aligned with a conventional view about the proper role of judicial function, but rather captures a certain rhetorical advantage of such an “absolutist” method: such method *seems to be* better suited to a judicial function. In the eyes of the general public, political class, non-legal audience which evaluates and monitors judges’ behavior, the use of an absolutist method carries a certain protection for judges against the charges that they intrude upon other branches’ privileged domain. This is because we (“we”—the non-lawyers, “we”—the public opinion) indeed expect the judges to do just that: to inquire, thoroughly and wisely, into the true meaning of the legal rules which they are about to apply to concrete cases or controversies. If we deny the judges to do *that*, we in fact deny them the authority to do their job.

The likely public perception of the use of proportionality analysis is quite different. When limitations of rights are viewed through the prism of “reasonableness” of those limitations, i.e. of the proportionality of those restrictions to the avowed aims of the regulation, the method seems to be a par excellence legislative rather than aligned with the application of the law; hence, conform more with the law-maker’s than a judge’s function. Under a conventional approach, as long as a judge “merely” engages in a thorough examination of the true meaning of a right, s/he stays fully and squarely in his/her domain, and is doing exactly what is expected from him/her. In contrast, proportionality analysis—the analysis of relationship of means to ends—seems to be a paradigmatically legislative function. This is for three reasons. First, the task of ascertaining and assessing the *aim* of the legislation is a par excellence legislative task: it is the legislators who decide about the aims to be pursued by the law, or the aims of citizens that the law is entitled to actively support. And we have seen that the inevitable first stage of any proportionality analysis, in the fully-fledged model, is to assess the legitimacy and the importance of the aims of a regulation under scrutiny. Second, proportionality of the means to the ends is a domain of complex judgments about empirically verifiable causal effects in the realm of social processes, hence the domain within which judges (under a conventional picture) have no competence, knowledge and information. Third—and most importantly—the entire proportionality analysis is (as we have seen earlier) underwritten by the idea of weighing and balancing of competing values, interests and preferences (recall a quote from Chief Justice Chaskalson). And it is precisely the legislators endowed as they are with democratic legitimacy from their constituencies who are

entrusted with the political task of conducting the act of weighing and balancing, and striking compromises between those competing values, interests and preferences. In contrast, the judicial function which fundamentally does not rely, and is not supposed to rely, upon the electoral pedigree for its legitimacy, seems incompatible with the task of an authoritative weighing and balancing of diverse societal interests and values.

This is the main disadvantage of judicial proportionality analysis, and just as before, I must add a clause that the preceding paragraph is an account of the public perception of such an analysis rather than my own assessment of it. Nevertheless, such a perception, justified or not, is in itself an important fact, and must in itself be factored into our evaluation of costs and benefits of alternative methods of adjudication on restrictions of constitutional rights.

Nevertheless, and notwithstanding this disadvantage, proportionality analysis based on reasonableness approach has also some very important advantages, compared to an absolutist method. First of all, it is much more “transparent.” A judge engaged in the act of weighing and balancing of competing constitutional goods discloses the elements of his reasoning to the public. It is, to use an admittedly imperfect analogy, as if a cook in an elegant restaurant first revealed to the customers all the ingredients, and then showed the guests, step by step all the stages of the preparation of the dish before it lands on their tables. By showing all the “ingredients” of his/her reasoning, a judge conducting the proportionality analysis indicates that the final conclusion is not a result of a mechanical calculus: a syllogism in which the conclusion necessarily follows from the premises, but rather the outcome results from a complex, *practical* reasoning, in which significant but often mutually competing values have to be considered in their actual social context. This practical reasoning, a judge implies, calls for making controversial, difficult choices regarding the comparative significance of those competing values in a given set of circumstances. As a result, even if some—even many—members of the audience disagree with the outcome, they know *why* it has occurred. (And by the audience I mean mainly the parties to a given constitutional litigation but also the judicial and legal milieu, the political class, the media and public opinion in general). Of course, from the fact that they *understand* it does not follow that they *accept* it, but the understanding of the reasons for a decision is a very important factor in the legitimacy of a constitutional judge—legitimacy which is always vulnerable, unstable and challengeable, for obvious reasons having to do with the dominant conception of democratic legitimacy based on electoral results. So the legitimacy dividend resulting from the transparency just described is an important asset for judges always facing the notorious, and unavoidable, legitimacy deficit.

I should also add that the contrast between the “absolutist” and the proportionality-based methods has been sharpened here deliberately, for argumentative purposes, and that in reality the opposition is not so stark. On the one hand, one may show a number of “absolutist” judgments which have exemplary clarity and which are perfectly intelligible to the non-legal audience, and on the other hand, many proportionality-oriented judgments which are unduly complex, written in arcane and difficult language, and unintelligible to non-lawyers (and often to lawyers as

well). But when I talk about “transparency” I mean not so much intelligibility, in terms of accessibility to a large number of reasonable intelligent people, but rather the fact that a good proportionality-oriented reasoning should contain a list of all the “ingredients” (in terms of mutually competing values)—while the absolutist reasoning, not necessarily. As such, proportionality analysis is more conducive to critical analysis and to dissection of its elements than the “absolutist” analysis which focuses on one constitutional right and on a thorough examination of its meaning.

But the primary advantage of proportionality analysis is its capacity for consensus building. Note that it is inherent to this method of reasoning that a judge must admit that both parties to the controversy have *prima facie* good constitutional arguments, and that no party is beyond the constitutional pale. When we conduct the weighing and balancing of competing constitutional value, we recognize the value of them all, including to the “losing” ones. If I have lost in this exercise, i.e. if my value has been recognized as less weighty in this particular constellation of values, it does not follow that it has been denied any value: it has just had to give way to another value or set of values. Constitutionality of all these values is preserved. More specifically: under the analysis of proportionality of means (rights restrictions) to legislative aims, a judge who ends up by striking down a given regulation is saying that those means are not sufficiently proportional (relevant) to the attainment of the aim, which may mean either that (1) the aim is not sufficiently weighty in order to justify such a rights restriction, or that (2) the cost of trying to find some other means to attain the end may be lower than the costs adopted by the legislator in the regulation under scrutiny (the costs consisting in the rights restrictions). In both these conclusions, the aims (in conclusion #1) and the means adopted (in conclusion #2) maintain *some* constitutional value—but not sufficiently high in order to justify a given restriction, i.e. lower than the value of avoiding this rights restriction. The upshot is that the arguments invoked in the litigation by an eventually “losing” party maintain their value, though in this constellation, a lower one than the values invoked by the “winning” party. (And, *mutatis mutandis*, the same would be the upshot of a judgment *upholding* a given regulation: the complaining party will not be told that it was mistaken as to the constitutional values which it invoked against the regulation but only that, in this particular context, the value of attaining the goal through the means adopted by the legislator outweighs the costs resulting from the rights restriction).

So if we were to articulate a message sent by the court which has just conducted a proportionality analysis and ended up with a determinate judgment, it would go roughly like that: “Both parties to the controversy had some constitutionally valid arguments but we, the court, must choose a lesser evil and in this case we believe that the arguments of one party constitutionally prevail over the arguments invoked by the other party.” This is a conciliatory argument, consensus-seeking and “wounds healing”—the wounds inevitably resulting from the unavoidable fact that one of the parties will lose. This argument implies, as Alec Stone puts it, “ritual bows to the losing party” (*ibid.*). In addition, the message resulting from such an argument may well contain an implicit promise that, in future, the presently losing party may prevail, if only the actual context will slightly change, thus affecting the reconfiguration

of all relevant constitutional values at stake. The weighing and balancing, resulting from complex practical judgments rather from a mechanical syllogism, may bring about a different outcome, because the judge may well assess that the cost/benefit calculus will be only slightly different—and this slight change may make all the difference. So there is a consolation for the losing party: it is a hope that it may win in the future, and that today's decision does not entrench its loss forever. In such a way, by building the grounds for consensus and by immediately healing the wounds resulting from the decision, a proportionality-oriented judge additionally enhances his/her legitimacy, damaged as it has been by a legislative-like way of proceeding.

2 Reasonableness in Political Philosophy

In liberal political philosophy, the category of “reasonableness” plays a crucial role, especially in relation to the question of political legitimacy, i.e. the question of the grounds for using state coercion towards those who do not necessarily agree with the content of the authoritative directive which is being applied to them. The most elaborate discussion of reasonableness in the context of political legitimacy has been provided by John Rawls, and it is his theory which serves here as the basis of my short discussion of reasonableness in politics.

Rawls distinguishes between two contiguous concepts: rationality and reasonableness, as two separate moral powers which jointly constitute a full moral physiognomy of a human self (Rawls 1993, 48–54). To say it very briefly, Rawls's “reasonableness” is about those moral capacities which allow us to “propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so” (ibid., 49); “rationality” in contrast applies to a single agent and is about forming, shaping, modifying and following our conception of the good. So to put it very simplistically, rationality is about the moral good for an individual person while reasonableness is about the moral bases of collaboration of an individual with the others, on the grounds which are acceptable to others.

This last statement leads to the central category in Rawls's political philosophy, namely Public Reason (PR) which is tied up with the liberal principle of legitimacy which postulates that only laws that are based upon arguments and reasons to which no members of the society have a rational reason to object can boast political legitimacy, and as such be applied coercively even to those who actually disagree with them. In Rawls's words: “Our exercise of political power is fully proper only when it is exercised in accordance with the constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason” (ibid., 137). This is based on a simple point: a law cannot claim any legitimacy towards me if it is based upon arguments and reasons that I have no reason to accept. The denial of legitimacy to such a law is based on the view that there must be some connection between the law and myself *qua* subject of the law—a connection that establishes some rational reasons to identify the good for myself in the law. The connection must be between

the substance of the law and the preferences, desires, convictions or interests of each individual subjected to it. If, under rational examination, no such connection can be detected, then I have no reasons to accept the law as legitimate. If, however, I disagree with the wisdom of a given law but would agree that it is based upon arguments that I can recognize as valid, then a *necessary* condition for its legitimacy has been met. This point has been expressed well by Jeremy Waldron (1993, 44): “If there is some individual to whom a justification cannot be given, then so far as *he* is concerned the social order had better be replaced by other arrangements, for the status quo has made out no claim to *his* allegiance.” As is clear, the category of PR serves to limit the range of rationales—of reasons—which can be invoked to justify (hence, legitimize) the proposed uses of coercion towards individuals.

The very idea of “public reason”, as expounded by Rawls, is not self-explanatory, and not without its difficulties. Rawls operates with two understandings of public reason which are not necessarily equivalent. The first one is revealed in the “equal endorseability by all” criterion; the second, in his extended distinction between political and comprehensive conceptions, with the proviso that public reason must safely place itself within the former. As to the first understanding, Ronald Dworkin has expressed doubts as to whether public reason, so understood (in Dworkin’s interpretation it is characterized as the “doctrine of reciprocity”), *excludes* anything at all. As Dworkin argues: “If I believe that a particular controversial moral position is plainly right . . . then how can I not believe that other people in my community can reasonably accept the same view, whether or not it is likely that they will accept it?” (Dworkin 2005, 252). The second formulation of public reason in Rawls is even more problematic. This is the requirement of locating public reason within the arguments that can be properly considered “political” (hence, positioned within an overlapping consensus) as opposed to comprehensive ones. This, in turn, seems to be a much too rigorous requirement, compared to intuitively acceptable common practices: to consistently purge public debate of all the political proposals made on (controversial) moral or religious grounds would lead to an undue erosion of public discourse, and would carry obvious discriminatory implications.

So we have a dilemma: we may identify two alternative readings of PR but under the first reading, it is much too lenient while under the second reading—much too rigorous, compared to our commonsensical understandings of the reasonableness in public discourse. Does it fully disqualify the very idea of PR to play a role in a test for the legitimacy of law? I do not think so. The contrast between two readings, just provided, has been excessively sharpened, and I hope that a more sensitive reading of PR need not lead to such unwholesome consequences. As to the first horn of the dilemma—that PR is a much too lenient test which will not be capable of disqualifying virtually any regulations—it should be noted that the very fact that someone sincerely considers his or her publicly provided rationale as reasonable, hence universalizable, does not necessarily mean that this view is justified from the point of view of an external observer. Some types of rationales for legal regulations may be viewed as not universalizable by their very nature, and so not lending themselves for figuring in the justifications of legal coercive rules. Perhaps all religious justifications are by their very nature not “endorseable by all”, because those who are

not adherents to a given faith have no reason whatsoever to endorse a rationale which crucially is based on that faith. It may well be the case that every believer is confident that his/her beliefs are truly reasonable, and that they are so self-evidently reasonable that every reasonable person must accept them. But this is not necessarily the only conviction accompanying religious beliefs: if, for example, someone believes in revelation as a source of religious faith then naturally that person cannot maintain that every reasonable person has good reasons to accept the views based on that faith. So these religious beliefs cannot become part of PR—and so the very conception of PR is not as toothless as this horn of the dilemma would imply.

We can extend this type of argument upon the second horn of the dilemma as well; it was, you will remember, that PR is much too rigorous a test because it would disqualify many more justifications, compared to our intuitions or common sense. This second reading of PR was based on hostility towards admitting “comprehensive”, philosophical-religious arguments into the domain of public discourse, in order to be able to construct an “overlapping consensus.” At the same time it is intuitively feasible that participants to the public discourse about law should be able—indeed, even encouraged—to cite and appeal to their deep philosophical conceptions, based on certain views of the universe, society and individual self. This suggests that the concept of “overlapping consensus”, if it is to inform a plausible model of PR, must undergo some modifications and refinements in order to make it compatible with widespread liberal-democratic intuitions. It seems to me that the very fact of citing or appealing to a deep philosophical rationale cannot disqualify a given argument from figuring in the PR—that would border on the absurd. Rather what matters is that we put forward only such proposals for a coercive law which may be accepted even by people who do not share our deep philosophical views—which in practice means that these proposals must be able of being defended *also* on some other grounds. This seems realistic and feasible; after all, most legal rules seem to be able to benefit from different philosophical (and other) rationales. Consequently, the second horn of our dilemma appears to be less damaging to the idea of PR than it might seem at first blush.

It is time to aim at some conclusions regarding the functions of the notion of reasonableness in political philosophy. As mentioned earlier, it has a special role in the context of the issue of legitimacy of political power, i.e. of the use of coercion towards individuals. Let me elaborate on this connection now. The issue of legitimacy arises in political philosophy, from the individual citizen’s perspective, when she asks herself a question why she should comply with a directive issued by an authority if she disagrees with the content of this directive. More specifically, this question arises in the context of legitimacy when a persons contemplates her *moral* duty to comply: if all that she wondered about was a *legal* duty, the question would be uninteresting, because tautological. Similarly, if she inquired only about practical, in particular about the prudential reasons for compliance, the question would not amount to the matter of legitimacy but rather would collapse into practical guidelines regarding avoidance of sanctions for non-compliance. But the moral question is different from the legal and from the practical one: it is a grand question (perhaps, *the* grand question) of political philosophy going back to Jean

Jacques Rousseau: how can we reconcile our individual freedom with subjection to the “general will” (however defined, as long as the “general will” does not necessarily translate fully our individual preferences into the collective choice)? So it is a question about the sources of the public authority, and of its dominance over the individual; it is a question of the grounds of the duty of obedience to law by the citizens. Liberals admit, of course, that this duty to obey is not unlimited—hence the acceptance of some room for civil disobedience—but they cannot go as far as to say that the duty to obey should be confined only to those authoritative directives with which we agree, on merits. It would be an anarchistic position, and the very fact of the lawfulness of a given directive would not add any weight to the argument in favor of compliance.

From this point of view, the concept of “legitimacy” serves as a marker to identify the point on a continuum between two extremes: the authoritarian position under which the very fact of authoritative enactment of a directive is a sufficient moral reason for compliance with it, and on the other side of the spectrum, an anarchistic position under which the very fact of legal enactment does not add any weight to moral arguments for compliance. Under a liberal approach, the fact of legal enactment is an argument for compliance (and in this, it is aligned to the authoritarian position), but is its not a sufficient reason and the duty of compliance is not absolute (and in this, it is aligned with an anarchistic position). The intermediate space which is occupied by a liberal position implies that there is a duty to comply with at least some authoritative rules which are not substantively accepted by a given person—and it is precisely the task of this idea of legitimacy to determine what are the criteria, grounds and scope of a moral duty to comply with those rules.

As we all know, political philosophy has in store a large number of theories trying to provide such criteria and grounds for the duty to comply with the rules we do not necessarily endorse substantively. Two recently most influential theories are by appeals to the idea of social contract and to deliberative democracy. The conception of Public Reason, as described above, attempts to reconcile both these argumentative strategies. From the idea of social contract it borrows a centrality of consensus which seems to be a foundation of authoritative social arrangements: we owe respect to authoritative decisions insofar as, and because, we can be seen to be their co-authors. This is only a hypothetical consensus, though, and a very thin one, based on the alleged common normative presuppositions implicit in the political culture. In turn, deliberative democracy also informs the idea of PR by insisting that the authoritative decisions, in order to be legitimate, must be justified (in both senses of the word: both actually justified and justifiable) to those who are bound by them. Just as with the consensus (social contract), this is a very *thin* notion of deliberation in which *justifiability* is pretty much a sufficient condition even though a liberal, of course, will hope that the authoritative decisions will be not only *capable* of being justified but also actually argued, discussed and justified in public dialogue. Nevertheless PR, per se, is reducible to justifiability of authoritative decisions. To sum up: reasonableness of political decisions, understood through the category of Public Reason, means a search for a consensus about those decisions by making sure that they are based on the rationales which are justifiable to everyone, including to those who disagree with those decisions on merits.

3 Conclusions

In the Introduction to this chapter I have flagged up a possibility that reasonableness in legal reasoning and reasonableness in politics are two completely distinct categories, and the only commonality they have is the word. If that were the case, any search for a common denominator would be a result of a simple nominalist error. I hope that this chapter has given some reasons to believe that it is not the case, and that the identity of the word may be a helpful indication of a functional similarity of the functions played by the category of reasonableness in these two contexts; the functional similarity which is underwritten by some common value-judgments on which this category is based. So it all boils down to a normative rationale provided for reasonableness in a legal and in a political context.

Let me recapitulate. I have established that in the context of legal theory, the category of reasonableness informs this factor of legal reasoning which may have either a weak meaning, of a “security valve” which allows judges to get rid of manifestly irrational or absurd decisions, which is of lesser importance to us, or—in its “strong” meaning—triggers a proportionality analysis, i.e. the proportionality of means to ends, where the “means” consist in restrictions of constitutional rights, and the “ends” are about constitutionally permissible aims pursued by the legislator. “Strong” reasonableness is therefore inherently tied up with proportionality, and also with the test of necessity, and thus is a guarantee of a minimal restriction of constitutional rights compatible with the attainment of a given purpose. This approach is one among many judicial approaches to the scrutiny of restrictions of constitutional rights; not the only one, and not necessarily the most libertarian one. It carries certain disadvantages because of an unfortunate alignment of the judicial role with the role of legislator whose classical and generally recognized role is to conduct a complex weighing and balancing of competing social values, interests and preferences. But the proportionality approach also has some great advantages when compared with alternative approaches: it is more transparent when it comes to revealing to the public all the ingredients of the judicial calculus, and most importantly, it reduces the sense of defeat for the losing party. As such, it is consensus-oriented because it acknowledges explicitly that there are valid constitutional arguments on both sides, and that the arguments outweighed by the opposing ones do not lose thereby their constitutional weight.

In turn in political philosophy the notion of reasonableness registers primarily in the liberal theory and applies to the determination of the standards of justification for authoritative decisions so that they can be considered legitimate, i.e. calling for respect even from those subjected to them who do not agree with them on merits.¹⁰ Such justifications can be seen to reflect the reciprocity principle which can be viewed as a version (albeit a weak one) of hypothetical social contract: it demands that only such rationales be provided for authoritative directives which can

¹⁰ I am deliberately using the careful language of “respect” rather than “compliance” because there is a plausible theory that legitimate authoritative decisions do not necessarily generate a moral duty to comply with them but rather to “respect” them; more on it see Sadurski (2006).

be endorsed by everyone to whom they are addressed. The attractiveness of this idea results from the fact that it combines two enormously popular traditions in democratic theory: those of social contract and of deliberative democracy. In general, the idea of political legitimacy based on reasonableness is an important guarantee of liberty (because, treated seriously, it limits the scope of possible rationales for legitimate coercive decisions) and also of equality (because, by resting on the reciprocity principle it requires that everyone should be registered in the rationale provided for this authoritative decision).

So it can be seen that both these conceptions: reasonableness in law and reasonableness in political theory have some obvious commonalities at the level of their deep justifications; both appeal (in the ways I depicted) to liberal, egalitarian and consensus-oriented values. This is not to say that there are no important differences between the two conceptions. But my aspiration in this chapter is to reveal the similarities which, in my view, have been overlooked in the conventional discourse on reasonableness, both in legal and in political theory. This aspiration, if accomplished, may be a confirmation of the hypothesis, flagged at the outset, that the similar word may be a helpful indication of the functional similarity. This hypothesis may, in turn, be conducive to interesting normative considerations: it may help us defend the use of proportionality analysis in law by appealing to the, antecedently accepted, political legitimacy based on reasonableness. Or vice versa: it may help us exploit the attractiveness of proportionality analysis in law in order to defend the idea of political legitimacy based on reasonableness. Either way, the category of reasonableness may be a helpful tool for consensus-seeking in the society marked by a deep disagreement as to fundamental moral values.

References

- Craig, P. 2006. *EU Administrative Law*. Oxford: Oxford University Press.
- Dijk, P. van and G.J.H. van Hoof. 1998. *Theory and Practice of the European Convention on Human Rights*. The Hague: Kluwer.
- Dworkin, R. 2005. *Justice in Robes*. Cambridge, Mass.: Harvard University Press.
- Mowbray, A. 2001. *Cases and Materials on the European Convention of Human Rights*. London: Butterworths.
- Rawls, J. 1993. *Political Liberalism*. New York, N.Y.: Columbia University Press.
- Sadurski, W. 2006. Law's Legitimacy and Democracy-Plus. *Oxford Journal of Legal Studies* 26: 377–409.
- Schauer, F. 1982. *Free Speech: A Philosophical Enquiry*. Cambridge, Mass.: Cambridge University Press.
- Waldron, J. 1993. *Liberal Rights*. New York, N.Y.: Cambridge University Press.

Global Legitimation and Reasonableness

Sebastiano Maffettone

1 Background and Prologue

Human societies are at once confronted with a social story of cooperation and conflict and a cultural story of identity and difference. This parallel story concerns both the internal life of any society and its international relations. It is generally the rule, of course, to imagine some overlap between the socio-economic side and the cultural side of the narrative. Identity based conflicts, for example, are often sparked and exacerbated for reasons of socio-economic background.

Often, however, people in my generation (I was born in 1948) will understand these two stories—these two cleavages—as originating at different times in their lives: they see a first part of their intellectual life as dominated by the socio-economic cleavage and the second one as re-shaped by the identity cleavage. Their perception tends to reconstruct a youth period in terms of heated discussions about the vices and virtues of communism versus liberal democracy, continuing with a more mature age in which the merits of communism became increasingly more obscure to many. After 1989, one might even have come to believe, quite naively to be sure, that the demise of communism and the concurrent victory of liberal democracy had set the stage for a more or less enduring age of global peace and prosperity. But quite rapidly, as we all know, the *histoire événementielle* belied this bizarre philosophy of history.

This widely shared narrative has had its institutional outcomes. Indeed, the breakup of the Soviet Union, coupled with the previous break up of the colonial regimes in Africa and Asia, made it appear in many areas of the world that the traditional institutions of the West were obsolete and in need of urgent change. The innovative claims of many emerging “indigenous” peoples compelled many of us to question the limits of even our preferred institutional model, namely, that mixture of basic individual rights and popular sovereignty that we usually call liberal democracy. We began to have doubts, so to speak, about its intrinsic normative significance, and began pile on conditions that would make it feasible, conditions, such as

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a decent level of income (the living wage), a coherent institutional framework, some form of religious pluralism, an ethnic and sociocultural base ranging within certain bounds, and so on. It's surely an exaggeration to reconstruct all these intellectual oscillations within the rather disturbing and quite rigid framework characterized by a permanent and global clash of civilizations. Still, it became standard in political theory across the globe to issue a cultural challenge to Western institutional models.

Political theory cannot survive too long without being shaped by the historical circumstances in which it flourishes. So, the growing relevance of cultural conflicts, compounded by the pressure of gender and race movements, was such that there simply *had* to be systematic consequences in our foundational thinking about the structure of the social order. Political philosophy, in other words, cannot resist historical change. But, what was the status of political philosophy during this period I am vaguely referring to? Of course, it is difficult, if not impossible, to answer this question in a proper way. Even so, if we can content ourselves with a loose yet hopefully sensible attempt at a *Nachrekonstruktion* (or rational reconstruction), we can provisionally explain this in terms of a systematic dualism between two main streams.

On the one hand, political philosophy saw a systematic attempt to address the new global problems from within the framework of liberal democratic theory, the intellectual winner emerging from the Cold War era. In its general form, liberal democracy was powerfully reformulated by John Rawls (1971) in terms of a theory of justice seeking to make compatible the human needs and aspirations present in a regime of basic pluralism. Rawls provided the impetus for attempting a global extension of this liberal model of political philosophy, whose original configuration was the nation-state: the model was thus first extended to the global socio-economic structure, with scholars like Beitz and Pogge, and subsequently to the global cultural scenario, with scholars like Kymlicka and Kukhatas.

On the other hand, we saw a sometimes confused but nevertheless energetic attempt to overcome the traditional foundational apparatus of political philosophy, that survives from the previous model. From Asia, Africa, and the Middle East there emerged a need to break out of the mould of liberal democratic theory, which was regarded as merely a Western product, at least in part, and so as the last vestige of the colonial era. Scholars like Said, Baba, Appadurai, Spivak, and Mbembe often found their ideal Occidental counterpart in the works of so called French Thought. In this way, you wound up with this odd mixture of Western post modernism and non-Western post-colonialism, that became exceedingly popular in the in the United States in what are often referred to as area studies. The outcome of this process often consists in a framework in which alternative and competing models of globalization coexist. To be sure, I do not think this kind of intellectual tradition has acceptably captured the sense of such basic political concepts as those of human rights and liberal democracy. But it does deserve credit for having presented some models of globalization antagonistic to a past of Western cultural and political dominance, which post-colonial peoples certainly had good reasons to react against.

To sum up, I see in the post-colonial post-modern tradition of political philosophy not so much a significant option in its own right as a useful symbolic reminder: a

signal that something is lacking in the models of liberal democracy, even when these are compellingly reformulated in terms of liberal justice. Rawls's theory of justice, to take the most influential of these models, offers a theoretical reconstruction of politics framed as a search for rational and reasonable terms on which basis it may be possible to institutionally build a stable system of cooperation among free and equal persons. In doing so, it must be conceded, this theory passes over in part what is probably the most traditional problem in political thought: not the problem of rights and justice *per se* but that of power. Many post-colonial post-modern thinkers who take up the intellectual heritage of Carl Schmitt or Michel Foucault, can be understood as saying that any political theory which fails to address the question of power is in a way empty. That is why we will eventually have something like a "clash of globalizations" (Hoffman 2002) in which alternative narratives meet and compare notes, as it were.

I shouldn't want to indulge here in any amateurish form of dialectics between liberal and antagonist models of globalization. Still, it does seem worthwhile to me to try and improve the general framework of a liberal theory of justice by bringing into it the question of power. And that is precisely the attempt I will timidly make in what follows.

In doing so, however, I will not present power in a naturalistic way, in the manner of Schmitt, with his friend-foe distinction, or in the manner of Foucault, with his biopolitical imagination: I rather conceive power in a normative way, consistently with a Kantian and liberal approach to political theory *à la* Rawls. In other words, I am interested in power understood not simply as force or influence but as justified liberal democratic authority. Which is why, I chose "legitimation as the concept through which" to discuss the question of power within a liberal theory of justice. Legitimation, so conceived forms the basis of stability, and stability—from Hobbes onward—has much to do with power.

This paper divides into five sections. In the next section, I will attempt to clarify what I mean by legitimation: this attempt includes a theoretical account of political normativity based on a non-standard distinction between justification and legitimation. In Section 3, I present what I judge to be a new statement of Rawls's idea of an overlapping consensus. In Section 4, I expand the traditional statist interpretation of an overlapping consensus to cover some aspects of global politics. This move presupposes the political ideal I have called pluralist integration. In Section 5, I consider whether this model can be stable. I conclude in Section 6 by pointing out some limitations the model comes up against.

2 Legitimation

Here I will define a concept of legitimation proceeding *per differentiam specificam*, mainly by contrast to other classical quasi-synonymous concepts. I mean by legitimation a kind of conferred, quasi-general, or at least widely recognized legitimacy. This move, however, does no more than transfer the burden of definition from legitimation to legitimacy, with some improvement from the standpoint of

ordinary language, perhaps, but certainly without any substantial theoretical gain. So, in working toward that end we must begin, I think, by distinguishing legitimacy from other traditional legal-philosophical concepts, such as effectiveness, legality, and validity. Its distinction from effectiveness is quite straightforward. The mere fact of a legal rule or provision being in effect doesn't say anything special about its legitimacy, which requires more than mere compliance: it requires some form and some degree of moral assent. Roughly the same distinction—in something of a more nuanced fashion maybe—can also be drawn between legitimacy and legality. The legality of a legal rule or provision implies an acceptable formal pedigree. When legality combines with effectiveness, that is, when it achieves a substantial degree of compliance or acceptance, it yields, validity. Unlike validity, however, legitimacy requires this potential acceptance to be acceptance for the right reasons.

This last point makes it necessary to introduce my main distinction in normative political theory: the distinction between legitimation and justification. Legitimation as previously defined—as a publicly conferred, quasi-general, or widespread legitimacy—certainly overlaps to some extent with justification, both concepts being moral. The problem with justification is that it cannot be fully public or extensively wide, this owing to what Rawls calls reasonable pluralism. In a plausible legal-moral universe, there will be any number of justifications behind a single legitimation. It seems clear enough that many justifications will be found where true pluralism thrives, each one having its own rightness, or a relative degree of it, and its own cultural origin. Think of what Rawls calls the burdens of the judgment: deep ethical and metaphysical justifications cannot even in principle be imagined to converge toward the same focal point.

Legitimation, by contrast, assumes the possibility of exactly this kind of unity. What do I mean here by unity? My idea is that legitimation relies on our general acceptance of an institutional system, and in this way offers the only plausible answer to the Hobbesian question of how order and stability are possible: they are made possible by combining a socio-political point of view with a legal-moral one. (Here the late Bernard Williams misinterprets liberalism.) Which in turn is possible because we generally believe that the basic legal rules and provisions (or at least some of them) must be generally accepted if we are to make anything meaningful out of the idea of a (moral) legal order. These rules may regard, albeit in different ways, both the internal order of a state (its “constitutional essentials”) and the international order among states. It is with these basic elements of the law that legitimation is concerned, since there can be no other focus or basis of convergence in a regime of pluralism. As we will see, this cooperative complementarity between justification and legitimation operates, in my model, through a revisitation of what Rawls calls an overlapping consensus.

My theoretical hypothesis, as I have been suggesting, proceeds on the idea of a dialectics between justification and legitimation. These terms are typically used with much overlap in political theory, but I nonetheless think it important to appropriately distinguish between them. According to my distinction, justification looks for the best theoretical argument, is intrinsically substantive, goes top-down, and is

rooted in the moral and metaphysical bases of a specific culture. Legitimation, on the contrary, is normally based on a successful practice, is procedural and factual, involves a political process, goes bottom up, and does not appeal to the deep roots of a culture. My thesis is that one needs to make justification and legitimation complementary. We can have conflicting justifications, all of them plausible, all the while relying on a single legitimation, if for no other reason because we are assuming the fact of pluralism in contemporary liberal-democratic societies and the consequent need for stability.

I should note here that not only Rawls but also Jürgen Habermas, another distinguished social thinker of our time, makes an implicit use of this distinction between justification and legitimation. In *Between facts and Norms*, Habermas (1996) starts out calling for a structural compromise between practical reason and social praxis. In doing so, he uses validity claims that do not depart too much from the dictates of traditional practical reason; but at the same time, he does not pretend to solve practical dilemmas a priori, and instead seeks to maintain a connection with factual reality. As a consequence, his discourse-based critical theory spills over beyond what is considered the standard compass of moral philosophy, making its way into the domain of positive law. In this way, Habermas argues, normativity parts with the tradition of a pure philosophy of the subject and seeks to objectify itself. In the outcome, this complex procedure should make it possible to restore the conjunction between ideal validity, which is normative and decontextualized, and social validity, which on the contrary is connected to factual criteria. This re-conjunction, according to Habermas, requires democratic law to be publicly recognized as legally valid, a recognition secured by the equilibrium that obtains between general compliance with the law (as assessed by statistical evidence) and our ability to justify this compliance through the dialogical nature of liberal democracy (where citizens are both producers and consumers of legal norms). These two functions the law allegedly serves are each the standard counterpart to the other, and together they provide what a complex contemporary society needs for its integration: a society of this sort cannot be integrated through normative values alone, but also requires the complement of factually operating institutions like a market system and judicial power. My argument is that the deep sense of this dual strategy can be better explained through the combined force of justification and legitimation, as previously defined: justification would provide the meaning of the ethical content on which a critical theory is based, and legitimation a working system so justified.

A similar move is made as well by Rawls (1993) in *Political Liberalism*, albeit with greater philosophical prudence and a different objective. Rawls doesn't actually seek, as Habermas does, to achieve a coherent integration between a normative-philosophical justification and a factual legitimation: he instead continues to work within the horizon of a philosophical theory of justice. Even so, in working through the central conundrum—of how to achieve stability all the while preserving pluralism—he must concede that it will not suffice to proceed on a pure philosophical justification of liberal democracy, such as the one he himself had presented in *A Theory of Justice*: this will not ensure the desired normative equilibrium between these two opposite claims (stability and pluralism). Just for this reason he forces

out a social device—the idea of an overlapping consensus—and makes it hybrid by enveloping it within a more general normative validity. In this way, as the second Rawls maintains, we can have a well-ordered society in which like-minded citizens with comprehensive, but reasonable, worldviews can peacefully coexist. This providential equilibrium, however, would not be possible but for a successful constitutional tradition in the background, such as that which has characterized US public life since the founding fathers. This background constitutional loyalty alone allows people and doctrines to coexist that differ in every other respect, in that the worldviews by which they are informed are divided by deep ethical and metaphysical differences. The history of an empirical success, such as the one the United States Constitution has had over time, is thus made to work in tandem with the moral and political normative premises of Rawls's discourse, and the two are made coherent. To translate this in my own terminology, the philosophical justification offered by the principles of justice meets the factual legitimation offered by the legal and constitutional history of American public life.

3 Overlapping Consensus

The central problem addressed in *Political Liberalism* is the simultaneous presence in a liberal democratic society of plural comprehensive doctrines: this pluralism poses difficulties for stability. In the second part of *Political Liberalism*, Rawls tries to solve this problem he framed in the first, and the key tool in working toward such a solution lies precisely in the idea of an overlapping consensus.

This solution requires two conditions for what Rawls calls a political conception: (i) this conception must be worked out for the basic structure; and (ii) political power must be coercive (Rawls 1993, 135–36).

Political power must coercively be imposed in the basic structure, because citizens espouse different comprehensive doctrines, and in all liberal democratic systems, this fact gives rise to what Rawls describes as the problem of liberal legitimacy, which is his rendering of the question of power posed here at the outset. Power can be justified only if exercised within the framework of a constitutional system of rules that free and equal citizens can endorse. This acceptance should take root under such institutional and political conditions as will foster the gradual assertion of an *overlapping consensus*.

In Rawls's vision, an overlapping consensus is typically achieved in any situation where citizens in a well-ordered society, despite the different comprehensive doctrines they espouse, tend to have the same liberal political outlook. This complex process is not imposed on citizens from the outside but rather develops “from within their own comprehensive view,” proceeding from their doctrines' own “religious, philosophical and moral grounds” (ibid., 147). Each citizen—regardless of whether his or her basic comprehensive doctrine is Muslim, Catholic, or Buddhist, secular or religious, utilitarian or Kantian, sceptical or pluralist—should come to agree on the principles of a liberal and egalitarian political justice, finding some of the reasons for such an agreement within his or her own comprehensive doctrine. The outcome

will not be, according to Rawls, a superficial or prudential consensus, but a properly moral one. In other words, it will not be a compromise, what Rawls calls a mere *modus vivendi*, since an overlapping consensus does not depend on any balance of force that might at any one time obtain among different reasonable comprehensive doctrines, but will instead partly be *rooted* in such doctrines.

The basic idea consists in breaking our morality down into two parts: on the one hand is our overall personal morality, resting on deep moral or religious foundations; on the other hand is a more limited institutional morality, which instead concerns us as citizens (rather than as persons) and is rooted not in our deep moral or religious commitments but in the loyalty we all devote to the political and constitutional system in which we live our public lives. The political conception based on this institutional morality makes it possible to govern the pluralism of the conceptions of the good, a pluralism viewed as a virtue of an open society. This is possible precisely through the formation of an *overlapping consensus* among citizens who—even as they hold on to their ultimate convictions, and indeed *depend* on them—nevertheless manage to set these convictions aside in the public sphere (or rather, in certain areas of the public sphere) and to act instead from a shared and dominant institutional morality. Rawls argues in *Political Liberalism* that this offers a better account of stability than that previously offered in *A Theory of Justice*. And what makes such an *overlapping consensus* possible is that citizens in a liberal democratic society are reasonable toward one another: they take its pluralism into account and value and respect it, which enables them at the same time to express themselves publicly in the language of political reason.

The core idea involved here is an old one: Rawls explains it as that of the “priority of the right” (over the good). Pluralism in a well-ordered society reigns supreme, and not just as a fact we can all appreciate every day in our lives, for it is also a good for most of us, that in an open society different aesthetic, ethical, and religious views can meet and, if necessary, engage with each other. Yet this pluralism cannot concern the entire institutional order and the fundamental structures of politics. Here, on the contrary, we all need a certain degree of unity. This unity, however, cannot be grounded in a single moral and political theory, such as the theory of justice as fairness. So in this case we need a consensus that’s not as deep but is broader, its primary object being precisely a political conception of justice for a basic structure capable of ensuring some degree of pluralism.

The source we should look to for inspiration in working out a model for such a consensus is, according to Rawls, the birth of classical liberalism—the outcome of a laborious process through which we achieved religious tolerance. It took centuries of clashing and warring, but the , European civilization eventually discovered, in Rawls’s words, “a new social possibility: the possibility of a reasonable harmonious and stable pluralist society” (ibid., XXV). *Before* that time it seemed inevitable to believe that “social unity and concord require agreement on a general and comprehensive religious, philosophical or moral doctrine” (ibid.). After that time, Europeans came to realize that “it is difficult, if not impossible, to believe in the damnation of those with whom we have, with trust and confidence, long and fruitfully cooperated in maintaining a just society” (ibid.).

On this view, liberalism cannot be separated from tolerance, just as tolerance cannot be separated from our loss of certainty about truth—from our no longer clinging to the idea of a single truth. If the liberalism of the European tradition (the liberalism Rawls is referring to) emerged through a loss of orthodoxy, then liberal political theory should still be characterised today by a certain loss of faith. This separation between liberalism and certainty (or even between liberalism and truth) can justifiably be characterized as historically traumatic, entailing as it did a long process and various intermediate stages, before attaining the maturity to which Rawls takes it in his own position. It thus seems natural, somehow, that a first brand of liberalism should initially have grounded all its certainty in precisely a loss of certainty, and in this sense was essentially sceptical, as Voltaire's was, or that a second brand of liberalism, operating on the conviction that another foundation could ultimately be found, should have set out searching for one—for a foundation alternative to, albeit no less deep than, the religious faiths—as in the case of Kant and Mill. Rawls's political liberalism rejects both of these solutions and charts a middle course, which is that of an overlapping consensus.

It should be noticed in this regard that we are now going through something like the same historical situation out of which liberalism first developed: just as religion was at one time a divisive force, so are there deep moral divisions nowadays that make politics a bitter and acrimonious affair. Whence the need to find some kind of common ground enabling different people and groups to live together in peace and harmony regardless of what other values they might cherish. This is the main task of political philosophy, considering that we turn to it primarily “when our shared political understandings [...] break down” (ibid., 44). And an overlapping consensus is the culmination of such a reconciliatory project.

Many scholars are perplexed about Rawls's solution of an overlapping consensus. Their perplexity is owed to the double standard to which Rawls holds the two main types of political and cultural disagreement that can be observed to exist in any society. This is to say that such disagreements may involve conceptions of the good or they may involve conceptions of justice: the former are paradigmatically religious, though they may also involve *secular* conceptions of the good; the latter concern instead social justice and arise out of our different understandings of it, as in the example of the controversy between liberals and socialists that dominated the political debate during the time when people in my generation were growing up.

It only makes sense to ask, therefore, what kind of relation can be imagined to hold between these two types of cultural and political disagreements, about the good on the one hand and about justice on the other. There are two main views in this respect: one stipulating a deep *continuity* between these two types of disagreement, and one stipulating instead a *discontinuity* between them. Continuity can be exemplified by taking the issue of abortion in Italy, a country in which the Catholic Church plays a significant political role. On this view, the political controversy on abortion is essentially an outgrowth of the opposing conceptions of the good espoused by those on either side of the debate (pro-lifers versus pro-choicers); thus, we might have, on the one hand, a conception of the good rooted in the idea of the sacred nature of human life, and on the other hand a Kantian conception of

individual autonomy, and these two conceptions are to account for the political disagreement. Another example is, in Muslim countries, the issue of how the relation between religion and politics should be framed as it affects the public sphere. Of course, on the view that disagreement about justice is continuous with disagreement about the good, the latter may well involve entirely *secular* comprehensive conceptions. On the opposite view, as was mentioned a moment ago, these two types of disagreement are instead discontinuous. In fact, not only are conceptions of justice separate from conceptions of the good: they are also asymmetrically situated with respect to the latter, since conceptions of justice are primarily intended to serve the institutional function of regulating such conflicts as they inevitably arise—given the fact of pluralism—between the conceptions of the good. Which means that disagreement between competing conceptions of justice cannot, on this view, be regarded as issuing from a disagreement involving conceptions of the good: we may disagree about how to handle conflicting conceptions of the good, but the reasons for our disagreement are not to be found in those conceptions themselves (given the separation assumed to exist between the two types of disagreement).

If we ask, now, what view Rawls takes in *Political Liberalism* on the question of how disagreement about the good relates to disagreement about justice, we will see that he understands these two as discontinuous. In *A Theory of Justice* and *Political Liberalism* alike, disagreement over the good is presented by Rawls as clearly distinct from disagreement about justice. But then, a most obvious problem emerges when a distinction so strong is made, separating what is inherently contentious from what is not, because doing so suggests (as Rawls seems to) an attempt to immunize the concept of justice from conflict. Rawls's praise of pluralism in *Political Liberalism*, and even his insistence on the burdens of judgment, seems limited to disagreements about the good. But then, when it comes to the "political conception," with its fund of "shared convictions" and "fundamental ideas," and even more so when we turn to the subject of an "overlapping consensus," we cannot but bear out the impression that a certain unified outlook joins us in the face of deep disagreements about the good, in that we rise to the occasion and seem to agree on at least a number of general characteristics of justice. Hence, the critics' perplexity: Is it really possible to conceive a world, such as the one we live in, where justice is not a thorny, controversial subject, in the sense of its not engendering robust political and moral disagreement?

Critics for whom the answer to such a question is in the negative charge that Rawls does immunize politics in *Political Liberalism*, and they see two main options in this regard: the immunization comes by way of a de facto compromise, a *modus vivendi*, or it comes by way of reviving in *Political Liberalism* the conception of stability found in *A Theory of Justice* (and criticized in *Political Liberalism*), meaning that Rawls brings back, in a different form, something like the liberal "comprehensive doctrine" on which his earlier account of stability was based.

I believe that if we are to reply to these objections, we must begin with an assumption, namely, that Rawls proceeds on two different interpretations of liberalism at once. On the first of these, liberalism is viewed as a comprehensive doctrine, and it can definitely be identified with the theory of justice as fairness, but also with

a Kantian conception of autonomy, or with some other conception still. But this only concerns the level I have called justification, which is grounded from within each person's comprehensive doctrine or conception of the good. Justification so understood sends down deep roots, but the "existence of pluralism," a typical feature of contemporary societies, makes it difficult to achieve such depth and exposes justification to attack from all sides. So, if we attempted to work something out at the deep level of justification, we would not be able to find the minimum of convergence on justice that Rawls is looking for. Whence the idea of taking up a second meaning of liberalism, a meaning divorced from justification and connected instead to what I have called "legitimation". This second idea of liberalism says, in short, that there are liberal democratic institutions and practices that no "reasonable" person would want to do without. These are only a handful but they are fundamental, concerning, as they do, the essential elements of a liberal constitution and some questions of basic justice, including several social bases of equality. My view is that an overlapping consensus can exist only insofar as it unites these two views of liberalism, the one based on justification and the other on legitimation.

My idea of legitimation takes into account the fact that Rawls always tries to include in his theory elements of historical experience capable, so to speak, of qualifying consensus with the support of external factors in some way independent of the favoured theoretical approach. On this view, there can be no way out of a theoretical impasse without looking to experience, which, in the public domain is given by the way in which the *basic structure* functions as part of a liberal democratic system. And this turns out, on closer examination, to be the vantage point from which Rawls looks at the theory of tolerance; and what marks the difference from his modern predecessors, such as Locke and Bayle, is that they could not, after all, rely on an exemplary practice for reference.

4 A Global Overlapping Consensus?

In the last section, I gave an account of Rawls's idea of an overlapping consensus. Extending such a consensus on a global scale is, needless to say, a more complex matter, and one that takes us on a path less travelled by.

As Rawls explains in *Political Liberalism*, the strategy in working toward an overlapping consensus presupposes a single institutional reality, this being a liberal democratic order that people can converge on even as they reason from different moral, religious, and metaphysical premises. But only within such a unified institutional reality, providing a common framework, is it plausible to think that different comprehensive doctrines can live side by side in a regime of reasonable pluralism and toleration. And, historically, this option is clearly linked to the fact of the nation-state. Indeed, the nation-state provides an institutional framework within which moral and intellectual disagreements can partially be worked out (or *reasonably* be worked out, to use the standard term), and we can see how the majority of them can in fact be so resolved, precisely because there is a common framework that everybody can accept all the while retaining their deep, comprehensive views.

But while this strategy seems appropriate for the liberal state, it does not *prima facie* seem extensible to international relations, for we cannot find here anything like the international equivalent of a common institutional framework that all can recognize. Now, I submit that such an impossibility theorem does not stand up.

If we assume, as seems entirely natural, that human rights are not only a set of moral imperatives but also a set of juridical requisites, then we should also recognize that this set of legal norms constitutes a deeply entrenched background that would pose a formidable challenge the moment we tried to remove it. It is quite difficult to think that existing human rights can be replaced with an alternative set of moral imperatives—all of them fully adequate safeguards for the protection of human dignity—if such imperatives did not have a successful historical background on their side. This observation suggests that, while any number of moralities, religions, and metaphysics can well ground and support the same existing set of human rights, they can hardly substitute for such a set of rights. In other words, it is easier to fit different religions, moralities, and metaphysics into the existing package of human rights than vice versa (than to package a new menu of human rights into an existing range of deep doctrines). Still, it seems to me that the process by which we set out to integrate an existing platform of human rights with several deep justifications of them must be a pluralist and critical one. This means, as we will see, that existing human rights cannot be taken for granted simply by virtue of their already being with us, and their legitimating force must therefore be discussed and evaluated through an open intercultural dialogue. If we accept this premise, then the overlapping-consensus model can be extended to also cover the domain of human rights.

To see how this might be achieved, we will in some way have to subscribe to the political ideal I choose to call pluralist integration, under which human rights, just like political democracy and the rule of law, cannot be established from the centre of the global system and then spread out and imposed on the outer reaches of such a system. Far from it: whether human rights can take root across the entire system will depend on the possibility of their becoming the heritage of the single national cultures. I believe there to be little doubt about the political reasonableness of this proposal: if it makes no sense to impose Western certainties on cultures that do not perceive them that way, it doesn't make much sense to sanctify local cultures, either, by abstaining from any critical assessment of their contents and implications. In any event, the political reasonableness of pluralist integration doesn't constitute a philosophical strength. Which is why my primary concern here is to set this proposal against the backdrop of a philosophical idea consistent with it.

The basic philosophical idea behind pluralist integration consists in singling out two levels at which we can each develop a sense of belonging and loyalty: at a moral and metaphysical level, we each retain our own traditional cultural or religious perspective; but, at the same time, at a political level, we each espouse a vision convergent with that of the other members of the international community, through a process that progressively builds up a multicultural overlapping consensus. The focus of such an extended overlapping consensus are human rights themselves, which figure as shared elements—their nature both legal and political—consistent with various moral, religious, and metaphysical foundations. This thesis

thus presupposes that inherent in all cultures is a critical potential which will eventually enable them to partially converge on a complex of legal and political values concretizing in a set of human rights.

This double-tiered scheme makes it possible to reconcile two contrary theses on human rights: the thesis that cultural sensitivity to local traditions should override the universality of human rights, over against thesis that it is instead the universality of human rights which should preempt local traditions. Pluralist integration attempts to reconcile these two theses on a higher level.

A strong case for such a synthesis can be made arguing from the correspondence between rights and interests. Which is to say that the basic rights map out the most important human interests and are accordingly supposed to protect them—and some of these interests are clearly global, as in the case of our interest in environmental protection and security, as well as our interest in curbing inequality and poverty. That these interests carry global import is definitely beyond question. We could think of them in analogy to public goods, on the basis of the traditional argument that presents such goods as a safety net against the risk of market failures. Where environmental risks, security problems, and poverty are concerned, we are confronted with problems that single nation-states cannot each resolve on their own. And since these challenges are intrinsically global, they call for global solutions. Whence the role of universal human rights, forced into the scene as tools with which to attempt such solutions. Yet these solutions have to be reasonable, in that human rights are susceptible of different interpretations within different cultures, and this makes it necessary to frame common standards and conditions subject to which human rights can be enforced. This situation intuitively explains not only the *need* for an overlapping consensus on some universal rights, but also the *possibility* of such a consensus.

5 Stability

In this section, I consider my proposed model, pluralist integration, from the standpoint of stability. I start here too from Rawls by noting the curious lot that befalls the notion in his intellectual career: stability is at first long neglected, only to become—after *A Theory of Justice* (1971)—an over-discussed issue. This twist of fate is somewhat baffling because *Theory* devotes much space to stability; in fact, the third and final part of the book can be said to culminate in an idea of stability understood as resulting from a convergence of the right (the reasonable) and the good (the rational) in a society regulated in keeping with the principles of a sound theory of justice.

We can make sense of this complex vicissitude by noting that there are in Rawls two different albeit parallel notions of stability. One is the notion of stability found in *Theory* and the other the one found in *Political Liberalism*, and although they do overlap in important ways, the differences ultimately outweigh the similarities. So, let us call them stability 1 and stability 2. The main difference, as I see it, is that stability 1 is based on the sheer force of justification, whereas stability 2 also relies

on the idea of legitimation. It might also be said, with a little strain, that stability 1 is unqualifiedly moral, whereas stability 2 is moral and political at once. It is my claim that stability 1 does not work but that stability 2 does. (I should note, incidentally, that this distinction of mine between stability 1 and stability 2 is not intended to be particularly original; in fact, what it illustrates is roughly the direction that Rawls himself seems to take in revising *A Theory of Justice*).

Stability 1 proceeds on the idea that Rawls's theory of justice as fairness can generate its own support. It is based on two main arguments: a psychological one and a philosophical one. We will not be concerned here with the psychological argument for stability, in large part because it is irrelevant to my thesis, and will only consider instead, however briefly, the philosophical argument, the one Rawls presents in the now-famous Chapter 9 of *A Theory of Justice*. This argument is based on the congruence of the good and the right, whereby rational persons using their full deliberative powers will decide that their rational interest lies in the principles of justice, which they will accordingly choose as the best scheme by which to regulate their mutual relations. In this way, the right and the good become congruent.

Rawls later concedes that this idea of stability (stability 1) is unrealistic: it will not work, since it cannot be assumed (or even imagined) that the members of a pluralistic society would all share the same comprehensive doctrine, as Rawls now qualifies his own theory of justice as fairness. This failure is generally regarded as the main motivation behind Rawls's passage from *A Theory of Justice* to *Political Liberalism*.

The main argument against stability 1 is that stability cannot be grounded in a philosophical justification alone, since, as discussed, philosophical justifications are plural and seldom reach across cultures, for which reason they are actually *part* of the problem: they may introduce the problem of stability, but cannot solve it. And it is precisely for this reason—because we need to solve this problem in a workable way—that it proves necessary to resort to legitimation (alongside justification). What necessitates legitimation, then, is the need to find a shared basis beneath the pluralism of deep philosophical theories. In a sense, the need for legitimation, in the quest for stability can be said to arise out of modesty: political philosophers have to be modest; their ambitions cannot be Platonic, as they do not have any special access to the truth; and they cannot turn to invention, either. Whence the need for them to proceed on a shared basis in working out solutions. And where matters of law are concerned, this shared basis is given, at its most general, by the fact of legitimation.

If we accept these premises, we will have stability 2, which is based on the idea of an overlapping consensus presented earlier. Stability can be achieved only on the condition that we accept from the outset the need to defend the liberal democratic state: if we accept this, then we can convincingly, albeit in different ways, justify such a state; if we do *not* accept this *ab initio*, then we will have no stability at all. That is why the notion of legitimation is key to understanding not only stability 2 but all of Rawls's work. And, as discussed earlier, the same model can be extended internationally to cover human rights.

6 Some Limitations

In this last section, I consider some limitations to my legitimation model. This model requires widespread acceptance of a political conception, a conception based on the idea of liberal democracy where domestic politics is concerned and on that of human rights where international relations are concerned. These ideas form our shared basis. And the main thrust of legitimation is that, once we are satisfied that something in this shared basis—say, a (moral) legal provision—is legitimated, we thereby have a duty to comply. This rule, however, is subject to exceptions, and I point out two of them below.

First, we cannot always assume we have the widespread background acceptance on which legitimation itself is based. It may happen that the presence of different justificatory backgrounds for the same institutional framework is in itself enough to set off a major controversy jeopardizing the prospect of our converging on a human-rights scheme. Thus, for example, the debate on so-called Asian values and the Islamic exceptions suggests—with all of the arguments put forward in support of these values and exceptions—that plural justifications essentially do amount to a lack of legitimation. The same may happen with bioethical issues such as abortion or artificial insemination. I actually think this is a different situation: this is not a matter we can enter into right now, but this much can be said, namely, that whatever else is true of the dynamics involved in a debate, divisive issues, like the ones just mentioned cannot be resolved without a strong and independent legitimation—this is a necessary background condition and there seems to be no way around it.

Second, our duty to comply given the fact of legitimation will lose much of its force in the face of significant injustice. Or rather, we will have in this case not one but two moral duties: on the one hand a duty to comply with legitimated law, and; on the other a duty to fight the injustice. Moral conflicts of this kind are typically the stuff of conscientious objection and civil disobedience, and it would be interesting to see whether deep social inequality is grounds for such action, or at least whether it properly sets up a conflict of duties. It is likewise interesting to imagine how such conflicts might apply beyond the case of the nation-state so as to become relevant in the sphere of international relations.

Third, we could ask how to go about meeting the challenge posed by non-standard objections, where exception is taken to the very idea of an overlapping consensus, viewed as inherently flawed from the start, *before* we even get to consider its scepticism or its comprehensiveness. This line of criticism might be taken, for example, by someone who was not in sympathy with me in supporting liberal democracy or human rights, perhaps on account of a deeper commitment to a radical political ideology, such as Marxism or fascism. My impression is that there is no argument against criticism of this sort, at least not if we stay within the scope of legitimation as presented in this paper. So, if any arguments can be made in reply to a nonstandard objection, they must come from somewhere other than from an idea of a global overlapping consensus however interpreted.

References

- Habermas, J. 1996. *Between Facts and Norms*. Cambridge, Mass.: Polity.
- Hoffman, S. 2002. Clash of Globalizations. *Council on Foreign Relations* 4: <http://www.foreignaffairs.org/20020701faessay8523/stanley-hoffmann/clash-of-globalizations.html>.
- Rawls, J. 1971. *A Theory of Justice*. Cambridge, Mass.: The Belknap Press of Harvard University Press.
- Rawls, J. 1993. *Political Liberalism*. New York, N.Y.: Columbia University Press.

Philip Pettit's *Law, Liberty and Reason*: Republican Freedom and Criminal Justice

Luca Baccelli

1 Republican Criminal Justice

The topics treated by Professor Pettit in his paper are connected with his republican theory of government, grounded in the “political ideal” of “liberty as non-domination.” We know that Pettit draws this concept from the scholarship devoted to the early modern republican tradition, and in particular from Quentin Skinner’s studies. In the writings of Machiavelli and the “neo-Roman” authors of the 17th and 18th centuries Skinner finds a conception of liberty clearly distinct from both the positive freedom of the ancients and the negative freedom of Hobbes and then the liberals. In my view, Pettit’s political and legal philosophy convincingly shows that a study of early modern political thought can bring to light views, concepts, and approaches that can point out critical and evaluative tools for dealing with our problems. The historiographical work done on republicanism enables us to see that modernity has been thought of in different ways: this can provide us with the conceptual tools for an alternative approach to contemporary issues. Pettit did this in connection with the legal system and in particular with the criminal justice system.

A few years ago, Pettit and John Braithwaite worked out a “republican theory of criminal justice”. Against the 1970s resurgence of retributive positions encapsulated under the banner “Criminals should get what they deserve—no more, no less” (Braithwaite and Pettit 1990, 4), we cannot, according to Pettit, simply return to the traditional approaches of preventionism and utilitarianism. We must take a different perspective, which Pettit draws precisely from the early modern conception of republican freedom. On this basis we can outline a comprehensive theory of criminal justice with which to handle the key issues of the penal system and answer such questions as “what kind of behaviours should be criminalized by the system?” or “how should resources be allocated to the system?” or “what kind and intensity of surveillance should be tolerated?” or “what sentences should courts impose on those found guilty?” In other words, the theory so outlined will be meant to

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deal with the various interrelated sub-systems for investigating crimes, prosecuting them, determining guilt, and punishing convicted felons. All the keywords of the republican theory of criminal punishment begin with an R: *rectification*, *recognition*, *recompense*, and *reassurance*.

As much as Pettit's philosophy of criminal law may be based on republican freedom, his republicanism is expressed in an original legal theory. In *Republicanism*, liberty as non-domination is presented by Pettit as a universal political ideal appealing to liberals and communitarians alike, as well as to environmentalists and feminists, to movements linked to the socialist tradition and those inspired by multiculturalism. And it is an "independent" ideal, one that need not be balanced with and weighed against other principles, such as equality, security or membership. As such, liberty as non-domination works for Pettit in the manner of a value guideline on which basis to work out a scheme for republican government; a scheme laying out the spheres where institutions may or should appropriately intervene, in such a way as to secure the rule of law and maintain different forms of "dispersion of power," including the separation of powers (legislative, executive, and judicial), as well as federalism and decentralisation. Particularly significant is his foundation of democracy "not on the alleged consent of the people, but rather on the possibilities for ordinary people to contest the doings of government" (Pettit 1997a, 277).

Pettit outlines a strategy of pre-emptive check on the actions of state officials which is very far away from Machiavelli's "assuming that all men are evil." For Pettit, we should rather assume that most individuals are law-abiding and value social esteem and their self-esteem, and should privilege screening devices over negative sanctions. Screening devices should operate, e.g., in political parties' selection of the political staff; and Pettit (2002) proposes here that we generally resort to committees of experts, including a "penal policy board." He imagines there to be an "intangible hand" whose operation should "boost a suitable economy of regard" (*ibid.*, 236).

Institutions can achieve these goals "only if they win a place in people's hearts" (*ibid.*, 240). From this point of view, the informal rules of civil society—Machiavelli's *buoni costumi*—play a crucial role together with state laws: "The laws must be embedded in a network of norms that reign effectively, independently of state coercion, in the realm of civil society" (*ibid.*, 241). Republican laws need "habits of civic virtue and good citizenship" (*ibid.*, 245), "a politics of the common good" (*ibid.*, 249). According to Pettit, a democracy open to contestation by the citizens makes it possible "to establish the republican legitimacy of its laws in the public mind" (*ibid.*, 280). In this way, a virtuous circle can emerge between republican vigilance—which requires an external attitude of personal distrust "keeping the authorities on their toes" (*ibid.*, 281)—and a high degree of trust.

This is not to say that criminal law is irrelevant. Crime undercuts and conditions the victim's freedom; those who commit crime "present themselves as dominators of the victim" (Pettit 1997b, 68); crime "reduces the extent of the victim's undominated choices" and "damages the dispensation of non-domination in the society as a whole" (*ibid.*, 156). But, on the other hand, the penal system itself can jeopardise freedom, so much so as to impose a "tyranny of avengers," as Montesquieu put it. Hence the need to exercise penal parsimony: "Since the laws should only

criminalize where criminalization promises to further overall non-domination [. . .] and since criminal laws are both delicate and dangerous weapons, there should be a presumption in favour of parsimony” (ibid., 154). The immense power of the modern police can hardly be subjected to effective checks and is liable to corruption. The system of penalties appears to be “the random product of press attention, moralistic fashion, and the fluctuating taste of vengeance” (ibid., 156), and must be “radically rethought.” This criterion gives “more prominence to *moralizing* social control over *punitive* social control” (Braithwaite and Pettit 1990, v–vi; italics added). Indeed, for Pettit we cannot rely too much on citizens to make utilitarian calculations, on the assumption that they will weigh the pros and cons of breaking criminal laws: Rather, we should expect a better protection against crime if citizens view it “as shameful and unthinkable.” The most relevant element here is reprobation: “We refrain from crime not so much because we fear or even know the punishment we are likely to get, but because it simply seems wrong to us, and one reason it seems wrong to us is that people are punished and shamed for it.” This has direct implications for the theory and practice of punishment: “Moral education should be the primary purpose considered in sentencing decisions” (ibid., 126). In other words “the criminal law should give moral guidance to the community” (ibid., 127).

This entails the strengthening of procedural due process and the defendant’s rights, as well as a less generalised resort to criminal trial. The state’s investigative and repressive apparatus must be subjected to community accountability mechanisms. The shift of emphasis from deterrence and retribution to the “three R’s” must also involve a redistribution of resources. Moreover, we should beware of buying into the illusion that a place of maximised domination such as is the prison can achieve results in terms of prevention, reeducation and resocialisation. It is through the massive recourse to measures alternative to incarceration that “Western criminal justice would become more like Eastern criminal justice with respect to moral education” (ibid., 134).

2 Law and Globalization

I am convinced that Pettit’s “neo-republican” theory is important, and in particular that his account of liberty as non-domination and of contestatory democracy is very significant. I think that we should devote serious consideration to Pettit’s idea that his theory of law—a very relevant one, ranging from constitutional law to criminal law—bears a connection to the foregoing principles, which he worked out in his treatment of early-modern political thought. And I think that his analysis of the legal system’s role in contemporary societies is realistic in many respects, and that many elements of his proposed politics of law are convincing. Pettit rightly remarks that “checking the republic” and stabilizing the institutions all the while respecting citizens’ freedom requires a complexly structured range of strategies. In his articulating rules of civil society to the rules of law, his acknowledging that large tracts of the law cannot be reduced to a command-punishment scheme, and his laying emphasis on screening devices and positive sanctions, he shows how fruitful

an “impure” theory of law can be that comes to terms with the intricate evolutionary processes of contemporary legal systems.

From this point of view Pettit’s account might be placed within the debate on the radical transformations of law—or crisis of law—in the age of globalization. In Italy, we associate this debate to the name of Maria Rosaria Ferrarese (2000; 2002). Globalization is said to lead to a legal system “of possibilities” based on “soft law” rather than to imperative rules of law. This means the end of the primacy of legislative or enacted law, all the while contract law is spilling over from private law to be used in constitutional, administrative, and criminal law, too. It is by now a blurred picture that Max Weber gave us of modern law as a coercive system supported by state monopoly of coercion in a given territory and legitimised by its being rationally “reckonable” and predictable. I think that Pettit’s legal theory can account for some of these processes and, most importantly, might give an answer to some of these tendencies (an answer welcome by those who are not especially keen on an apology of the legal order of markets). However, I have to wonder whether his leaning towards a single universal ideal—liberty as non-domination—really suited to contemporary legal systems, with all their complexity and differentiation.

I must confess in this regard some perplexities about the very basic assumption of Pettit’s theory. In other words, I wonder whether a systematic political philosophy can be built upon the complex and diverse history of early modern republicanism; or whether the different and often conflicting views of politics expressed in the language of republicanism can be reduced to one idea and make up a coherent theory. But most of all, I wonder whether liberty as non-domination can be taken to be the one unified self-sufficient political value, *the* ideal to pursue. Isaiah Berlin had many reasons for arguing that too inclusive a notion of freedom ends up with making us less aware of moral pluralism: The risk, in other words—when dilemmas of morality, politics, and law are at issue—is that the idea of a pivotal super-value may make less transparent our representation of value conflicts and more difficult our effort to balance these values against one another and settle on a decision (which entails taking political responsibility for an ultimate decision among irreconcilable and incompatible principles).

This seems to me especially relevant when we shift from the level of defining the republican ideal of freedom to that of designing republican political and legal institutions. Are we to think, as Pettit’s stringent arguments suggest that something as complex as the contemporary society’s legal system—or, even more implausibly, a global society’s differently interplaying systems—can be governed and indeed *is* or *are* in fact governed, under a single political ideal, a single normative principle?

3 Legal System and Shared Ethos

Pettit more specifically deals with the crucial issue of the relationship between a legal system and a shared ethos. He revives Machiavelli’s idea that while legal institutions—“*ordini*”—play a vital role in defending liberty against domination,

even the best institutional devices turn out to be ineffectual and powerless in the face of “universal corruption”, or generalized social apathy.

Pettit sees here in particular the operation of the intangible hand and the beneficial effect of reprobation as powerful means to maximize freedom, that is to pursue the common good. Pettit confidently uses such phrases as “moralizing social control,” emphasizing the possible effects of the devices of social approval and disapproval. He invites us in this regard not to overestimate the anonymity of contemporary societies. I wonder whether we could in return invite him not to underestimate the effects of social differentiation and of the way that social control and the media have evolved. I may be too biased by the experience of public communication in Italy. But I cannot help thinking of this experience when Pettit argues that the division and articulation of power favour the emergence of “an established ethos of people’s speaking their mind” (Pettit 1997a, 236). I cannot but think of how communication between the legislative, the executive and the judiciary short-circuits on a daily basis, in large part as a result of pervasive media influence. And I wonder what the shared criteria of praise and reprobation can be in our societies exposed to an endless flow of multimedia communication. It seems that if we are fight back against Orwell’s Big Brother, and are to do so on the basis of shared criteria, we cannot turn for help to *Big Brother*, a reality TV show whose characters—people “like” us, from the street—appear to either have no shared criteria or to share ones that won’t do us much good.

In his treatment of the “economy of esteem” (Brennan and Pettit 2004) Pettit certainly takes social differentiation and groups pluralism into account. He does not seem as much aware, however, of a consequence of pluralism: pluralism exists even within the individual, now increasingly locus of multiple memberships; the streams of pluralism, in other words, do not just invest society as a whole but also cut across the individuals themselves, who accordingly have to deal with different regimes of approval and disapproval that can hardly be reduced to a single intangible hand (see, e.g., Facchi 2001). Here I might remark that Pettit does neglects to pay close enough attention to a significant aspect of the thought of some republican authors he otherwise often quotes: he fails to stress the importance recognized by a line of thinker—from Machiavelli to Adam Ferguson—for the theme of conflict between social groups and its possible impact on the development of freedom and the inclusion into citizenship. The issue of groups conflict brings into play that of value conflict, which is especially relevant within contemporary societies. Polytheism of values seems today more complex than in Weber’s time: with the multicultural and transnational development of our social systems, the Pantheon becomes overcrowded and its gods appear more and more quarrelsome.

4 Rights and Criminal Law

These issues become especially delicate and tricky when dealing more specifically with criminal law. One can see in Pettit’s work many concerns in common with the approach that in legal theory in Italy (and perhaps Spain, too) is referred to

as *garantismo*, by which is meant the primacy accorded to individual rights in criminal law and procedure. In many passages he proposes solutions suggesting something like what Luigi Ferrajoli (1989, 2007) calls “minimal criminal law,” and in any event these proposals express the idea of a sparing recourse to penalties limiting personal freedom. Especially relevant in this regard are Pettit’s compelling pages about prisons as places of maximized domination and about the dynamics set in motion by recurrent outbursts of public outrage, drawing media attention with demands for stiffer punishments and exemplary sentences: these pages shed light on those periods when the dark ideologies of law and order and zero tolerance seem to meet no opposition at all in political debate (see Re 2006). Pettit (2002) acknowledges all the limitations of criminal law, and in particular of a punishment-based criminal law, and even questions the politically feasibility of criminal justice.

However, when outlining an alternative proposal from a republican perspective he insists upon a sort of moralization of criminal law itself. Not only do sanctions connected with approval and disapproval play a key role, but “the criminal law should give moral guidance to the community” and moral education is the principal aim of punishment. Even though entire libraries have been written, at least since Beccaria, about the separation between criminal law and morality, criminal liability and sin, it would be unfair to quote them against Pettit so much so that Pettit’s argument is part of a multifaceted and highly developed theoretical debate on the function of criminal law, alternative forms of justice, penalties alternative to detention, and restorative justice. Still, the argument is open to some classical objections from the granitic principle of legality—*nullum crimen sine lege*—as well as from the principles of legal certainty and of mandatory criminal prosecution (the former principle involving a thorny issue, let alone the latter). For all the one-sidedness clearly involved Kelsen’s crime-punishment scheme, under which a legal norm exists only insofar as the legal system connects a given act with a penalty, it cannot be denied that the scheme is still appealing from the standpoint of the protection of rights. For a whole tradition of thought stemming from the classical vision of the rule of law, the predictability of the state’s judicial and repressive apparatus is undermined by conceptions of criminal law that seem to bring in elements of discretion, and so of uncertainty. And this is all the more true of any conception that appears morally supercharged. At the same time, however, can a penal system that cannot guarantee a minimum threshold of deterrence, prevention and re-socializations of convicts be regarded as providing any moral guidance for society?

Finally, a simple question I should like to set up as follows. The perspective of international criminal law has been into focus since the 1990s. The ad hoc tribunals set up for the former Yugoslavia and for Rwanda, as well as the International Criminal Court, seem to propose a liberal globalized model for the criminal trial, and to do so universalizing the traditional approach of punishment as deterrence or retribution, with all of its contradictions (see Henham 2003; Zolo 2006). However, alternative approaches have been attempted in dealing with the tragic experiences of communities coming out of situation of extreme crisis, from dictatorships to genocides and Apartheid: think of truth and reconciliation commissions or of traditional

nonjudicial forms of community justice (see Lollini 2003, 2005). Has the republican theory of criminal justice anything to say from this perspective, too?

References

- Braithwaite, J., and P. Pettit. 1990. *Not Just Deserts. A Republican Theory of Criminal Justice*. Oxford: Clarendon.
- Brennan, G., and P. Pettit. 2004. *The Economy of Esteem. An Essay on Civil and Political Society*, Oxford: Oxford University Press.
- Facchi, A. 2001. *I diritti nell'Europa multicultural*. Rome–Bari: Laterza.
- Ferrajoli, L. 1989. *Diritto e ragione. Teoria del garantismo penale*. Rome–Bari: Laterza.
- Ferrajoli, L. 2007. *Principia iuris. Teoria del diritto e della democrazia*. Rome–Bari: Laterza.
- Ferrarese, M.R. 2000. *Le istituzioni della globalizzazione. Diritto e diritti nella società transnazionale*. Bologna: Il Mulino.
- Ferrarese, M.R. 2002. *Il diritto al presente. Globalizzazione e tempo delle istituzioni*. Bologna: Il Mulino.
- Henham, R. 2003. The Philosophical Foundations of International Sentencing. *Journal of International Criminal Justice* 1: 64–85.
- Lollini, A. 2003. Le processus de judiciarisation de la résolution des conflits: les alternatives. In *La justice pénale internationale dans les décisions des TPI ad hoc*. Ed. E. Fronza and S. Manacorda. Milan: Giuffrè.
- Lollini, A. 2005. *Costituzionalismo e giustizia di transizione. Il ruolo costituente della Commissione sudafricana verità e riconciliazione*. Bologna: il Mulino.
- Pettit, P. 1997a. *Republicanism. A Theory of Freedom and Government*. Oxford: Clarendon Press.
- Pettit, P. 1997b. Republican Theory and Criminal Punishment. *Utilitas* 9: 59–79.
- Pettit, P. 2002. Is Criminal Justice Politically Feasible. *Buffalo Criminal Law Review* 5: 427–50.
- Re, L. 2006. *Carcere e globalizzazione. Il boom penitenziario negli Stati Uniti e in Europa*. Rome–Bari: Laterza.
- Zolo, D. 2006. *La giustizia dei vincitori. Da Norimberga a Baghdad*. Rome–Bari: Laterza.

Part Ic
Reasonableness in Constitutional
Adjudication

Proportionality, Judicial Review, and Global Constitutionalism

Alec Stone Sweet and Jud Mathews

1 Introduction

Over the past fifty years, proportionality analysis (PA) has widely diffused. It is today an overarching principle of constitutional adjudication, the preferred procedure for managing disputes involving an alleged conflict between two rights claims, or between a rights provision and a legitimate state or public interest. With the consolidation of the “new constitutionalism,”¹ this type of dispute has come to dominate the dockets of constitutional and supreme courts around the world. Although other modes of rights adjudication were available and could have been chosen and developed, PA emerged as a multi-purpose, best-practice, standard.

From German origins, PA has spread across Europe, including to the post-Communist states in Central and Eastern Europe, and into Israel. It has been absorbed into Commonwealth systems—Canada, South Africa, New Zealand, and, via European law, the UK—and it is presently making inroads into Central and South America. By the end of the 1990s, virtually every effective system of constitutional justice in the world, with the partial exception of the United States, had embraced the main tenets of PA. Strikingly, proportionality has also migrated to the three treaty-based regimes that have serious claims to be considered “constitutional” in some meaningful sense: the European Union (Stein 1981; Stone Sweet 2004; Weiler 1999), the European Convention on Human Rights (Alkema 2000; Flauss 1999), and the World Trade Organization (Cass 2005; Petersmann 2000; Trachtman 2006). In our view, proportionality-based rights adjudication now constitutes one of the defining features of global constitutionalism, if global constitutionalism can be said to exist at all.

In this paper, we seek to explain why this has happened, through what processes, and with what consequences for judicial authority. Because some readers might not be familiar with PA, it might be useful to summarize the basics.

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¹ See below note 9. The basic elements of the “new constitutionalism” are discussed in Section 2.3. See also Stone Sweet 2000.

PA is a doctrinal construction: It emerged and then diffused as an unwritten, general principle of law through judicial recognition and choice. For our purposes, it is a decision-making procedure,² an “analytical structure” (Kumm 2004, 574, 579) that judges employ to deal with tensions between two pleaded constitutional “values” or “interests.” In the paradigmatic situation, PA is triggered once a *prima facie* case has been made to the effect that a right has been infringed by a government measure. In its usual form, the analysis involves three steps, each involving a test. First, in the “legitimacy” or “suitability” stage, the judge confirms that the government is authorized to take a measure, in pursuit of some collective good, and verifies that the means adopted by the government are rationally related to stated policy objectives.³ The second step, “necessity,” has more bite. The core of necessity analysis is the deployment of a “least-restrictive means” [LRM] test: the judge ensures that the measure does not curtail the right any more than is necessary for the government to achieve its stated goals. PA is a balancing framework: if the government’s measure fails either of these first two tests, the act is *per se* disproportionate (it is outweighed by the pleaded right), and is therefore unconstitutional. The last stage, “balancing in the strict sense,” is also called “proportionality in the narrow sense.” If the measure under review passes the first two tests, the judge proceeds to balancing *stricto sensu*. In the balancing phase, the judge weighs the benefits of the act—which has already been determined to have been “narrowly tailored,” in American parlance—against the costs incurred by infringement of the right, and then determines which “constitutional value” shall prevail, in light of the facts.

In many polities today, proportionality is treated as a taken-for-granted feature of constitutionalism, or a criterion for the perfection of the “rule of law.” For us, this “taken-for-granted” quality is an outcome of a social process that, like any social process, can and should be examined empirically. Treating PA as a natural, inherent principle of the legal system disguises the open-ended process through which it emerged, and downplays the controversies that PA routinely occasions among judges, elected officials, and scholars. The source of the anxiety is clear: however inherently “judicial” one takes the procedure to be, the LRM and balancing stages of PA fully expose judges as lawmakers. Indeed, the framework is typically debated from two opposed standpoints.⁴ Some see it as dangerous: judges may defer too much to legislators and executives; they may even “balance rights away.” Others see PA as being too restrictive of policy discretion, inevitably casting judges as masters of the policy processes under review.⁵ Proponents defend proportionality

² As a general principle of law, some form of proportionality is found in most stable legal systems. In criminal law, the severity of punishment is expected to be proportionate to the seriousness of the crime; in classic international law, proportionality is found in the law of reprisal and the use of force, and so on. Our focus is on PA as an argumentation and balancing framework.

³ These two tasks may be distinguished as separate tests.

⁴ The standard European reference is the debate between Jürgen Habermas (1996, 256–59) and Robert Alexy (2003).

⁵ In the American context, see Aleinikoff (1987). U.S. and European perspectives on constitutional rights and balancing are debated in Nolte (2005).

against attacks from both sides (see, e.g., Beatty 2004, 159–75). Although we will join this debate, it is important to emphasize that PA is an *analytical procedure*—it does not, in itself, produce substantive outcomes. That point made, judges also use proportionality as a foundation on which to build doctrine, the “argumentation frameworks” that govern rights litigation.

The paper is organized as follows. Section 2 proposes a theory of proportionality that blends strategic and normative elements. It is argued that adopting an explicit balancing posture gives distinct advantages to the rights adjudicator, and that PA provides a principled doctrinal foundation for balancing. We give empirical content to these ideas in two ways. First, we emphasize the neat “fit” between proportionality and the structure of contemporary rights provisions. Second, we provide a brief summary and analysis of Robert Alexy’s influential theory of constitutional rights (Alexy 2002). Sections 3 and 4 of the paper provide a genealogy of PA, trace its global diffusion, and assess its impact on law and politics in a variety of settings, both national and supranational. In Section 5, we assess the relationship between PA and judicial power. Although PA can be portrayed as a “neutral” procedure, its adoption has—inexorably—led to a steady accretion of judicial authority over how constitutions evolve and how policy is made.

We do not want to be misunderstood on this last point. PA helps judges manage disputes that take a particular form; it does not dictate correct answers to legal problems. As argued in Section 2, the key to the political success of PA—its social logic—is that it provides a set of relatively stable, off-the-shelf, solutions to a set of generic dilemmas faced by the constitutional judge. If PA mitigates certain legitimacy problems, it also creates, or at least spotlights, an intractable, second-order, problem. PA does not camouflage judicial lawmaking. Properly employed, it requires courts to acknowledge and defend—honestly and openly—the policy choices that they make, when they make constitutional choices. Proportionality is not a magic wand that judges wave to make all of the political dilemmas of rights review disappear. Indeed, waving it will expose rights adjudication for what it is: constitutionally-based lawmaking. Nonetheless, one of our claims is that PA offers the best position currently available from which judges can rationalize and defend rights review, given the structure of modern rights provisions and the precepts of contemporary constitutionalism.

In the conclusion, we discuss, in more general and comparative terms, the relationship between proportionality and judicial power. When a court moves to adopt PA as an operating system to manage rights adjudication, it alters the relationship between judicial authority and all other public authority, enhancing the former. Consider alternatives. Courts could, as in Commonwealth systems of yore, choose to operate under the “*Wednesbury* reasonableness”⁶ standard developed by British courts, wherein judicial review of government measures is only granted if the claimant can demonstrate that officials have acted irrationally. The judge must find that officials have made a decision that *no* rational person could have made.

⁶ *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp* [1948] 1 K.B. 223 (U.K.).

Wednesbury reasonableness is a deference doctrine, a cousin of “rational basis” inquiry in the United States. In most Continental systems, like France and Italy, courts used, pre-proportionality, various standards, including “manifest error of appreciation” (granting very wide deference), “reasonableness” (a kind of inchoate intermediate standard in American parlance), and various modes of *ultra vires* (or abuse of discretion) review. Adopting proportionality replaces all of these standards with something akin to strict scrutiny, positioning courts to exercise dominance over both policy and constitutional development. However, to reiterate: adopting PA, in and of itself, does not determine how PA will, in fact, be deployed.

Last, it bears emphasis that judges *chose* to adopt and develop the proportionality framework; it was not imposed on them. In the next Section, we develop an explanation of why they have done so.

2 Theory

The phenomenon we seek to explain—the emergence of PA as a global constitutional standard—is enormously complex, involving hundreds of discrete decisions taken by actors, public and private, operating in very different political contexts and legal settings. The first part of the explanation therefore rests on a set of simplifying assumptions, and a series of generic arguments related to classic dilemmas of adjudication. How can judges bolster the perception, among losing parties (or legal interests), that their decisions are not the product of bias in favor of winning parties (or legal interests)? If the law evolves primarily through judicial interpretation and application, how can judges depict this “lawmaking” as “judicial,” rather than “legislative”? If rights provisions are relatively open-ended norms, how can a rights-protecting court escape the charge that it is both master of the constitution and of the decision-making of the “political” branches of government? In adopting the proportionality framework, constitutional judges acquire a coherent, practical means of responding to these basic legitimacy questions. As important, once adopted, PA tends to develop a normative status of its own, comprising a new element of a “presupposed Grundnorm,”⁷ or a meta-constitutional principle governing the development of constitutional doctrine. We interpret Alexy’s account of rights—as “optimization requirements”—in light of this tendency. The question of how PA in fact diffused, with what consequences for judicial power, demands a separate treatment, which is provided in Sections 3–5.

2.1 *Two-Against-One*

We proceed from a simple, reductive theory of third party dispute resolution (TDR) (see Stone Sweet 1999. See also Shapiro 1986; Shapiro and Stone Sweet 2002,

⁷ See Kelsen (1992, 208–09) (arguing that successful changes of the Grundnorm are ratified once they are “presupposed” by those who interpret and enforce the law).

especially Chapter 4). At its core is an insight first made by anthropologists, namely, that the social demand for TDR is so intensive and universal that one finds no society that fails to supply it in some form. When two parties in dispute ask a third party for assistance, they build, through a consensual act of delegation, a node of social authority, or mode of governance. By “mode of governance,” we mean a process through which the rule systems (norms, law) in place in any society are applied and adapted, on an ongoing basis, to the needs and purposes of those who live under them. The theory focuses on the dynamics and political consequences of moving from the dyad (cooperation, conflict, dispute settlement between two parties) to the triadic context, and moving from consensual TDR to compulsory TDR.

Triadic governance contains a fundamental tension that threatens to destroy it. In consensual TDR, the triadic figure knows that her social legitimacy rests in part on the consent of the parties, and thus on the perception that she is neutral *vis à vis* the dispute. Yet in declaring a winner, she creates a 2-against-1 situation that is likely to erode that perception. Given a fundamental interest in *not* declaring a loser, she will seek to mediate settlements, or to “split the difference” between the parties. If one party must win, the typical solution is to base the outcome on pre-existing norms. By definition, a society’s norms, whether informal or formalized as law, comprise ready-made standards of appropriate behavior, and thus facilitate dispute settlement. In invoking norms, the triadic figure is, in effect, saying to the loser, “you have not lost because I prefer your opponent to you; you have lost because it is my responsibility to uphold what is right in our community, given the harm that has occurred.” Her legitimacy now rests, in part, on the perceived legitimacy of a third interest being brought to bear on the parties—the social interest embodied in the norms being applied. In any community, of course, the “perceived legitimacy” of applicable norms, and therefore of TDR, will vary across time and contexts.

Old-fashioned legal anthropology (see Collier 1973) and “new” economic approaches to norms (see Ellickson 1991) have shown that consensual TDR in close-knit societies typically operates to reassert pre-existing norms, or to evolve new ones only gradually. In social settings characterized by rising levels of interdependence (increased social differentiation, division of labor, impersonal contracting across larger distances) and rising transaction costs, the functional demand for TDR overlaps a growing need for rule adaptation (lawmaking). In such situations, consensual TDR, with its emphasis on settling conflict through (re)enactment of existing norms, is often insufficient to sustain increasing levels of social exchange. Governance and commitment devices—law and adjudication—are all but required.

2.2 Courts and Judicial Lawmaking

The move to adjudication aggravates the 2-against-1 dilemma, in at least two ways. First, the judge’s authority is fixed by office and compulsory jurisdiction, backed by the state’s enforcement capacities. Courts are still ritually portrayed in terms of an “orthodox prototype,” which highlights their TDR functions and properties. And judges still seek to avoid or mitigate the effects of declaring a loser, through

the development of settlement regimes, splitting the costs of a decision among the parties, processing appeals, and so on. But, from the point of view of defendants and losers, at least, judges are part and parcel of the coercive apparatus of the state. Second, given a steady caseload, adjudicators will make law. One can assume, as we do for the purposes of this paper, that this lawmaking behavior is primarily defensive. The judge develops rhetorics of justification, in part, to counter the perception of bias. Even so, a record of normative deliberation—the giving of reasons—will have prospective, regulatory effects, so long as some minimal notion of precedent exists in the system.

From the perspective of 2-against-1, judicial lawmaking raises a second-order legitimacy dilemma, given that the “content of the law governing the dispute could not have been ascertained by the parties at the time [it] erupted” (Stone Sweet 1999, 157). The applicable law is revealed through the judge’s ruling. How one should properly understand judicial lawmaking, and how the legitimacy of courts ought to be evaluated in the face of ongoing lawmaking, are questions that have haunted democratic and legal theory over centuries.⁸ Here we note only two responses to them.

One major stream of positivist theory emphasizes how the law itself constrains judges. Hart implies that the extent of defensible lawmaking discretion in place at any point is proportional to the extent of indeterminacy of the pertinent law (Hart 1994, 124–47). Judicial lawmaking can be defended in so far as it proceeds in light of existing law and precedent, and to the extent that it “renders” that law more determinate. The argument is functional: if judges did not possess lawmaking discretion, they would not be able to perform their adjudication role properly, given normative indeterminacy and other uncertainties. For MacCormick, a close student of Hart’s, the primary objective of legal theory is the development of standards for evaluating a court’s jurisprudence as “good or bad,” and “rational or arbitrary.” Good decisions are arrived at through normative deliberation and analogical reasoning; and the good judge packages his lawmaking as a relatively redundant, self-evident, incremental extension of available legal materials (MacCormick 1978).

A set of (not incompatible) arguments proceeds from standard delegation theory. In modern constitutional systems, judicial power is delegated power. Rulers—the principals—confer lawmaking discretion on courts—their agents—for sound functional reasons, and good agents are those that use this authority to perform the tasks given to them. When the system operates properly, courts help rulers govern more efficiently. When the principals are not unified but a multiple competing for power amongst themselves, they organize courts as commitment devices. Consider a federalism court, a rights court, the European Court of Justice, or the WTO Appellate Body. In these cases, the agent—what we will call a *trustee* court in the next Subsection—enforces constitutional bargains struck by the principals (political parties, Member States) even against the principals. Further, as with any complex

⁸ The crisis engendered by judicial lawmaking also generates mountains of legal materials—judicial decisions, commentaries and treatises—whose purpose is to reassert the coherence and underlying stability of the law, and therefore the legitimacy of courts, with reference to precedent and settled canons of interpretation and reasoning.

contract, constitutions are fundamentally incomplete. The contracting parties need judges not only to resolve disputes among them, but to clarify their obligations, over time, as disputes arise and circumstances change. It follows that judicial lawmaking counts as a positive to the extent that it operates to help principals deal with their governance problems, including imperfect commitment and normative indeterminacy.

In this view, judicial lawmaking is a normal by-product of delegating to constitutional judges, at worst, a reasonable, predictable price to pay for obtaining some greater social benefit: protecting rights, securing federalism, making trading blocs work. For their part, judges build constitutional doctrine, those constraints on the exercise of lawmaking discretion presumed to be stable.

Yet debates about the legitimacy of “judicial activism” rage on, and for an obvious reason. As we move from (1) consensual TDR, to (2) a judge interpreting a statute in order to apply it, to (3) a constitutional court enforcing rights against a legislative majority, the triadic figure is increasingly implicated in systemic governance, and, in situation (3) the court governs the political rulers. In rights adjudication, wherein litigating parties always represent some wider social interest, lawmaking and 2-against-1 necessarily overlap. A court that chooses one constitutional value over another is also favoring one policy interest over another. Other things equal, the most acute form of this problem will appear under conditions of judicial supremacy.

2.3 Judicial Supremacy: The “New Constitutionalism” and the Trustee Court

Over the past fifty years, the “new constitutionalism” has swept across the globe, and today has no rival as a template for the organization of the state.⁹ The model’s precepts can be simply listed: (a) institutions of government are established by, and derive their authority exclusively from, a written constitution; (b) the constitution assigns ultimate power to the people by way of elections or referenda; (c) the use of public authority, including legislative authority, is lawful only insofar as it conforms with the constitutional law; (d) the constitution provides for a catalogue of rights, and a system of constitutional justice to defend those rights; and (e) the constitution itself specifies how it may be revised.

⁹ By the 1990s, the basic formula of the new constitutionalism—(a) a written, entrenched constitution, (b) a charter of rights, and (c) a review mechanism to protect rights—had become standard, even for what most of us would consider non-democratic, authoritarian states. There are 194 states in a recent data set on constitutional forms compiled by Alec Stone Sweet and Cristina Andersen. Of these, 190 have written constitutions, of which 183 contain a charter of rights. There have been 114 constitutions written since 1985 (not all of which have lasted), and we have reliable information on 106 of these. All 106 of these constitutions contain a catalogue of rights, and 101 provide for rights review by a supreme or constitutional court. It seems that the last constitution to leave rights out was the racist 1983 South African constitution, hardly a model to emulate.

To be viable, the form requires massive delegation to constitutional judges. Under the classic (today virtually defunct) “legislative sovereignty” constitution, one can portray courts as agents of the legislature. The basic principal-agent framework, however, loses its relevance when it comes to modern systems of constitutional justice. A more appropriate metaphor is that of constitutional “trusteeship”: situations wherein the founders of new constitutions delegate expansive, open-ended “fiduciary” powers to a review court.¹⁰ A *trustee* is a particular kind of agent, possessing the power to govern the rulers themselves. In the most common situation, the trustee court exercises fiduciary responsibilities with respect to the constitution, in the name of a fictitious entity: the sovereign People.

In such systems, political elites—members of the parties, the executive, the legislature—are *never* principals in their relationship to constitutional judges.¹¹ Elected officials may seek to overturn decisions or restrict the court’s powers, but they can do so only by amending the constitution. The decision rules governing constitutional revision, however, are usually more restrictive than those governing the revision of legislation, and amendment procedures may involve other actors outside of their control. In many of the states under consideration in this paper, for example, amendment of rights provisions is a practical or legal impossibility; and in the EU and the WTO, the decision-rule governing treaty-amendment is unanimity of the Member States.

Modern constitutionalism is characterized by structural judicial supremacy, where the principals have, in effect, transferred a bundle of significant “political property rights” to judges, for an indefinite duration. Structural supremacy is a purely formal construct; it varies by degrees across systems; and nothing in the notion tells us anything about how judges will actually exercise their powers.¹² However, institutionalized supremacy means that the outcomes produced through constitutional adjudication will be inflexible, being “more or less immune to change except through adjudication,” so long as some minimally robust conception of precedent exists (Stone Sweet 2002b, 112, 120). In such a situation, judges have every interest in building doctrine—argumentation frameworks—capable of being decoupled from specific policy outcomes.

2.4 *Balancing, Argumentation, Proportionality*

One of our claims is that PA has provided an important *doctrinal* underpinning¹³ for the rights-based expansion of judicial authority across the globe. In the rest of

¹⁰ See Stone Sweet 2002a, building on the contributions of Giandomenico Majone (2001).

¹¹ In practice, some elected officials participate in some of functions usually associated with principals, such as appointment. Nonetheless, they are more often merely “players” within the rule structures provided by the constitution. They compete with each other in order to be in the position to legislate, among other things.

¹² For an extended discussion, see Stone Sweet 2008.

¹³ We recognize that some academic lawyers and most social scientists are deeply suspicious of purely doctrinal explanations of the evolution of legal systems. Our explanation relies on doctrine being conceptualized in a particular way, namely, as a discursive frame for norm-based

this paper, we will portray it as a type of operating system that constitutional judges employ in pursuit of two overlapping, general goals:

- to manage potentially explosive environments, given the politically sensitive nature of rights review.
- to establish, and then reinforce, the salience of constitutional deliberation and adjudication within the greater political system.

PA provides basic materials for achieving both objectives, in a relatively standardized, easy-to-use form. Under conditions of supremacy and a steady case load, a trustee court has powerful reasons to seek to draw the major actors in the polity into the processes it governs, and to induce them to use the modes of deliberation that it curates. In so far as they do, political elites will help to legitimize the court and its doctrines, despite or because of controversy about supremacy.

2.4.1 Balancing

A basic task of constitutional judges is to resolve intra-constitutional conflict: legal disputes in which each party pleads a constitutional norm or value against the other. Where the tension between two interests of constitutional rank cannot be interpreted away, a court could develop a conflict rule that would determine which interest prevails. In fact, most judges are loath to build *intra*-constitutional hierarchies of norms. Instead, they typically announce that no right is absolute, which thrusts them into a balancing mode.

When it comes to constitutional adjudication, balancing can never be dissociated from lawmaking: it requires judges to behave as legislators do, or to sit in judgment of a prior act of balancing performed by elected officials. We nonetheless argue that the move to balancing offers important advantages. Consider the alternatives. A court could declare that rights are absolute, or that one right must always prevail over other constitutional values, including other rights provisions. Creating such hierarchies would, in effect, *constitutionalize* winners and losers. Further, we know of no defensible procedure for doing so other than freezing in place a prior act of balancing: in so far as judges gave reasons for having conferring a higher status on one value relative to another, they have in fact balanced. A court could also generate precedent-based covering rules for determining when a right is or is not in play, or under what circumstances one interest prevails against another. The procedure can not save the court from charges that it legislates or balances. On the contrary, such a court dons the mantle of the supreme legislator whose self-appointed task is to elaborate what is, in effect, a constitutional code.

A court that explicitly acknowledges that balancing inheres in rights adjudication is a more honest court than one that claims that it only enforces a constitutional code, but neither balances nor makes law. It is also makes itself better off strategically, relative to alternatives. The move to balancing makes it clear: (a) that each party is pleading a constitutionally-legitimate norm or value; (b) that, a priori, the court

argumentation that enable the litigating parties and the judge to bridge the domain of law and the domain of interest-based conflict.

holds each of these interests in equally high esteem; (c) that determining which value shall prevail in any given case is not a mechanical exercise, but is a difficult judicial task involving complex policy considerations; and (d) that future cases pitting the same two legal interests against one another may well be decided differently, depending on the facts.

2.4.2 Argumentation Frameworks

In balancing situations, it is context that varies, and it is the judge's reading of context—the circumstances, fact patterns, and policy considerations at play in any case—that determines outcomes. A balancing court can, nevertheless, give some measure of coherence to adjudication by developing stable *procedures* for arriving at decisions. To the extent that it is successful, these procedures will take on some of the systematizing functions of precedent more broadly.

Our focus in this paper is on a particular type of procedure, an “argumentation framework.” These are discursive structures that organize (a) how litigants plead their interests, and how they engage their opponent's arguments, and (b) how courts frame their decisions. Following Sartor (1994),¹⁴ such frameworks embody a series of inference steps, represented by a statement justified by reasons (or inference rules) that lead to a conclusion. In balancing situations, such frameworks incorporate inconsistency—that is, argumentation—to the extent that each inference step offers both a defensible argument and counter argument, from which contradictory but defensible conclusions can be reached. In resolving disputes within these structures, judges typically choose from a menu of such conclusions.

It is our view that a balancing court seeking to manage its environment can do no better than to propagate appropriate argumentation frameworks. Once in place, the court will know, in advance, how the parties to an intra-constitutional dispute will plead, and each side will know how the court will proceed to its decisions. Under conditions of supremacy (given a steady case load), consistency on the part of the court will entrench the framework as constitutional doctrine. To the extent that arguing outside of the framework is ineffective, skilled legal actors will use the framework, thereby reproducing and legitimizing it.

2.4.3 Proportionality

PA is an argumentation framework, seemingly tailor-made for dealing with intra-constitutional tensions (the indeterminacy of rights adjudication). The framework clearly indicates to litigating parties the type and sequence of arguments that can and must be made, and the path through which the judges will reason to their decision. Along this path, PA provides ample occasion for the balancing court to express its respect, even reverence, for the relative positions of each of the parties. This latter point is crucial. In situations where the judges can not avoid declaring a winner,

¹⁴ For a fuller discussion, see Stone Sweet (2002a).

they can at least make a series of ritual bows to the losing party. Indeed, the court that moves to balancing *stricto sensu* is stating, in effect, that each side has some significant constitutional right on its side, but that the court must, nevertheless, take a decision. The court can then credibly claim that it shares some of the loser's distress in the outcome.

2.5 *The Structure of Constitutional Rights*

In contemporary rights adjudication, balancing holds sway for three basic reasons. First, rights provisions are relatively open-ended norms, that is, they are both indeterminate and in danger of being construed in an inflexible and partisan manner. As discussed, judges have good reasons to formalize a balancing procedure, and to impose this on litigating parties. PA is such a formalization.

Second, most post-World War II constitutions state unambiguously that most rights provisions are not absolute but, rather, are capable of being limited by another value of constitutional rank. In fact, limitation clauses are the norm. Take the following examples:

- In Germany (1949), Article 2.1 of the Basic Law (GG) states that “everyone shall have the right to the free development of his personality in so far as he does not violate the rights of others or offend the constitutional order or moral code.”
- In the Spanish Constitution of 1978, Article 20.1.a proclaims the right to free expression, which Article 20.4 then “delimits” with reference to “other rights, including personal honor and privacy.” Article 33.1 declares the right to private property, while Article 33.3 provides for the restriction of property rights for “public benefit,” as determined by statute.
- Section 1 of the Canadian Constitution Act (1982) declares that: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”
- Article 17 of the Charter of Rights of the Czech Republic (1993) states: “freedom of expression and the right to seek and disseminate information may be limited by law in the case of measures essential in a democratic society for protecting the rights and freedoms of others, the security of the State, public security, public health, and morality.”
- In South Africa (1996), the extensive Bill of Rights is followed by Section 36.1, announcing that: “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.”

In each of these settings (see Section 4), constitutional judges have adopted PA to manage the intra-constitutional conflicts associated with rights. Put differently, judges do not develop doctrines that enable them to “enforce” limitation clauses; a law is struck down when it fails the test of proportionality. In Canada, judges apply a least-restrictive means test when they are asked to enforce the “reasonable limits” prescription of Section 1 of the Charter of Rights and Freedoms. In South Africa, LRM testing is required by the Bill of Rights itself, but the founders based this provision on a prior ruling of the Constitutional Court to adopt proportionality as an overarching principle of rights adjudication.¹⁵ Across, post-1989 Central Europe, PA is automatically activated whenever the “necessity,” or “essential” nature, or “reasonableness,” of governmental measures is challenged under a rights provision.

A third reason: many modern constitutions (or constitutional theory or doctrine) require state organs, including the legislature and the executive, to work to protect or enhance the enjoyment of rights. It is a core function of constitutional and supreme courts to supervise this activity. In such situations, governments will develop arguments to the effect that their measures are not opposed to rights, but in fact stand-in for a specific right. The classic conflict—between right X and the will of the “majority” as expressed in a statute—is recast, as one between right X and a government action designed to facilitate the development or enjoyment of right Y. Courts can, and often do, interpret these disputes as tensions between two rights. Apart from adopting a formal balancing framework such as PA, we do not see how a court could position itself better to deal with such cases.

2.5.1 The Trustee Court and Rights Adjudication

The move to proportionality generates what we earlier called a “second-order” legitimacy problem, in that it fully exposes the lawmaking capacities of the rights-protecting judge. The point has been made forcefully by Hans Kelsen, the founder of the modern constitutional court, and of another important strain of positivism. In his constitutional theory, Kelsen focused on the legal system as a hierarchy of norms, which judges are enlisted to defend as a means of securing the system’s validity and legitimacy. In the inter-war years, Kelsen labored to rationalize constitutional review, in the face of longstanding political hostility to sharing power with judges. Most important, he distinguished what legislators and constitutional judges do, when they make law (Kelsen 1928). Parliaments are “positive legislators,” since they make law freely, subject only to constitutional constraints (rules of procedure). Constitutional judges, on the other hand, are “negative legislators,” whose legislative authority is restricted to the annulment of statute when it conflicts with the constitutional law. The distinction between the positive and the negative legislator rests on the absence, within the constitutional law, of enforceable human rights. Although this fact is ignored by his modern-day followers, Kelsen explicitly warned of the “dangers” of providing for rights of constitutional rank, which he equated

¹⁵ *S. v. Makwanyane and Another* 1995 (3) SA 391 (CC) at 436 (S.Afr.). Discussed in Section 4.1.2.

with natural law. The court that sought to protect rights would inevitably obliterate the distinction between the “negative” and the “positive” legislator (*ibid.*, 221–41). Through their quest to discover the content and scope of rights, constitutional judges would, inevitably in his view, become super-legislators.

The passage to new constitutionalism proved Kelsen right: a rights-protecting, trustee court is a positive legislator whose discretionary lawmaking authority, at least on paper, is potentially limitless. But the context for Kelsen’s arguments has radically changed (Section 4). After WWII, rights and constitutional review became central to the very idea of constitutionalism. In most places with new constitutions, it would be a relatively simple matter to defend judicial supremacy from the standpoint of delegation theory: a political commitment to rights requires massive delegation to judges; and, if the judges do their jobs properly, they will at times impinge upon policy processes and outcomes. One could also argue that, under the new constitutionalism, there is no legitimacy problem, since the constitution itself expressly provides for rights, rights review, and the structural supremacy of the constitutional judge in certain (policy-relevant) processes. What is interesting is that neither argument has succeeded in shutting down the controversy that attends supremacy or what judges do with it. We discuss the politics of PA further in Section 5.

2.6 *Balancing as Optimization*

Robert Alexy’s book, *A Theory of Constitutional Rights*, is arguably the most important and influential work of constitutional theory written in the last fifty years. Alexy develops a “structural theory” of rights and proportionality balancing in light of the case law of the German Federal Constitutional Court (GFCC) (Alexy 2002). But the theory has far wider application, since it speaks directly to major issues raised by the new constitutionalism, and in this paper. At this point in time, Alexy’s ideas constitute the basic conceptual foundations of PA. In this brief Subsection, we briefly highlight some of the claims Alexy makes, focusing on concepts to be used further along in the paper.

For our purposes, Alexy makes two original contributions. First, he distinguishes between *rules* and *principles* and then conceptualizes principles as “optimization requirements” (*ibid.*, 44–61). Rules “contain fixed points in the field of the factually and legally possible”; that is, a rule is a norm that is either “fulfilled or not” (*ibid.*, 47–48). For Alexy, principles, such as those contained in rights provisions, are norms that “require that something be realized to the greatest extent possible given the legal and factual possibilities” (*ibid.*, 47). The distinction makes a difference in adjudication. Whereas a conflict between two rules can be resolved through invalidating, or establishing an “appropriate exception” to, one of the rules, a conflict between two principles can only be managed through balancing. One principle outweighs the other, but only in a particular set of circumstances. The “scope of the legally possible” is thus determined by the opposition between principles, which is

itself a product of the contextual basis of the conflict.¹⁶ “Conflicts of rules are played out at the level of validity,” Alexy argues, whereas “competitions between principles are played out in the dimension of weight,” given a specific context (Alexy 2002, 50).

If rights are “optimization requirements,” binding on all public (and in some cases, private) authorities, then rights adjudication (and therefore lawmaking more generally) reduces to balancing.¹⁷ Further, the purpose of balancing must be both to resolve alleged conflicts between principles, and to aid *all of the organs of the state* in their task of optimizing rights and other countervailing principles properly.

Alexy’s second major contribution follows from his construction of balancing as a kind of *meta-constitutional rule* (Alexy does not use that phrase; in our view, he presupposes PA and balancing as a Grundnorm). A conflict between principles places judges under a duty to balance and to optimize. Although we now skip a number of steps in the argument, Alexy theorizes the necessity prong of PA—the LRM test—in terms of Pareto-optimality (*ibid.*, 399). Accordingly, there can be no defensible justification for allowing a public authority to infringe more on a right than is necessary for it to realize any second principle, given that the right could be optimized: the bearer of the right could be made better off if the government were to choose less onerous means. Optimization is also built into Alexy’s “law of balancing,” which governs the “proportionality in the narrow sense” phase of PA: “The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other” (*ibid.*, 102).

Alexy acknowledges that the question of what relative weight judges should give to opposed principles, in any given dispute, falls completely outside the theory (*ibid.*, 100, 105). In our view, any proponent of PA must admit that the move to proportionality balancing reveals, rather than disguises, Kelsen’s positive legislator, the rights-protecting, trustee court. Alexy can nonetheless claim, as we have, that PA generates a particular form of argumentation, and places the judge under an obligation to justify her decisions in terms of certain constraints.¹⁸ Thus, to the extent that judges actually search for Pareto-optimal solutions (the necessity phase) and actually seek to comply with the law of balancing (the final balancing phase), PA is less vulnerable to the charge that it proceeds in the absence of rational criteria, and is no more than a means to package a court’s (unconstrained) policy choices.

From the point of view of 2-against-1 and judicial lawmaking, it should be obvious that rulings that conform to the law of balancing, or can be portrayed as falling on some point along a Pareto frontier, will be more palatable than those that are not Pareto-optimal. From a broader-based political economy perspective, such rulings enable judges to deal with conflicts between (a) those social interests that are likely

¹⁶ Rather than being a fixed property of the norms themselves (in the abstract, they are of equal weight).

¹⁷ “Constitutions with constitutional rights are attempts simultaneously to organize collective action and secure individual rights.” Alexy (2002, 425).

¹⁸ As Alexy notes, the law of balancing is “not valueless [. . . but] identifies what is significant in balancing exercises.” Alexy 2002, 105.

to lose the most and (b) those social interests standing to gain the most, from any new allocation of collective goods being produced by the government measure under review. The court, in effect, is stating that it took every pain to minimize the negative consequences of its ruling for the losing party or interest: the right or interest or value being pleaded by the loser requires as much. If the judges do so, then it will *always* be possible for some observers to claim that the policy effects of their rulings are an inevitable by-product of adjudicating rights claims, rather than outcomes that judges seek to impose on the polity. After all, the policy context—and the menu of options available to the court—were generated by the parties, not the court.

2.7 Summary

Our argument to this point rests on two logics that are separate in principle, but are inseparable in practice. First, at least in theory, PA can help judges respond to a set of acute overlapping dilemmas, related to 2-against-1, lawmaking, and judicial supremacy. Second, PA fits the structure of rights provisions in a world dominated by the precepts of the “new constitutionalism.” Most important, new constitutions proclaim rights and then immediately provide for legitimate exceptions to them, in the guise of various constitutionally-recognized public interests. Intra-constitutional conflicts are inevitable in such normative systems, hence extensive delegation to constitutional judges.¹⁹ In our view, the two logics will typically overlap in rights adjudication. Our explanation thus blends “political” (or “strategic”) and “legal” factors, theorized in particular ways.

3 The German Genealogy

The German Basic Law (1949) established a system of constitutional justice that not only transformed German law, politics, and state theory, but has impacted heavily on the development of constitutionalism across the globe. The GFCC has been the main agent of these changes. Our concern is with one contribution of the German experience to global constitutionalism: the emergence of PA as a formal procedure for dealing with rights claims. We trace the antecedents of the proportionality framework back two centuries, to a corner of German law—police law (*Polizeirecht*). Long before courts were applying PA to invalidate state action, the rudiments of PA emerged as a theoretical construct for assessing when the interventions of the state in the private sphere were justified. In the second half of the nineteenth century, as courts emerged with the institutional capacity to review administrative actions, elements of PA, notably the LRM test, emerged as a core

¹⁹ One could also portray the second logic in strictly formal terms: the structure of modern rights provisions necessarily implies PA. Judges, however, have choices in how best to manage rights-based, intra-constitutional conflict—they were not required to adopt PA.

administrative law principle. In the post-war order, with the advent of a constitutional court and a new solicitude for human rights, proportionality migrated to the constitutional law in the 1950s and, under the tutelage of the GFCC, developed into the expansive balancing framework.

3.1 *From Scholars to Judges*

Scholars proposed an embryonic version of PA in the late eighteenth century, when they began to contemplate new forms of state intervention and, therefore, the prospect of regular conflict between public purposes and individual freedoms. Leading legal and political thinkers sought to ground the legitimacy of police interventions—i.e., administrative actions—on stable principles capable of mediating the conflict between private autonomy and the public good. The conflict was taken seriously because private autonomy was highly valued in the social contractarian theories that undergirded public law thinking in late eighteenth century Germany. In the view of jurists such as Carl Gottlieb Svarez (1746–1798), individuals possessed natural rights that were permanent and prior to the state, but they had given up some of their freedom in order to realize collective goods, through the state. The social contract justified the state’s authority, but also fixed the outer bounds of that authority. Proportionality was given a central place in these early theories of the police power, as a standard governing the legality of state measures. In the words of Günther Heinrich von Berg (1765–1843):

The first law [...] is this: the police power may go no farther than its own goals require. The police law may abridge the natural freedom of the subject, but only insofar as a lawful goal requires as much. This is its second law. (Würtenberger 1999, 55, 63)

Berg’s laws capture the essence of the suitability and LRM tests: the police may invade citizens’ freedoms only in the service of lawful goals, and their measures may restrict those freedoms no more than necessary. The third distinctive element of PA—balancing in the strict sense—was also recognized in the eighteenth century. In his treatise, *Lectures on the State and Law*, Svarez described the balancing exercise, but insisted that it proceed with a thumb on the scale in favor of rights:

Only the achievement of a weightier good for the whole can justify the state in demanding from an individual the sacrifice of a less substantial good. So long as the difference in weights is not obvious, the natural freedom must prevail [...]. The [social] hardship, which is to be averted through the restriction of the freedom of the individual, has to be more substantial by a wide margin than the disadvantage to the individual or the whole that results from the infringement.²⁰

Although jurists had thus already devised a proportionality test for the legitimacy of state intervention in private freedoms before 1800, it is important to note that PA was not yet being deployed as a constraint on state action. It would be many decades before the judicial review of administrative acts would appear in any of the German

²⁰ Carl Gottlieb Svarez quoted in Würtenberger (1999, 62).

states.²¹ Svarez, who presented his arguments in lectures delivered to Crown Prince Friedrich Wilhelm, the later King Friedrich Wilhelm III, was in effect proposing a principle that the state should adopt for its conduct; was not describing positive law (Heinsohn 1997).

Throughout the nineteenth century, scholars continued to reiterate and refine proportionality-based standards for the exercise of police power, and these ideas were finally given agency with the establishments of administrative courts. The most important of these courts, Prussia's *Oberverwaltungsgericht*, or Higher Administrative Court, began operating in 1875. Fed by a steady stream of cases, that court quickly gained a reputation across Germany as the leading expositor of administrative law principles (Stolleis 2001, 283). By the 1880s, it had begun to annul police measures on LRM grounds. The court grounded this LRM review textually in the provision of the Prussian General Law of 1794 (*Allgemeines Landrecht*) governing police powers. This clause reads: "The office of the police is to take the necessary measures for the maintenance of public peace, security, and order." Accordingly, the court reasoned, actions *not* necessary to pursue these ends are beyond the police's authority. Administrative courts in the other German states soon began following Prussia's lead, striking down police measures on LRM grounds.

By the end of the nineteenth century, the principle of proportionality enjoyed a secure place in administrative law, both in judicial decisions and scholarly treatises. As noted, judges initially seemed to regard proportionality primarily in LRM terms, but courts did not always distinguish between the various ways that administrative measures might be disproportionate (see Hirschberg 1981, 6). Over time, balancing was also contemplated and employed, but the practice was far from uniform.

Constitutional rights review proved to be more problematic. Although the constitutions of most German states did contain bills of rights in the later nineteenth century, courts did not enforce those rights as trumps against otherwise legal state action. During the 1875–1918 period, administrative review had become in some respects "a functional substitute for constitutional review" (Stolleis 2003, 270–71), and administrative judges routinely invoked rights, in the form of principles binding on the executive. But statutes were, at least technically, immune from judicial control.

The Weimar Constitution (1919–1933) established a republic. It also contained a catalogue of "rights"—perhaps better described as a list of programmatic aspirations, since they could be overridden by ordinary statute. Nonetheless, in the 1920s, with political authority weak and divided, some judges seized on a discourse of rights to wage what legal historian Michael Stolleis has termed a reactionary "war" on politicians, triggered by takings and debt cases (*ibid.*, 273. See also Huber 1992, 36). From 1921, the *Reichsgericht* (the Supreme Court) claimed for itself the authority to review the conformity of statutes with basic rights, especially property rights, which it characterized as "sacred" (Stolleis 2003, 272). At the same

²¹ *Ibid.*, 64–65, 67. The first was Baden (1863); second Prussia (1875).

time, leading jurists—including Carl Schmitt, Heinrich Triepel, Rudolph Smend, and the young Gerhard Leibholz—began to theorize rights as the foundational basis of all constitutional legality. Much of this scholarship was conservative and anti-parliamentarian, but not all of it. Triepel and Smend, for instance, argued that rights were best understood as a system of “legalized values,” and that these values ought to infuse all of the constitutional law, and to impose positive duties on government. Although these efforts were upended by the Third Reich, they laid the groundwork for the rights jurisprudence of the post-war constitutional order. Smend renewed his efforts after 1945, and Leibholz, who joined the first GFCC in 1951, worked hard to have the Court adopt these ideas (see Günther 2004, 190–91).

Had the Weimar Republic survived, it is at least possible that the Supreme Court would have generated a rights-oriented jurisprudence with proportionality doctrines at its core. The advent of the Third Reich mooted the question, as judicial review came under attack from the Nazis and their new doctrinal establishment (Stolleis 1998, 134). Labeling a state measure “political” was usually enough to shield it from judicial review (*ibid.*).

3.2 The Constitutionalization of Proportionality

Drafted under the watchful gaze of occupying forces, the German Basic Law of 1949 established the Federal Republic as a new constitutional order grounded in a commitment to human rights enforceable as higher law. Immediately, jurists began arguing for the recognition of proportionality as a constitutional principle. Some, such as Herbert Krüger, were “close associates” or followers of Rudolph Smend, and Smend’s theories about rights and constitutional “integration” enjoyed a privileged position throughout the 1950s. (Günther 2004, 180). At the same time, rights-oriented scholars, such as Gerhard Leibholz, were appointed to the GFCC.

In hindsight, one sees the hugely important role that legal scholars played in elevating proportionality to a constitutional principle. They refined the concepts that courts employed, and provided the rationales for proportionality’s expansion. Two figures stand out in particular: Rupprecht Krauss and Peter Lerche. Krauss’s influential 1953 dissertation made the case for treating proportionality as a constitutional principle. Krauss coined the term, “proportionality in the narrow sense,” and presented it as a latent strain already present in the very concept of proportionality. Krauss’s insistence that the concept of proportionality implied a balancing test reflected a heightened solicitude for rights. He wrote: “if the measure [of legality] is only necessity [i.e., the least restrictive means test], then a quite negligible public interest could lead to a severe right infringement, without being unlawful” (*ibid.*, 15). Peter Lerche made his contribution as the constitutionalization of proportionality was underway, in his 1961 dissertation. While Lerche was careful to distinguish between the least restrictive means test and proportionality in the strict sense, like Krauss, he argued that the two were logically connected. The least restrictive means test on its own would be ineffectual, since “any measures at all could be

presented as “necessary,” if the purpose they serve is defined in wide enough terms” (Lerche 1961, 20). Proportionality in the strict sense must be added to the least restrictive means test, “if the principle of necessity is not to lose all substance” (ibid.).

From Svarez to Lerche, then, one finds a remarkable continuity in doctrinal commitment to developing a proportionality-based account of rights. Germany’s constitutional judges echoed this commitment from the earliest days of the post-war order. The Bavarian Constitutional Court applied a LRM test to statutory restrictions on state constitutional rights in 1949,²² and by 1956 had asserted that the Proportionality Principle was implied by the very nature of the rights guaranteed in the Bavarian constitution, combined with the “*Rechtsstaat*” principle.²³ The GFCC moved almost as quickly. Indeed, by the close of the 1950s, the GFCC had elaborated the familiar multi-stage PA framework,²⁴ albeit without citing authority or giving a rationale for its application. To this day, the Court has not explicated the source of proportionality. As Dieter Grimm (Justice on the GFCC, 1987–1999) puts it: “The principle was introduced as if it could be taken for granted” (Grimm 2007, 387).

If the Court were to justify its move to PA today, we would argue, it would invoke these considerations: the priority of rights, given the recent Nazi past; the structure of rights, taking account of the modern welfare state and commitments to social democracy; and the rationality of the proportionality principle as a well-theorized general principle of law that “flows,” in Grimm’s words, “from the rule of law or the essence of fundamental rights” (ibid., 385), and confers basic legitimacy on the system as a whole.

In any event, in the 1960s, the GFCC’s invocations of PA became more confident and the structure of its analysis more formalized. In 1963, the Court suggested that it would deploy PA to all cases in which a right is restricted²⁵ and, in 1965, it announced, with no supporting citations, that “in the Federal Republic of Germany, the principle of proportionality possesses constitutional status.”²⁶ In 1968, the GFCC declared proportionality to be a “transcendent standard for all state action” binding all public authorities.²⁷ While, at this time, the Court did not always employ all the steps of PA to decide a case, especially when proportionality was only one of the legal issues raised, in subsequent cases it took care to be explicit about how it would use the different elements of PA.

²² Bayerischer Verfassungsgerichtshof [BayVerfGH] [Bavarian Constitutional Court] July 7, 1949, 1 II Entscheidungen des Bayerischen Verfassungsgerichtshofs [BayVerfGHE] 64 (76, 78) (F.R.G.).

²³ BayVerfGH Dec. 28, 1956, 9 II BayVerfGHE 158 (177); see also Stern 1993, 171.

²⁴ In *Apothekenurteil*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 11, 1958, Entscheidungen des Bundesverfassungsgericht [BVerfGE] 7, 377 (404–05)(F.R.G.).

²⁵ BVerfG June 10, 1963, BVerfGE 16, 194 (201) (1963).

²⁶ BVerfG December 15, 1965, BVerfGE 19, 342 (348–49). In this case, the court found that a lower court violated the plaintiff’s constitutional rights by not considering whether the pre-trial detention of the plaintiff, a 75-year-old retired admiral charged with murder in connection with an order he gave during World War II, was consistent with the principle of proportionality.

²⁷ BVerfG March 5, 1968, BVerfGE 23, 127 (133).

The impact of the GFCC's rights jurisprudence on German law and politics has been deep and pervasive. For various reasons, virtually every major policy issue that arises will eventually make it to the Court, in the form of a rights claim. The voluminous literature on the "judicialization" of the German legislative process²⁸ focuses on the pedagogical authority of the Court's rights jurisprudence in legislative processes (a politics of anticipatory reaction that takes place *during* the legislative process). PA undergirds judicialization, because it leads the court to put itself in the shoes of policymakers, and then to walk through their decision-making processes, step-by-step, evaluating constitutional legality of decisions along the way. The result has been the production of a relatively detailed set of proscriptions about how legislators and administrators should behave, if they wish to exercise their authority lawfully in virtually all important policy domains. In the shadow of proportionality review, and particularly balancing in the strict sense, German lawmakers engage in meaningful constitutional deliberation, and systematically so.

Rights and balancing have also been crucial to the "constitutionalization" of the private law, initiated by the GFCC's ruling in *Luth* (1958).²⁹ According to the Court—following the doctoral dissertation of Günter Dürig³⁰—the "value system" expressed by the *Grundgesetz*, and in particular its system of rights, "influences all spheres of law." As a result, "every provision of the private law [i.e., the various codes, especially the Civil Code] must be compatible with this system [...] and every such provision must be interpreted in its spirit." Private law judges must do so through balancing. When they fail to strike a proper balance between rights and other legal interests, they violate "objective constitutional law," and thus the rights of individuals. The ruling created a new cause of action, against the civil law judge, which the GFCC would hear through the constitutional complaint procedure. As subsequently developed, the *Lüth* line of jurisprudence means that "all private law is directly subject to constitutional rights"—and therefore to balancing—radically enhancing the presence of constitutional rights, and the GFCC, in German private law.

4 Diffusion

In this Section, we examine how judges, in three national and three international systems, came to adopt PA. We are interested here in how judges represent what they are doing when they turn to PA, and if and how PA gets "constitutionalized" as a meta-principle of judicial governance. We will not attempt to survey all of the similarities and differences observed when we examine the use of PA comparatively, across these systems. One finding deserves emphasis in advance. In each of the

²⁸ The classic study is Landfried (1984). See also Kommers (1994, 470); Landfried (1992).

²⁹ BVerfG January 15, 1958, BVerfGE 7, 198.

³⁰ In the 1950s, Dürig was the principal proponent of the view that the GG set out "an objective order of values" that penetrated every aspect of the legal order. We thank Robert Alexy for alerting us to Dürig's contribution.

systems examined, judges adopted PA to deal with the most politically salient, and potentially controversial, issues to which they could expect to be exposed. In our view, this is powerful evidence for arguments made in Section 2 of this paper.

As important, proportionality's impact has not been confined to the judiciary. To different degrees across our cases, legislatures and executives have adapted to the adoption of PA in ways that reinforce its status as a constitutional commitment. The exact shape and scope of these developments depend heavily on the particular institutional structures and legacies onto which PA has been grafted. A complete account of how non-judicial actors internalize proportionality into their own decision-making procedures lies beyond the scope of this article. Nonetheless, it is clear that such internalization can and does occur, with important consequences for our understanding of "judicial" authority *vis à vis* "political" authority.

4.1 National Legal Systems

From a comparative law perspective, PA exhibits a viral quality, spreading relatively quickly from one jurisdiction to another. In post-1989 Central and Eastern Europe, for example, virtually every constitutional court has adopted PA on the German model; most did so all but immediately, citing the case law of the GFCC and the European Court of Human Rights as authority (Sadurski 2005).³¹ PA is also gaining ground in Central and South American legal systems, and citations of Alexy in law journals are on the rise. In this Section, we focus on the cases of Canada, South Africa, and Israel, partly because these systems have not historically been much influenced by German or Continental law.

4.1.1 Canada

The Canadian Supreme Court adopted proportionality analysis in the mid-1980s as the technique for deciding rights claims under Canada's Charter of Rights and Freedoms. The Charter contains an extensive catalog of rights and an invitation to courts to review statutes for infringements of those rights. Under Section 1, the Charter "guarantees" rights *subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*.³²

The Court first clearly laid out the terms of proportionality analysis in *Regina v. Oakes* (1986).³³ At issue was a provision that created a rebuttable presumption that a person found to be in possession of drugs was, in fact, trafficking the drugs. *Oakes*

³¹ Sadurski (2005, 263–87, 267) devotes an entire chapter to proportionality, noting that: "The Courts in Central and Eastern Europe have clearly followed the path of the proportionality doctrine as developed by their Western counterparts, and in particular the European Court of Human Rights." Sadurski discusses the use of PA by the courts of Bulgaria, Croatia, Lithuania, Slovakia, Slovenia, Czech Republic, Poland, Estonia, Hungary, Romania, but the list is not exhaustive.

³² Canadian Charter of Rights and Freedoms § 1 (emphasis added).

³³ *R. v. Oakes*, [1986] 1 S.C.R. 103 (Can.).

claimed that the provision violated his right to the presumption of innocence under Section 11(d) of the Charter.

The Court concluded that the provision constituted a *prima facie* violation of the right to the presumption of innocence, and moved on to consider whether the Narcotics Act was nonetheless a permissible limitation of the right under Section 1. The Court addressed the question using a form of PA. To override a right, a statute must serve an “objective [that] relate[s] to concerns which are pressing and substantial in a free and democratic society,” and must further satisfy “a form of proportionality test.”³⁴ And the test, as outlined by Judge Dickson, contained the three steps familiar from German doctrine.³⁵

Although *Oakes* is recognized as a landmark case, it introduced the three-step proportionality analysis to Canadian law with relatively little fanfare. The opinion stressed the continuity with a previous case, *Big Mart* (1985), which mentioned proportionality in dicta.

Notably, the *Oakes* Court made no reference to foreign antecedents of its proportionality analysis, and referenced no other authority. The silence here suggests that, rather than resting on a foreign pedigree, the court wishes to present proportionality as a reasoned and sensible approach to the particular problem posed by Charter rights.³⁶ In any case, it did not take long for the proportionality framework developed in *Oakes* to be accepted as standard operating procedure in Charter litigation. Since the *Irvin Toys* decision of 1989, which announced the *Oakes* framework as “well established,”³⁷ *Oakes* has been cited in nearly two hundred decisions of the Court.³⁸

Judicial decisions tell only part of the story of proportionality’s impact in Canada. As in Germany, the Court’s Charter jurisprudence has induced significant changes “upstream,” requiring other government actors to consider proportionality as part of the legislative process. *Oakes* and related decisions have had, as Janet Hiebert has shown, “an important influence on bureaucratic and political cultures, which became more receptive, or at least more resigned, to the importance of assessing proposed legislation from a Charter perspective” (Hiebert 2004, 1970). Knowing that their actions will be subject to judicial review for conformity with the Charter, legislators and executive-branch actors have an incentive to consider the proportionality of their policymaking, and to build a record of their deliberations, in order to “Charter-proof” their policies (Hiebert 2006, 15. See also Hiebert 2009). And when the Supreme Court has struck down statutes under the Charter, such as a ban on the advertising and promotion of tobacco, Parliament has responded by passing similar legislation, but now accompanied by a record showing Parliament’s serious attention to the law’s proportionality.

³⁴ *Ibid.*, 139.

³⁵ *Ibid.*

³⁶ More recently, the Court has become more open about acknowledging the German influence. See Attorney General of Canada v. JTI-Macdonald Corp., 2007 SCC 30, par. 36.

³⁷ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

³⁸ As of June 22, 2009.

Seeing how the government and Parliament have incorporated proportionality standards into the legislative process puts the Supreme Court's Charter jurisprudence in another light. Some commentators have argued that the Supreme Court has become more deferential to Parliament in reviewing legislation since the time of *Oakes*. The charge raises fierce methodological issues but, arguably, one could arrive at exactly the opposite conclusion. As the other branches have taken on responsibility for considering proportionality, as they are socialized into what is a new system of policymaking, the Court has had less of a need to conduct Charter analysis *de novo*. Further, the Court has made clear that there is rarely a single "right answer" in questions under Section 1: what is crucial to these politics is that the relevant decision-maker makes clear how it has deliberated proportionality.

4.1.2 South Africa

The mid-1990s were years of rapid constitutional development for South Africa, and the constitutionalization of proportionality was among the major outcomes. South Africa's Interim Constitution, ratified in 1993, contained an extensive catalog of fundamental rights, along with a limitation clause reminiscent of Canada's.³⁹ The Interim Constitution also established South Africa's Constitutional Court and vested it expressly with the power of judicial review.⁴⁰

The new Constitutional Court initially resisted applying PA to the limitation clause, but this resistance evaporated almost immediately. The Court's second case involving the limitation clause, *State v. Makwanyane*, presented a challenge to the constitutionality of the death penalty. Writing the lead opinion, President Chaskalson found that the statute represented a *prima facie* violation of the constitutional right against cruel, inhuman, and degrading punishments. He then turned to proportionality: "The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality."⁴¹ Proportionality, in the court's view, is "implicit in the provisions of [the limitation clause]." The Court then laid out a laundry list of factors that bear on PA, including

the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.⁴²

³⁹ S. Afr. (Interim) Const. 1993. Section 33 provided that fundamental rights may be limited by law of general application, so long as the limitation is reasonable, "justifiable in an open and democratic society based on freedom and equality," and does not "negate the essential content of the right in question." The constitution further provided that limitations on a subset of fundamental rights—including the rights to human dignity, freedom from forced labor, and freedom of conscience—were permissible only when such limitations were "necessary." § 33(1).

⁴⁰ *Ibid.* § 98(5).

⁴¹ *S. v. Makwanyane and Another* 1995 (3) SA 391 (CC) at 436 (S. Afr.).

⁴² *Ibid.*

Chaskalson explicitly referenced foreign sources of authority for the move, discussing the role of PA in German, Canadian, and European law, noting differences and similarities with the South Africa context.⁴³

Although the *Makwanyane* formula treats proportionality as a single-stage, multi-factored balancing, elements of a suitability and a least-restrictive means inquiry are present. The death penalty came up short in the Court's analysis, and was invalidated.⁴⁴

Makwanyane's approach was adopted in subsequent cases. Initially, proportionality was treated more as a pragmatic approach to applying the limitation clause than as an ineluctable principle of law.⁴⁵ When South Africa adopted a permanent constitution in 1996, however, the drafters of that document elevated proportionality to the status of a constitutional principle. The Interim Constitution's limitation clause was revised to incorporate expressly the factors named in *Makwanyane* as elements of PA. Crucially, the Constitutional Court certified that the new Constitution was consistent with the interim document's Constitutional Principles—a necessary condition for the Constitution to take effect.⁴⁶ The Court rejected objections that the new limitation clause, Section 36(1), did not comply with international norms on human rights, and hence, with the right guarantees in the Interim Constitution.⁴⁷ The Court held Section 36(1) to be valid, essentially because PA defines best practice standards for rights review.

Since the mid-1990s, proportionality has become a cornerstone of the work of South Africa's Constitutional Court. Writing in 2003, Justice Albie Sachs declared that “[p]roportionality and balancing are at the heart of constitutional litigation in our country,” and estimated that as many as three quarters of the Court's cases require the justices to engage in a balancing analysis (Sachs 2003). Under Section 36(1)'s proportionality framework, the Court has resolved a number of high profile disputes, including constitutional challenges to the corporal punishment of juveniles, anti-sodomy statutes, felon disenfranchisement, a prohibition on cannabis as applied to Rastafarians, who use it for religious purposes, and a number of criminal procedure rules alleged to burden the presumption of innocence.

In its development since the mid-1990s, “South African limitations jurisprudence has borrowed extensively from Canadian limitations jurisprudence” (Iles 2007, 69). However, PA does not take the exact same form in the two jurisdictions: in particular, the analysis in South Africa is not always conducted in a sequence of discrete

⁴³ *Ibid.*, 436–39.

⁴⁴ *Ibid.*, 446, 451.

⁴⁵ See, e.g., *S. v. Williams and Others* 1995 (3) SA 632 (CC) at 649. “In *S. v. Makwanyane* this Court dealt with Section 11(2) of the Constitution on the basis that Section 33(1) is applicable to breaches of that section. I follow the same approach in the present case.” (citation omitted).

⁴⁶ *Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC). The Constitutional Court was given responsibility for certification by Section 71(2) of the Interim Constitution.

⁴⁷ *Ibid.*, 804.

steps. But even if “as part of its overall, nonmechanical assessment, the [Court] does not always disaggregate the various strands of the test,” as in Canada, “the least restrictive means part of the test has been perhaps the most important in practice” (Gardbaum 2007, 842).

Like its Canadian and German counterparts, the South African Constitutional Court also recognizes that the LRM test permits deference to legislative judgments. As academic authorities have noted, “[t]he use of a value-based, context-sensitive standard to determine the reasonable of legislative and other limitations of fundamental rights, which is based on proportionality and balancing, is hardly consistent with the idea of a rigid separation between the legislative and judicial functions” (Botha 2003, 14, n. 5). For its part, the Court expects the parliament to consider the constitutional issues as part of its policymaking process, as the Court emphasized in *S. v. Manamela*.⁴⁸

4.1.3 Israel

Israel is one of the four countries in the world today without a codified, entrenched constitution.⁴⁹ The country nonetheless possesses a Supreme Court that became a powerful actor in high-profile disputes when it began, in the 1980s, to inject rights and doctrines of judicial review into the higher law. In this same period, the Court was in the throes of developing a kind of indigenous, proto-proportionality doctrine. Once the use of PA in other legal systems came to its attention in the 1990s, the Court quickly adopted the standard, German-based framework. It then used PA both for determining when limitations on rights were permissible, and for judging the legality of administrative action. Today, arguably, the Israeli Supreme Court applies PA more consistently and rigorously than any other judicial body in the world.

Israel’s most important “proto-proportionality” cases share a similar fact pattern. Regulation 119 of the Defense (Emergency) Regulations, a holdover from the days of the British Mandate, give military commanders wide latitude in taking measures responsive to terrorist acts. In cases challenging these responses as “excessive,” such as *Hamdi v. Commander of Judea and Samaria* (1982)⁵⁰ and *Turkeman v. Minister of Defense*,⁵¹ the Supreme Court adopted a simplified form of proportionality analysis.

Scholarly commentary paved the way for the judicial acceptance of a more fully developed PA. A 1994 comparative piece by law professor (and later, Supreme Court Justice) Itzhak Zamir was the first important piece to focus on the connections between proportionality in German and Israeli administrative law (Zamir 1994, 109,

⁴⁸ *S. v. Manamela and Others*, 2000 (3) SA 1 (CC) at 41 (O’Regan, J., and Cameron, AJ, diss.). The majority in this case declared its agreement with these principles. 2000 (3) SA 1 (CC) at 20.

⁴⁹ The others are Bhutan, New Zealand, and the United Kingdom.

⁵⁰ H CJ 361/82 *Hamdi v. Commander of Judea* [1982] IsrSC 36(3) 439.

⁵¹ H CJ 5510/92 *Turkeman v. Minister of Defense* [1993] IsrSC 48(1) 217.

130). Concurrently, Aharon Barak's 1994 commentary on Israel's new Basic Law of Human Dignity and Freedom explicitly advocated the *Oakes* proportionality analysis as the method for determining when rights must yield to public law.

In their capacity as Justices on the Supreme Court, the authors of these pieces quickly and forcefully brought this cosmopolitan perspective on proportionality into the law of Israel. Justice Zamir surveyed other jurisdictions' acceptance of proportionality and made a strong pitch for giving it the "proper status and weight" in Israel's law, in *Euronet Golden Lines [1992] Ltd. v. Minister of Communication*.⁵² For his part, as Chief Justice, Barak offered an extensive discussion of the origins and diffusion of proportionality analysis in his *Ben-Atiyah v. Minister of Education, Culture & Sports* concurrence.⁵³ Barak even found antecedents of proportionality in Maimonides's injunction to treat illness with powerful medicines only if weaker medicines fail. *Ben-Atiyah* involved students who had been denied admission to a state program on the grounds that they had attended schools with high levels of cheating. Barak would have overturned the ministry's order on proportionality grounds, while the other two judges decided the case in terms of reasonableness, a lower standard than LRM in Israeli law.

The decisive turning point for proportionality came in *United Mizrahi Bank plc v. Midgal Cooperative Village*,⁵⁴ a landmark in Israeli constitutional law. *United Mizrahi Bank* established the principle of judicial review, and closely linked the exercise of judicial review to proportionality. Writing for himself and six other members of the Court, Chief Justice Barak held that the Court possessed the power to strike down legislation that contravened rights named in the Basic Laws (see *Omi* 1997, 765). The Knesset could infringe on those rights only with statutes that satisfied the Basic Law's limitation clause, which read: "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required."⁵⁵ And to satisfy the limitation clause, argued Barak, meant to satisfy the principle of proportionality.

Barak went on to note that a form of proportionality is recognized in Israeli administrative law, and used comparative examples to show that the move of proportionality from administrative law to the constitutional level has ample precedent in other legal systems. He explained that proportionality began in administrative law in Europe, "and from there spread to the constitutional law of most countries in Europe and outside of it."⁵⁶ Barak quoted *Oakes* on the elements of the proportionality test

⁵² HCJ 987/94 *Euronet Golden Lines [1992] v. Minister of Communication [1994]* IsrSC 48(v) 412.

⁵³ HCJ 3477/95 [1995] IsrSC 49(5) 1, 9. *Ben-Atiyah* was actually published after *United Mizrahi Bank*, but it was argued several months before *United Mizrahi Bank*.

⁵⁴ CA 6821/93 [1995] IsrSC 49(4) 221.

⁵⁵ The limitations clause was amended in 1994 to permit explicit legislative override of Basic Law provisions.

⁵⁶ *United Mizrahi Bank [1995]* IsrSC 49(4) at 436. Barak specifically mentions Canada and South Africa.

and cites to German authorities.⁵⁷ He concluded that the statute met the conditions of the limitation clause.

After it was introduced in *United Mizrachi Bank*, the three-stage proportionality analysis was embraced by Israel's Supreme Court, and its application has not been confined to adjudicating rights claims under the Basic Laws. The *Oakes*-style proportionality test was also applied as a check on administrative actions. The 2004 *Beit Sourik* case demonstrated how much bite PA has attained in Israel's law. The case raised a challenge to plans for the controversial separation fence intended to impede terrorist access to Israel. The proposed route for the fence would separate thousands of West Bank farmers from their fields and would require the seizure of many local inhabitants' lands. The petitioners claimed violations of Israeli administrative law and international law.⁵⁸

Writing for a unanimous three-justice panel, Barak found that the route violated proportionality in the strict sense. Justice Barak ruled that the plans satisfied the first two proportionality sub-tests: the fence was rationally connected to the goal of security, and no alternative route that infringed on human rights less could provide the same level of security. But "the gap" in security between the proposed fence and a less intrusive alternative was "minute, as compared to the large difference" in how the proposed fence and the alternative would affect the lives of inhabitants.

Perhaps because PA was made to do so much work in this decision—the invalidation hinged solely on the balancing test—Chief Justice Barak justified proportionality at some length in his opinion. He described proportionality as a "foundational principle" of law that "crosses through all branches of law." It is part of the "universal" solution to the "general problem in the law" of "balancing between security and liberty." Barak then went on to demonstrate proportionality's doctrinal roots as "a general principle of international law" as well as Israel administrative law. The decision also stressed how similar the PA framework is across diverse legal systems, including international law, common law, civil law, and Israeli law.

The judiciary is not the only branch of government to be affected by the constitutionalization of proportionality in Israel. According to Chief Justice Barak, "the executive branch has internalized the constitutional revolution" (Barak 2006, 19). All government legislation and administrative actions "are carefully evaluated to determine if they pass constitutional muster," and the Attorney General and departmental legal advisers have inculcated the civil service in the framework of rights analysis (*ibid.*). Chief Justice Barak also writes that "the legislative branch takes the constitutional change seriously," and "exercises great caution on this issue" (*ibid.*). However, unlike in Canada, Israel's Supreme Court continues to conduct its proportionality analysis *de novo*, without regard to the judgments of other branches regarding the constitutionality of their actions.

⁵⁷ *Ibid.*

⁵⁸ HCJ 2056/04 Beit Sourik Village Council v. Government of Israel [2004] IsrSC 58(5) 807.

4.2 *International Regimes*

We now turn to the consolidation of PA in three regimes created by international law: the European Convention on Human Rights, the European Community, and the World Trade Organization. Through their courts, these regimes have evolved important constitutional features, leading scholars to engage lively debates about whether they have been “constitutionalised” in some meaningful way.⁵⁹ Regardless of how we respond to this issue, these debates are data. They alert us to the fact that something transformative has happened to which traditional concepts and categories, drawn from comparative or international law and politics, may not easily apply (Walker 2001). In our view, a court that adjudicates conflicts arising from such a normative structure is a court operating in a constitutional mode, inherently, irrespective of how one understands the “constitutional” nature of the regime more broadly. The fact that the high courts of these regimes have embraced PA, a global constitutional standard, supports the point.

4.2.1 *The European Community*

The Treaty of Rome, which entered into force in 1959, constituted the European Community (EC), the first pillar of the European Union. In 1970, the European Court of Justice (ECJ) took a first step toward recognizing proportionality as an unwritten, general principle of EC law.⁶⁰ It derived a necessity requirement (LRM) from a ban on discrimination, without citing source or authority. Today proportionality governs lawmaking and adjudication in virtually every major domain of law established by the Treaty of Rome. Indeed, the consensus among doctrinal authorities is that proportionality is inherent to any proper legal system, and therefore to the EU, being “an expression of the rule of law” (Schwarze 2005).

PA constitutes the foundation of the ECJ’s jurisprudence on the four freedoms—free movement of goods, labor, capital, services (and establishment)—and of the Court’s approach to indirect sex discrimination (Stone Sweet 2004, 165–70; and generally Chapter 4). It is at the heart of the Community’s largely judge-made system of administrative law, and applies to mergers and anti-trust law. PA also dominates the ECJ’s approach to the fundamental rights, which the Court incorporated into the Treaty of Rome, during the 1969–1974 period, as “general principles

⁵⁹ See Introduction.

⁶⁰ “A public authority may not impose obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure.” *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, 1136. In *Schraeder*, the Court announced that “the principle of proportionality is one of the general principles of Community law. By virtue of that principle, measures [...] are lawful provided that [they] are appropriate and necessary for meeting the objectives legitimately pursued by the legislation in question. Of course, when there is a choice between several alternatives, the least onerous measure must be used.” Case 265/87, *Schraeder v. Hauptzollamt Gronau*, 1989 E.C.R. 2237 (1989).

of law.⁶¹ The Member States have ratified these moves in various ways, helping to institutionalize proportionality as an overarching, constitutional principle. The ill-fated 2004 European Constitution contained an elaborate, 54-article, Charter of Fundamental Rights. Following the ECJ's lead, Article 52 states:

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

The Charter, including Article 52, was part of the package of reforms agreed to by Member States in December 2007 (the Lisbon Treaty). At this moment, the Lisbon Treaty has yet to be ratified, though the EC's organs have announced that they will abide by the agreement as if it were law.

After the consolidation of the ECJ's "constitutional" doctrines of supremacy and direct effect, the emergence of proportionality balancing as a master technique of judicial governance is the most important institutional innovation in the history of European legal integration. Hans Kutscher and Pierre Pescatore were the intellectual leaders in this move. Kutscher, who was a judge on the German Federal Constitutional Court during its crucial foundational period (1955–1969), came to the ECJ in 1970, and served as the President of the ECJ from 1976 to 1980. Pierre Pescatore,⁶² left a professorship for the ECJ in 1967, and served on the Court until 1985.

In the EC/EU context, the Court's move to proportionality can be characterized as having "constitutional" importance—or is inherently constitutional—in at least two ways. First, when it deploys PA, the ECJ is doing what constitutional and supreme courts do, namely, managing tensions and conflicts between rights and freedoms, on the one hand, and the power of the EC/EU and of Member States, on the other. Second, harnessed to the "constitutional" doctrines of supremacy and direct effect, PA constitutes a mechanism of coordination between the supranational legal order and national legal orders. When the ECJ first embraced it at the end of the 1960s, proportionality was native to only one Member State: Germany. In its jurisprudence on the free movement of goods, indirect sex discrimination, and other legal domains, the ECJ required national judges to use PA when they reviewed the legality of national law and practice under EC law. As has been documented, some national judges initially resisted this "obligation" (see Stone Sweet 2004, 168–70). As the formalization of the principle of proportionality has proceeded, resistance has been steadily withering, a process reinforced by choices made by the European Court of Human Rights.

⁶¹ The Treaty of Rome contains no catalogue of rights. The Court cited the ECHR and the "constitutional traditions of the member states" as sources. Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419 (1969); Case 4/73 *Nold v. Commission*, 1974 E.C.R. 491 (1974).

⁶² Pescatore, a law professor, mentions proportionality as a general principle of law in a 1970 article, written while he was on the Court (Pescatore 1970, 350).

4.2.2 The European Convention on Human Rights

The European Convention on Human Rights (ECHR) is the most effective human rights regime in the world, today covering the territory of 47 states and more than 800 million people. The Convention, which entered into force in 1953, established a basic catalogue of rights binding on the signatories, and new institutions charged with monitoring and enforcing compliance. Distinctive at its conception, the ECHR has evolved into an intricate legal system. The High Contracting Parties, in successive treaty revisions, have steadily upgraded the regime's scope and capacities. They have added new rights, enhanced the powers of the European Court of Human Rights, and strengthened the links between individual applicants and the regime. For its part, the Strasbourg Court has built a sophisticated jurisprudence, whose progressive tenor and expansive reach have helped to propel the system forward. Today, the Court is an important, autonomous source of authority on the nature and content of fundamental rights in Europe. In addition to providing justice in individual cases, it works to identify and to consolidate universal standards of rights protection, in the face of wide national diversity. In a 1995 decision, the Court called the ECHR "a constitutional document" of European public law⁶³; and Luzius Wildhaber, as President of the Court (1998–2007), argued strongly in favor of enhancing its "constitutional" functions (Wildhaber 2000).

The Convention proclaims some state obligations to be firm prohibitions (of torture, degrading treatment, and slavery),⁶⁴ but most rights are "qualified" in various ways. Most important for our purposes, Articles 8–11 are qualified by a necessity clause. States may only "interfere" with the exercise of rights to privacy and respect for family life, and the freedom of thought, conscience, religion, expression, assembly, and association, when such interferences are "necessary in a democratic society" and "in the interests of" some specified public good. States purposes mentioned include "national security," "public safety," "the economic well-being of the country," "the prevention of disorder or crime," "the protection of health or morals," and "the protection of the rights and freedoms of others." These rationales for restricting rights are exhaustive: Article 18 prohibits states from infringements "for any purpose other than those [...] prescribed."

The Court subjects all Convention rights to balancing,⁶⁵ and has developed a German-style proportionality approach to Articles 8–11, and to Article 14 (non discrimination on sex, race, colour, language, religion, political opinion, national origin, etc.). Like national constitutional courts, the Court faced the problem of determining the standard for judging necessity, but the problem was exacerbated by wide national variance in approaches to judicial review. By the early 1970s, the proportionality framework was routinely used in Germany, and was just emerging in the EU under the ECJ's tutelage, but PA was virtually unknown in all of the

⁶³ *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) at 27 (1995).

⁶⁴ These are contained in Articles 3 and 4, respectively.

⁶⁵ "In practice, the European Court engages in balancing in the context of almost every Convention right" (Rivers 2006, 182).

other High Contracting Parties of the Council of Europe, with the exception of Switzerland (Stone Sweet and Keller 2008a, 19). The main agent of this development was Professor Jochen Frowein, a member of the Commission on Human Rights (1973–1993), its Vice President (1981–1993), and long associated with the Max Planck Institute for Comparative and International Law, Heidelberg, including as director.

The Court's turn to proportionality was heavily conditioned by its confrontation with cases coming from the UK, where the "*Wednesbury* reasonableness" test, a type of "rational basis" standard, governed applications for judicial review of government acts.⁶⁶ This conflict—between German-style PA and UK-style reasonableness—is a deeply structural one, implicating the most basic constitutional precepts of a legal system wherever it arises. Simplifying a complex reality, the UK's accession to the EC led judges to create exceptions to certain core precepts of parliamentary sovereignty. The ECJ's supremacy doctrines meant relaxing the UK's doctrine of implied repeal and enforcing EC law, even against subsequent law; and the move to proportionality meant evolving new remedies, and the relaxation of the *Wednesbury* standard. But traditionalists could nonetheless assert that these exceptions were limited to those legal domains governed directly by EC law. Because the ECHR potentially governs virtually all domains of law and judicial practice, the Strasbourg Court's adoption of PA had the potential of fatally undermining not only *Wednesbury*, but every other practical implication of parliamentary sovereignty.

The Court's first serious dealings with the limitation clauses of the Convention came in *Handyside v. the United Kingdom* (1976),⁶⁷ an Article 10 case involving the censorship of a book on public morals grounds. In its ruling, the Court observed that "the adjective 'necessary,' within the meaning of Article 10 par. 2 is not synonymous with 'indispensable' [and] neither has it the flexibility of such expressions as [...] 'admissible,' [...] 'useful,' 'reasonable,' or 'desirable.'" Nevertheless, it was "for national authorities to make the initial assessment of the pressing social need implied by the notion of 'necessity' in this context."⁶⁸ The Court then found that the U.K. had exercised its "margin of appreciation"—today jargon denoting the discretion of states to strike the proper balance in the first instance—on the matter properly, but insisted that the use of such authority must "go hand in hand with [...] European supervision."⁶⁹ The Court did not go further. In *Dudgeon v. the United Kingdom* (1981),⁷⁰ however, the Court declared measures that criminalized homosexual acts to be "disproportionate," on LRM grounds, in the context of the right to privacy (Article 8). Building on *Dudgeon*, the Court then entrenched a version of PA as a general approach to qualified rights.

⁶⁶ See above note 6.

⁶⁷ *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976).

⁶⁸ *Ibid.*, at 22.

⁶⁹ *Ibid.*, at 23.

⁷⁰ *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 24 (1981).

In doing so, the Court became a powerful agent in PA's diffusion into national legal orders. In two more recent privacy cases, *Smith and Grady v. United Kingdom* (1999),⁷¹ and *Peck v. United Kingdom* (2003),⁷² the Court strongly criticized U.K. courts for continuing to apply *Wednesbury* rather than a LRM-based necessity test. In *Peck*, the Court noted that UK judges refused to entertain pleadings based on the Convention except where claimants could show that public authorities had acted "irrationally in the sense that they had taken leave of their senses, or had acted in a manner in which no reasonable authority could have acted." In both *Smith and Grady* (unlawful discrimination against homosexuals in the armed services) and *Peck* (unlawful broadcasting of closed circuit camera footage) the Court held that the absence of necessity review by the UK courts, per se, constituted a breach of Article 13: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority." In both cases, the Court noted that UK judges had strongly implied that they would have found for the applicants, but for the *Wednesbury* restriction.⁷³ Thus, it can be argued that the Court was helping UK judges overcome a restriction that had made it impossible for them to fulfill their obligations under the Convention.

Peck's application for judicial review was rejected by the High Court in 1997, and the European Court's judgment on the merits did not come until 2003. In the meantime, the 1998 Human Rights Act⁷⁴ incorporated the ECHR into UK law and, in 1999, the House of Lords adopted PA as the procedure for determining necessity.⁷⁵ Under the Act, individuals may plead the ECHR before UK judges, and judges may enforce Convention rights. A court, however, may not annul or disapply statutes that violate the Convention—it may only issue a declaration of incompatibility. The Government and Parliament can maintain incompatible statutes, but they must give reasons for why they have chosen to do so (the doctrine of implied repeal does not apply). The judicial politics of the Human Rights Act are in rapid development, and PA will be central to how the relationship between judges and legislators evolves.

Although UK courts profess to have abandoned the "reasonableness" test when it comes to rights review, they do not always apply the LRM test with rigor. Many judges, even those on high courts, consider necessity analysis to be an inherently legislative mode of decision-making; some use the necessity stage merely to affirm legislative discretion, even sovereignty. In doing so, they expose themselves to censure under the Convention. In *Hirst v. United Kingdom*,⁷⁶ for example, a 2005 case involving the voting rights of incarcerated prisoners, the Strasbourg Court condemned the UK, in part, on the grounds that neither the UK Parliament, nor

⁷¹ *Smith and Grady v. United Kingdom*, 29 Eur. H.R. Rep. 493 (1999).

⁷² *Peck v. United Kingdom*, 36 Eur. Ct. H.R. Rep. 41 (2003).

⁷³ *Ibid.* See also *Smith and Grady v. United Kingdom*, 29 Eur. H.R. Rep. 493 (1999).

⁷⁴ Human Rights Act, 1998, c. 42, available at <http://www.opsi.gov.uk/acts/acts1998/19980042.htm>.

⁷⁵ In *de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands, and Housing* 1 A.C. 69, 80 (P.C. 1998) the Privy Council of the House of Lords adopted PA.

⁷⁶ *Hirst v. United Kingdom*, App. n. 74025/01 (Eur. Ct. H.R. October 6, 2005).

the judiciary, had “ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on a right of a convicted prisoner to vote.”⁷⁷ In consequence, the British and the Scottish Governments are now preparing reforms, while taking care to build a record of their own proportionality-based determinations (see White 2007).

Under the Court’s supervision, PA is now the process of diffusing to every national legal order in Europe, where it will typically be absorbed as a *constitutional* principle (Stone Sweet 2008b, 688, 698–701). In the territory covered by the Convention today, the failure on the part of national courts to use PA when they adjudicate qualified rights and non-discrimination cases is itself an infringement of Convention rights—to judicial remedy. Further, the scope of the proportionality principle extends to the exercise of all public authority. In *Hirst*, the Court pointedly criticized the UK Parliament, as well, for having failed to deliberate the proportionality of legislation when it was adopted. Proportionality is a transnational principle that casts an ever-deepening shadow over both national rights adjudication and policymaking more broadly conceived.

4.2.3 The World Trade Organization

The World Trade Organization (WTO), which entered into force on January 1, 1995, absorbed or replaced institutional features that had evolved under the General Agreement on Tariffs and Trade (GATT). The GATT-WTO’s purpose is to facilitate the expansion of international trade, through legislating and enforcing trade law for its members: sovereign states. In 1948, when the GATT entered into force, “anti-legalism” reigned in the regime (Long 1985, 70–71; Hudec 1992). The treaty did not provide for TDR, and diplomats pointedly excluded lawyers from GATT organs. In the 1950s, TDR nonetheless emerged, in the form of the Panel System. Panels, of three to five members, usually GATT diplomats, acquired their authority through the consent of two disputing states. In the 1970s and 1980s, the system underwent a process of judicialization (see Stone Sweet 1997, 1999). States began to litigating disputes aggressively, deploying lawyers who used standard litigation techniques; jurists and trade specialists replaced generalist diplomats on panels; and panels began treating their output as case law, a process encouraged and ratified by the litigating lawyers. Judicialization helped to generate the conditions necessary for the emergence of the WTO, which established a system of adjudication on the basis of compulsory jurisdiction. The panel system was, in part retained, but it is today crowned by a high appellate instance, called the Appellate Body (AB).

By our definition, the AB of the WTO is a trustee court. The myriad treaty instruments comprising the substantive law of the WTO can only be revised by unanimous vote (of 151 members today). The legal system provides third party dispute settlement to states, but virtually all important disputes are linked to questions of treaty interpretation. Thus, as in any constitutional regime, TDR and

⁷⁷ *Ibid.*, pars. 79–80.

rule-adaptation (constitutional lawmaking) are nested activities. States are fully aware of this fact, and they use the panel system and the AB, in part, to evolve treaty rules they favor, and to block interpretations to which they object. The AB is gradually exerting dominance over the normative evolution of the regime, which is to be expected given the legal system's steady case load, and the AB's trustee status.

The core legal text is the GATT (1947, 1994), which lays down the basic rules and principles of international trade. National law and practices related to taxation, customs, regulatory transparency, subsidies, currency and balance of payment management, and the like, may all be manipulated in ways that will make them discriminatory, non-tariff barriers to trade. The GATT seeks to make such manipulation illegal, through a mixture of rules and standards governing such policies.

Unlike the post-Single European Act EU, the GATT-WTO has been unsuccessful at generating "positive integration": law to address the negative externalities of trade. By default, Article XX (GATT) has become the main site for testing the limits of state competences to deal with such problems unilaterally. Article XX contains a list of "General Exceptions" to the GATT. Measures that come under one of the headings listed in Article XX, and meet the conditions that have been developed by panels and the AB, are permitted. Permissible exceptions include those national "measures" that are judged to be "necessary": "to protect public morals" (XX [a]); "to protect human, animal, or plant life and health" (XX [b]); and "to secure compliance" with "customs enforcement" and "the protection of patents, trademarks and copyrights, and the prevention of deceptive practices" (XX [d]). Other headings include exceptions for measures "relating to": "the products of prison labour" (XX [e]); and "the conservation of exhaustible natural resources" (XX [g]).

In a regime otherwise dominated by free trade values and legislative inertia, adjudicating Article XX has become the main "forum" in the WTO for deliberating countervailing interests and values. In response to litigation, panels and the AB developed a host of balancing techniques, and proportionality in particular, to control the use of these exceptions, and to develop GATT-WTO law. Much of the law, politics, and scholarly discourse concerned with the question of if and how trade law can accommodate "societal values" other than free trade—including public health (see, e.g., Howse and Tuerk 2006), human rights (see, e.g., Cleveland 2002), and environmental protection (see, e.g., Ramangkura 2003)—is organized by the AB's Article XX jurisprudence, and speculation on how the AB will decide cases in the future. The AB has been successful at focusing attention on Article XX by making it clear that WTO judges considers these values to be, at least a priori, as important as free trade. Moreover, the AB has at times decided that they outweigh trading rights.

The LRM test, with its "reasonably available alternative" corollary, emerged in a pre-WTO dispute, *U.S.—Section 337 of the Tariff Act of 1937* (1989).⁷⁸ In this dispute, the EC successfully challenged a U.S. measure that treated patent infringement litigation differently, depending on the site of production of the good. The statute in question blocked access to the federal courts of cases involving

⁷⁸ GATT Panel Report: *United States—Section 337 of the Tariff Act of 1930*, Nov. 7, 1989, GATT B.I.S.D. (L/6439 36S/345 36th Supp.) at 345.

foreign products manufactured under an American patent, pushing them into an agency, the International Trade Commission, where procedures and remedies were less advantageous for imports. The U.S. pleaded Article XX [d]: the measure was “necessary to secure compliance with laws [. . .] relating to the protection of patents.” Indeed, it claimed that Section 337 “provided the only means of enforcement available to it,” since patent infringement cases involving goods manufactured abroad would always pose special problems (service of process, enforcement of judgments, etc.). For its part, the EC could see no reason why the Federal Courts should not be used, and the Panel agreed.

What is crucial is the disagreement about the standard to be applied in necessity review: the EC argued for the application of a LRM test, and the U.S. advocated a rational basis standard. It would seem that each side was proceeding on the basis of their understanding of how LRM tests are used *in their own systems*. In European national constitutional law, and under the Treaty of Rome and the ECHR, it is not rare to see statutes and administrative measures pass necessity review. In the U.S., the outcome is heavily prejudged: once a court decides to proceed to strict scrutiny, the act under review is likely to be invalidated under a LRM test. “Strict in theory, fatal in fact” goes the maxim. Indeed, the U.S. had argued that: “Under the Community’s proposed standard, adoption by a contracting party of a regime different from that adopted by other States, for example for the protection of human, animal or plant life and health or of public morals, could never be justified [. . .] since it would have a trade restrictive effect and could not be shown to be objectively ‘necessary.’”

The three-member Panel, which included former ECJ Judge and proponent of PA Pierre Pescatore, simply adopted a solution that would be familiar to any consumer of the ECJ’s Article 28 (EC) case law, well-established in 1989:

a contracting party cannot justify a measure inconsistent with another GATT provision as “necessary” in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.⁷⁹

As a technique of judicial review, the application of LRM analysis in GATT-WTO proceedings has proved to be as intrusive as it is in any national constitutional system. Much like their ECJ counterparts, WTO judges will block claimed exceptions to GATT rules when a national measure fails proportionality, but only after scrutinizing, in micro detail, why and how the measure was adopted and applied in the first place. With necessity analysis, we would emphasize that such rejection is conditioned by a constraint. As in the EC, WTO judges routinely identify specific, “reasonably available,” less-restrictive-on-trade, policy alternatives that would pass the LRM test. Indeed, one might consider whether such a burden

⁷⁹ *Ibid.*, recital 5.26.

constitutes a kind of informal duty that binds the judge who would censure a measure on LRM grounds.

The next case involving necessity review under Article XX illustrates the point. In *Thailand—Cigarettes* (1990),⁸⁰ the U.S. attacked Thailand's treatment of imported cigarettes, taking its arguments on necessity directly from *U.S.—Section 337 of the Tariff Act of 1937*, the case it had just lost.⁸¹ Thailand taxed foreign-produced cigarettes at a higher rate than the domestic equivalent and subjected importers to a special licensing at a procedure. In response, Thailand invoked Article XX [b], which permits national measures that are "necessary to protect human life or health." The measures under review, it claimed, were designed "to protect the public from harmful ingredients in imported cigarettes, and to reduce the consumption of cigarettes in Thailand." The Panel then gave a polite bow to Thailand, recognizing the importance of the interests being pleaded, before moving to LRM analysis.

Our interest here is on how the Panel fleshed out the LRM standard.⁸² The Panel suggested that other countries use labeling and "ingredient disclosure" requirements to permit "governments to control and the public to be informed of, the content of cigarettes." Indeed, it went so far as to state that: "a non-discriminatory regulation [...] coupled with a ban on unhealthy substances, would be an alternative consistent with the GATT." On the issue of reducing smoking, the Panel suggested that Thailand had a wide range of GATT-consistent options available to it: it could launch a publicity campaign against smoking; it could ban advertising of all cigarettes, or smoking in public places; it could enhance warnings on cigarette packages; it could use the state monopoly—the Thai Tobacco Monopoly—to restrict supply and raise prices. Thailand failed the necessity test (par. 81) precisely because the Panel could so easily come up with less-restrictive-on-trade alternatives.

Once the new WTO legal system began operating, panels and the AB simply adopted the LRM approach to necessity analysis, refining it over time. In all WTO rulings rejecting an Article XX exception on necessity grounds coming after *Thai Cigarettes*, one finds the same compulsion to access the legitimizing resources of Pareto optimality.⁸³ As it has developed, the WTO version of necessity analysis absorbs the balancing in the strict sense phase, importing elements of Alexy's "law of balancing" into its jurisprudence. In *Korea-Beef* (2001), the AB provided a subtle analysis of the proportionality of national measures, with regard to the public health exception, and clarified its approach to necessity in important dicta:

The more vital or important [...] common interests or values are, the easier it would be to accept as "necessary" a measure designed as an enforcement instrument. There are

⁸⁰ GATT Panel Report: *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, Nov. 7, 1990, GATT B.I.S.D. (DS10/R-37S/200).

⁸¹ See, e.g., *ibid.*, par. 3.

⁸² *ibid.*, recitals 72–80.

⁸³ On this point, see Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, 5 (January 10, 2001), pars. 162–6.

other aspects of the enforcement measure to be considered in evaluating that measure as “necessary.” One is the extent to which the measure contributes to the realization of the end pursued, the securing of compliance with the law or regulation at issue. The greater the contribution, the more easily a measure might be considered to be “necessary.” [...] Determination of whether a measure [...] is “necessary” [...] involves in every case a process of weighing and balancing a series of factors [that] include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.

Claus-Dieter Ehlermann, a German, a veteran senior official of the European Commission, and a leading proponent of PA in trade law,⁸⁴ chaired the AB college that decided this case, and likely wrote the decision.

5 All Things in Proportion

Over the past half-century, most of the world’s most powerful high courts adopted PA to deal with the most politically salient, and potentially controversial, issues to which they could expect to be exposed. The same is true of the courts of the EC/EU, the ECHR, and the WTO. Judges have embraced proportionality for similar reasons. Given the constitutional texts they have been asked to interpret and enforce, PA made it easy for them to prioritize the values that the polity itself has chosen to prioritize, even in the difficult situations in which these values would come into tension or conflict. Proportionality review is inescapably an exercise in applied constitutional lawmaking. But it also fits the mission of modern trustee courts, who govern political rulers by regulating the exercise of state authority in light of higher law norms that are assumed to be both constitutive and permanent. In each of the cases examined, courts first moved toward proportionality tentatively, before embracing it as an overarching principle of the legality. Today, judges around the world claim that PA is essential to the performance of their duties, a position the rest of us might consider more seriously. In our view, proportionality is today a foundational element of global constitutionalism.

We have also found that PA constitutes an important *doctrinal* underpinning for the expansion of judicial authority globally. This finding rests on certain necessary conditions, the most important of which is the prior turn to the New Constitutionalism. In Germany, Central Europe, and South Africa, the move to rights and PA was linked to democratization, given recent authoritarian pasts. In Canada, rights adjudication under the Bill of Rights (1960), a text possessing no supra-legislative rank, was infirm, stillborn. Under the Charter (1982), which has constitutional rank, the Canadian Supreme Court not only adopted PA but, through experience, rights have become a kind of civic religion in Canada, constraining in practice Parliament’s use

⁸⁴ Mr. Ehlermann sat on the AB from 1995 to 2001, finishing as its chairman. Previously he had served the European Commission as Director-General of the Legal Service (1977–1987), and Director-General for Competition (1990–1995).

of its powers to override the Court's decisions. New Zealand maintained legislative sovereignty and modeled its Bill of Rights Act on the Canadian. Yet its courts, citing the Canadian Court's Charter jurisprudence as authority, embraced PA, thereby neutralizing *Wednesbury*-based deference. The move raises the question whether parliamentary sovereignty, traditionally conceived in Commonwealth countries, will survive anywhere.

More broadly, in every system examined, we found that a court's turn toward PA generated processes that served to enhance, radically, that court's role in both law-making and constitutional development. To the extent that it is robust and on-going, PA inevitably becomes a primary mechanism of a polity's judicialization, and it triggers secondary mechanisms. Where the move to PA is successful, a court induces all other relevant actors in the system—future litigants and their lawyers, governmental officials, legal scholars—to think of their roles in terms of proportionality. In the cases examined, that is exactly what has occurred. To be a skilled social actor in the constitutional politics of Germany, Canada, Israel, the EU, the ECHR, or the WTO means learning to reason and deploy the language of PA. For proof, consult lawyers' briefs to the proportionality judge, read the law professor's commentary on the court's rulings, or track the increasing extent to which non-judicial officials apply the principles of proportionality—and of the court's case law—to their own lawmaking. As a mode of judicial governance, PA casts a deep shadow on the lawmaking of non-judicial actors, while providing judges with a flexible means of managing sensitive legal questions in potentially explosive political environments.

We noted that the process through which proportionality has spread exhibits a viral quality. The theory presented in Section 2 helps us to understand part of what is going on, but only in the abstract. The case studies supplement this understanding, and allow us to make at least the following points, each of which deserves more attention.

First, the emergence and early consolidation of PA depended heavily on the influence of legal scholars on judging, in Germany, and then on the influence of Germany on European law. Second, specific identifiable agents (judges and law professors-turned-judges) were instrumental in bringing PA to the EC, the ECHR, and the WTO. In principle, one could map the network of individuals, and the connections between institutions, that facilitated the spread of PA. Again, one would find pervasive German influence. Third, in Europe, the EC/EU and the ECHR developed features of hierarchy that made possible what Powell and Dimaggio (Dimaggio and Powell 1991, 63) call a process of "coercive isomorphism": the diffusion of institutional forms and practices through legal obligation backed up by monitoring and enforcement mechanisms. The Luxembourg and Strasbourg courts commanded other national courts to deploy PA, and announced that they would supervise how national judges actually do so. Fourth, as more and more courts adopted PA, the dynamics of diffusion became subject to logics of mimesis and increasing-returns (band-wagon effects): courts began copying what they took to be the emerging best-practice standard, thus ensuring the result. This process, one of choice not duty, can also be expressed in terms of what Powell and Dimaggio call "normative isomorphism" (*ibid.*) which explains the diffusion of forms through the building of

normative consensus among an elite group, whose claim to authority and influence is knowledge-based. Judges and law professors are such a group, and those committed to PA are relatively coherent and self-regarding.

Although one finds support for the basic claims made in Section 2, it is also clear that the kind of simple theory we have offered is neither meant or equipped to deal with much of the variance in how different courts actually use PA, on the ground as it were. The diffusion of PA adds layers of complexity to any truly comparative analysis, and some of this complexity will always escape attempts to build more general theory. Thus, though we find important similarities across cases, at least at some moderately high level of abstraction, we also confront important differences in how judges use PA, across time and jurisdiction. Most important, even a cursory survey of practice will show that, in every system, judges shape PA to their own purposes, with use, and how they do so may change over time.

One source of change will be exogenous: new issues and changing circumstances will lead judges to use PA differently. In this mode of adjudication, it is context, not the law per se, that varies. Change may also occur endogenously. A court, in processing a stream of cases in the same policy domain, may choose to accord more deference to legislative choices, over time, to the extent that lawmakers demonstrate that they are taking seriously proportionality requirements when they legislate. This latter dynamic, found wherever proportionality review is minimally effective, constitutes a mechanism of institutionalization (positive feedback). On the other hand, a court is likely to be stricter on necessity when PA is less entrenched as a general mode of policymaking, not least, because the Court may see the need to “teach” the basics of PA to lawmakers. Further, a point that has generated a great deal of controversy in some jurisdictions (notably Canada and the ECHR), courts may expand and contract the discretion they grant to lawmakers, at the suitability or necessity stage, when it is not confident that it has anything to teach them. This flexibility, which we count as a virtue rather than a vice of PA, is never immune from attack by those who believe that a more determinate, more principled, approach to rights adjudication is possible, or that PA is just a fancy way to package judicial policy making.

Variance in how courts conceive the nature and purpose of each stage of PA may also be meaningful. In Canada and the EC/EU, most laws that fail proportionality testing do so at the necessity phase, and judges rarely move to the “balancing in the strict sense” stage—although there is evidence that this reticence might be changing. Judges may be acting on the view that post-LRM balancing exposes them too much as balancers, that is, as lawmakers. Like their counterparts on the AB of the WTO and on the Strasbourg Court, Canadian judges often engage in (what the German and Israeli Courts would consider to be) *de facto* “balancing in the strict sense,” as part of suitability or necessity analysis. The American Supreme Court may be doing the same when it examines a rights claim in light of the government’s “compelling interest,” in strict scrutiny analysis. In contrast, the German and Israeli Courts move more systematically to the final, balancing stage, especially when it comes to the most politically controversial issues. Compared with the Canadian Court, the German Court seems to calculate the legitimacy costs of doing so differently (see Grimm 2007, 393–95). It uses the first two stages to pay its respects, first, to the

importance of the policy consideration generally and, second, to the legislator's own deliberations on the proportionality of the law. If and how such differences actually matter to outcomes (right protection, policymaking, the relationship between judges and legislators) remains a mystery, but is worthy of exploration.

Last, although PA today dominates other approaches to rights adjudication today, courts could have chosen to proceed otherwise. Judges could have developed and maintained strong deference doctrines, assuring that "judicial" authority to supervise "political" authority—when it comes to balancing situations—would be exercised only at the margins or not at all. But that is not what they have done. Traditional reasonableness postures remain defensible (Waldron 2004), but not from the standpoint of contemporary, rights-oriented constitutionalism.

References

- Aleinikoff, T.A. 1987. Constitutional Law in the Age of Balancing. *Yale Law Journal* 5: 943–1005.
- Alexy, R. 2002. *A Theory of Constitutional Rights*. Trans. J. Rivers. Oxford: Oxford University Press.
- Alexy, R. 2003. Constitutional Rights, Balancing and Rationality. *Ratio Juris* 2: 131–40.
- Alkema, E.A. 2000. The European Convention as a Constitution and its Court as a Constitutional Court. In *Protecting Human Rights: The European Perspective 41*. Ed. P. Mahoney, F. Matscher, H. Petzold, and L. Wildhaber, 41–63. Cologne: Carl Heymanns.
- Barak, A. 2006. Human Rights in Israel. *Israel Law Review* 2: 12–34.
- Beatty, D.M. 2004. *The Ultimate Rule of Law*. Oxford: Oxford University Press.
- Botha, H. 2003. Rights, Limitations, and the (Im)possibility of Self-Government. In *Rights and Democracy in a Transformative Constitution*. Ed. H. Botha, A. Van der Walt, and J. Van der Walt, 13–31. Stellenbosch: Sun.
- Cass, D. 2005. *The Constitutionalization of the World Trade Organization*. Oxford: Oxford University Press.
- Cleveland, S. 2002. Human Rights Sanctions and International Trade: A Theory of Compatibility. *Journal of International Economic Law* 5: 133–89.
- Collier, J.F. 1973. *Law and Social Change in Zinacantan*. Stanford, Calif.: Stanford University Press.
- Dimaggio, P., and W. Powell. 1991. The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields. In *The New Institutionalism in Organizational Analysis*. Ed. P. Dimaggio and W. Powell, 63–82. Chicago, Ill.: University of Chicago Press.
- Ellickson, R.C. 1991. *Order Without Law: How Neighbors Settle Disputes*. Cambridge, Mass.: Harvard University Press.
- Flauss, J.-F. 1999. La Cour Européenne des droits de l'homme est-elle une cour constitutionnelle? *Revue française de droit constitutionnel* 36: 711–28.
- Gardbaum, S. 2007. Limiting Constitutional Rights. *UCLA Law Review* 4: 789–854.
- Grimm, D. 2007. Proportionality in Canadian and German Constitutional Jurisprudence. *University of Toronto Law Journal* 2: 383–97.
- Günther, F. 2004. *Denken vom Staat her: die bundesdeutsche Staatsrechtslehre zwischen Dezision und Integration, 1949–1970*. Munich: Oldenbourg.
- Habermas, J. 1996. *Between Facts and Norms*. Trans. W. Rehg. Cambridge, Mass.: MIT Press.
- Hart, H.L.A. 1994. *The Concept of Law*. 2nd ed. Oxford: Clarendon.
- Heinsohn, S. 1997. *Der öffentlichrechtliche Grundsatz der Verhältnismässigkeit*. Dissertation: Munich.
- Hiebert, J.L. 2004. New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights? *Texas Law Review* 7: 1963–1988.

- Hiebert, J.L. 2006. Parliamentary Bills of Rights: An Alternative Model? *Modern Law Review* 1: 7–28.
- Hiebert, J.L. 2009. *Legislating Under the Influence of Charter Norms*. Forthcoming.
- Hirschberg, L. 1981. *Der Grundsatz der Verhältnismässigkeit*. Göttingen: Schwartz.
- Howse, R., and E. Tuerk. 2006. The WTO Impact on Internal Regulations: A Case Study of the Canada-EC Asbestos Dispute. In *Trade and Human Health and Safety*. Ed. G. Bermann and P. Mavroidis, 77–117. Cambridge, N.Y.: Cambridge University Press.
- Huber, E.R., ed. 1992. *Dokumente zur deutschen Verfassungsgeschichte 1918–1933*, vol. 4. Stuttgart: Kohlhammer.
- Hudec, R.E. 1992. The Judicialization of GATT Dispute Settlement. In *Whose Interest? Due Process and Transparency in International Trade*. Ed. M.H. Hart and D. Steger, 9–43. Ottawa: Centre for Trade Policy and Law.
- Iles, K. 2007. A Fresh Look at Limitations: Unpacking Section 36. *South Africa Journal on Human Rights* 1: 68–92.
- Kelsen, H. 1928. La Garantie Juridictionnelle de la Constitution. *Revue du droit public* 44: 197–257.
- Kelsen, H. 1992. *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law*. Trans. B. Litschewski Paulson and S.L. Paulson. Oxford: Clarendon. (1st ed. 1934.)
- Kommers, D. 1994. The Federal Constitutional Court in the German Political System. *Comparative Political Studies* 4: 470–91.
- Kumm, M. 2004. Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice. *International Journal of Constitutional Law* 2: 574–96.
- Landfried, C. 1984. *Bundesverfassungsgericht and Gesetzgeber*. Baden-Baden: Nomos.
- Landfried, C. 1992. Judicial Policymaking in Germany: The Federal Constitutional Court. *West European Politics* 15: 50–67.
- Lerche, P. 1961. *Überrass und Verfassungsrecht: Zur Bindung des Gesetzgebers an die Grundsätze der Verhältnismässigkeit und der Erforderlichkeit*. Cologne: Heymanns.
- Long, O. 1985. *Law and its Limitations in the GATT Multilateral Trade System*. Dordrecht: Kluwer.
- MacCormick, N. 1978. *Legal Reasoning and Legal Theory*. Oxford: Clarendon.
- Majone, G. 2001. Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance. *European Union Politics* 1: 103–22.
- Nolte, G., ed. 2005. *European and U.S. Constitutionalism*. Cambridge, MA: Cambridge University Press.
- Omi. 1997. Leading Decisions of the Supreme Court of Israel and Extracts from the Judgment. *Israel Law Review* 31: 754–803.
- Pescatore, P. 1970. Fundamental Rights and Freedoms in the System of the European Communities. *American Journal of Comparative Law* 18: 343–51.
- Petersmann, E.-U. 2000. The WTO Constitution and Human Rights. *Journal of International Economic Law* 3: 19–25.
- Ramangkura, V. 2003. Thai Shrimp, Sea Turtles, Mangrove Forests and the WTO: Innovative Environmental Protection Under the International Trade Regime. *Georgetown International Environmental Law Review* 15: 677–708.
- Rivers, J. 2006. Proportionality and Variable Intensity of Review. *Cambridge Law Journal* 1: 174–207.
- Sachs, A.L. 2003. The Challenges of Post-Apartheid South Africa. *Green Bag* 7: 63–78.
- Sadurski, W. 2005. *Rights Before Courts: A Study of Constitutional Courts in the Post-Communist States of Central and Eastern Europe*. Dordrecht: Springer.
- Sartor, G. 1994. A Formal Model of Legal Argumentation. *Ratio Juris* 2: 177–211.
- Schwarze, J. 2005. The Role of General Principles of Administrative Law in the Process of Europeanization of National Law. In *Studies On European Public Law*. Ed. L. Ortega, 25–50. Valladolid: Lex Nova.
- Shapiro, M. 1986. *Courts: A Comparative and Political Analysis*. Cambridge: Cambridge University Press.

- Shapiro, M., and A. Stone Sweet. 2002. *On Law, Politics, and Judicialization*. Oxford: Oxford University Press.
- Stein, E. 1981. Lawyers, Judges, and the Making of a Transnational Constitution. *American Journal of International Law* 1: 33–50.
- Stern, K. 1993. Zur Entstehung und Ableitung des Übermaßverbots. In *Wege und Verfahren des Verfassungslebens: Festschrift für Peter Lerche zum 65. Geburtstag*. Ed. P. Badura and R. Scholz, 165–75. Munich: Beck.
- Stolleis, M. 1998. *The Law Under the Swastika*. Chicago Ill.: University of Chicago Press.
- Stolleis, M. 2001. *Public Law in Germany, 1800–1914*. New York, N.Y.: Berghahn.
- Stolleis, M. 2003. Judicial Review, Administrative Review, and Constitutional Review in the Weimar Republic. *Ratio Juris* 2: 266–80.
- Stone Sweet, A. 1997. The New GATT: Dispute Resolution and the Judicialization of the Trade Regime. In *Law Above Nations: Supranational Courts and the Legalization of Politics*. Ed. M. Volcansek, 118–41. Gainesville, Fla.: University Press of Florida.
- Stone Sweet, A. 1999. Judicialization and the Construction of Governance. *Comparative Political Studies* 2: 147–84.
- Stone Sweet, A. 2000. *Governing with Judges: Constitutional Politics in Europe*. Oxford: Oxford University Press.
- Stone Sweet, A. 2002a. Constitutional Courts and Parliamentary Democracy. *West European Politics* 1: 77–100.
- Stone Sweet, A. 2002b. Path Dependence, Precedent, and Judicial Power. In *On Law, Politics, and Judicialization*, Ed. M. Shapiro and A. Stone Sweet, 112–36. Oxford: Oxford University Press.
- Stone Sweet, A. 2004. *The Judicial Construction of Europe*. Oxford: Oxford University Press.
- Stone Sweet, A. 2008. Constitutionalism, Rights, and Judicial Power. In *Comparative Politics*. Ed. D. Caramani, 217–39. Oxford: Oxford University Press.
- Stone Sweet, A., and H. Keller. 2008a. Introduction: The Reception of the ECHR in National Legal Orders. In *A Europe of Rights: The Impact of the ECHR on National Legal Systems*. Ed. A. Stone Sweet and H. Keller, 3–30. Oxford: Oxford University Press.
- Stone Sweet, A., and H. Keller. 2008b. Assessing the Impact of the ECHR on National Legal Systems. In *A Europe of Rights: The Impact of the ECHR on National Legal Systems*. Ed. A. Stone Sweet and H. Keller, 677–710. Oxford: Oxford University Press.
- Trachtman, J. 2006. The Constitutions of the WTO. *European Journal of International Law* 3: 623–46.
- Waldron, J. 2004. Some Models of Dialogues Between Judges and Legislators. *Supreme Court Law Review* 7: 17–21.
- Walker, N. 2001. The EU and the WTO: Constitutionalism in a New Key. In *The EU and the WTO: Legal and Constitutional Issues*. Ed. G. De Búrca and J. Scoot, 31–57. Oxford: Hart.
- Weiler, J.H.H. 1999. *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration*. Cambridge, Mass.: Cambridge University Press.
- White, I. 2007. Convicted Prisoners and the Franchise. *UK Parliament, Constitution Centre, Standard Note SN/PC/1764, Jan. 24, 2007*. <http://www.parliament.uk/commons/lib/research/notes/snpc-01764.pdf>.
- Wildhaber, L. 2000. A Constitutional Future for the European Court of Human Rights? *Human Rights Law Journal* 23: 161–65.
- Würtenberger, T. 1999. Der Schutz vom Eigentum und Freiheit im ausgehenden 18. Jahrhundert. In *Zur Ideen- und Rezeptionsgeschichte des Preussischen Allgemeinen Landrechts*. Ed. W. Gose and T. Würtenberger. Stuttgart: Fromman.
- Zamir, I. 1994. Israeli Administrative Law Compared to German Administrative Law. *Mishpat U'Mimshal* 2: 109–47.

Constitutional Adjudication and the Principle of Reasonableness

Andrea Morrone

1 Introduction

There is a very close relationship between the Italian Constitutional Court and the principle of reasonableness.¹ The principle of reasonableness expresses the specific character of constitutional adjudication.² All types of review carried out by the Constitutional Court (i.e., the review of statute law and the resolution of disputes between branches of government and between regional and central bodies) imply a review of reasonableness. Reasonableness, when applied to disputes between states, regions, and local governments, translates into the well-known caselaw on *interests*,³ and when it is applied to disputes between branches of government, it translates into the principle of *loyal cooperation*.⁴ Moreover, reasonableness is also invoked in judgments on the admissibility of abrogative referendums, which is the least concrete of all types of review. Reasonableness is applied to such referendums through the well-known criterion of homogeneity of the referendum request, as well as through that of proportionality⁵ and that of balancing of constitutional interests.⁶

Limiting analysis to judicial review of statute law, reasonableness is normally applied to three types of judgments aimed at evaluating the law's compliance with the Constitution: reasonableness as equality, reasonableness as rationality, and reasonableness as applied to the balancing of interests. These three merely descriptive

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¹ This paper is an update of a wider study carried out in Morrone (2001a).

² For a comparative analysis see Cerri (1994).

³ Constitutional Court, Decisions 177/1988 and 303/2003.

⁴ Constitutional Court, Decisions 379/1992 and 31/2006.

⁵ Constitutional Court, Decisions 30/1997; 35, 36, and 37 of 2000; and 41, 42, 43, and 44 of 2003.

⁶ Constitutional Court, Decisions 26/1981; 35/1997; 18/1997; 42/2000; and 45, 46, 47, 48, and 49 of 2005.

models will be used heuristically in this paper, so as to make it possible to fully understand the meaning of the principle of reasonableness.⁷

2 Reasonableness as Reasonable Equality

2.1 *Judicial Review Based on the Principle of Equality*

It is empirically evident that the most common application of the principle of reasonableness is judicial review based on the formal principle of equality, as set forth in Article 3(1) of the Italian Constitution. However, not all judgments on equality necessarily coincide with reasonableness understood as reasonable equality.

It is common knowledge that equality presupposes a relationship. This is because it implies a comparison between at least two elements so as to establish a relationship. Simplifying to the extreme, there are only three possibilities from a logical standpoint: *identity*, *similarity*, and *difference*. One will have *identity* when there is a situation of absolute equality between all parties involved ($A=A$, $B=B$, etc.). One will have *similarity* when equality is limited to certain elements. Finally, one will have *difference* when there is a total lack of equality or similarity between the two parties, i.e., they have nothing in common ($A\neq B$, $B\neq C$, etc.).

Equality from a legal standpoint refers to *identity* and *similarity*. However, due to the fact that absolute equality does not exist (at least not in the natural world) it would not make sense for a legal system to provide for it. Therefore, in legal terms, one has equality when there is substantial coincidence between the elements being compared. This leads one to a “relative” notion of both equality and inequality. Equality is defined as similarity to something else, and inequality as difference from something else. This notion of equality has an effect on judgment. In fact, the decision is greatly influenced by the relevance attributed to the constitutive characteristics of the two elements being compared. If there is substantial coincidence, then the two elements will be treated as equal. If there is substantial difference, then the two elements will be distinguished.

2.2 *Reasonable Equality*

It is easy to understand why “reasonableness” is rooted in a judgment concerned with equality. In fact, “one is equal to someone or something *because of some other thing* (i.e., the element that makes the two terms equal),” thus making the identification and the evaluation of this element decisive.

The Italian Constitutional Court has used this sort of legal reasoning from the outset. The court has never limited its review to the mere scrutiny of the constitutive

⁷ For a more comprehensive approach, see Scaccia (2000), D’Andrea (2005), and Morrone (2001a).

characteristics of the two elements so as to verify the correspondence between the factual situation and the rules laid down by the lawmaker (i.e., a judgment about equality *stricto sensu*). On the contrary, it analyses the decision-making process, and in particular the discretionary choices made by the lawmaker. It does this in order to evaluate whether the choice so made by the lawmaker in treating the two situations equally or differently is reasonable or not.

In one of its decisions, the court clearly states that “the principle of equality is infringed as well when the law, without reason, treats citizens in the same situation differently.”⁸

Usually, judicial review has a binary structure, that is, it involves a comparison between the statute under scrutiny and a constitutional parameter. The reasonable-equality test has, by contrast, a triadic structure. The triad is composed of (i) the provision under scrutiny; (ii) a *tertium comparationis*, i.e., the provision used as a term of comparison; and (iii) the principle of equality, i.e., the constitutional parameter. Even so, the “triad” is just a *fictio iuris*, i.e., a legal fiction, a scheme that, in itself, does not allow any decision to be delivered in terms of equal or differential treatment. In order to apply the reasonable-equality test and to justify the lawmaker’s abstract classification, a judgment on the “relevant point of view” adopted by the lawmaker is required. A few common elements are not sufficient to justify equal treatment under the law. Equal treatment needs to be based on the ground of an adequate element. The “relevant point of view” is a hypostasis, just as the relation between the two terms is a hypostatic abstraction. The two situations are not the same, but through the “relevant point of view” they are treated as if they were.

In Decision 1009/1988, the Constitutional Court clearly stated the following: “The principle of equality contained in Article 3 of the Constitution is infringed not only when identical factual situations are differently treated from a legal standpoint, but also when the different treatment is irrational and in contrast to the rules of practical discourse, because the two factual situations are different, but reasonably similar.”

2.3 Case (a): Putting What Is Equal on a Par: The Tertium Comparationis and the Extension of a General Rule

The reasonable-equality test is used in particular in cases of arbitrary differentiation of equal situations. In Decision 10/1980, the Italian Constitutional Court outlined the essential components of this test: “Constitutional review of the law based on the principle of equality is carried out in various areas of the legal system and follows different models, but it always requires a comparison. The provision under review must be compared with another provision (taking into account even defective provisions or *lacunae legis*) in order to decide whether the rules adopted by the lawmaker are so unreasonable as to be declared unconstitutional.”

⁸ Constitutional Court, Decision 15/1960.

The reasonable-equality test as outlined in the above-mentioned case was taken as a model by the leading Italian scholar Livio Paladin (1965, 169ff.; 1984). The test is essentially aimed at comparing situations regulated by a special provision with those regulated by a general rule, in order to determine the reasonableness of the *ratio derogandi*. It should be noted that referring to general rules does not mean completely excluding special provisions but rather means identifying a general rule considering the legal context of its application. As a consequence, “to affirm that the principle of equality is respected in its logical terms makes it necessary to conduct the comparison in such a way as to put on a par the discriminatory provision with the rule to be applied.”⁹

An analysis of the Italian Constitutional Court’s caselaw brings to light the steps involved in the test and the different types of cases in which a general rule has been extended because the rule had been unreasonably made subject to derogation: in order to evaluate whether or not treatment is equal on the basis of a “relevant point of view,” it is important to verify (i) the existence of a pertinent *tertium comparationis* and (ii) the suitability of the rule that will be taken as a term of comparison between the two elements.¹⁰

The *tertium comparationis* will generally be specified by the judge *a quo*, but it can also be specified through the Constitutional Court’s interpretation, which can correct, integrate, or even replace the judge’s *a quo* reference.¹¹ The *tertium comparationis* must be a rule (i.e., a provision that is part of the legal system and has legal effects, or else a “normative situation,” meaning a situation that only excludes such facts as are totally independent of any legal provision).¹² Moreover, the *tertium comparationis* must be unambiguous, with regard to both its abstract meaning and its concrete application. Otherwise, the decision that follows would be ambiguous.¹³ Finally, the *tertium comparationis* must be a law in force; in other words, the court cannot use repealed provisions or, more in general, provisions referring to normative contexts that have different *ratione temporis*.¹⁴

The *tertium comparationis* is extended when the differential legal treatment is not sufficiently justified. Despite the heterogeneity of the caselaw, the “relevant point of view” appears to be crucial for the court’s final ruling.¹⁵ For example, the Constitutional Court declared a Lombardy Region law unconstitutional because it provided free transport for people with total disability, but on the condition that they

⁹ Constitutional Court, Decisions 220/1982, 46/1983, 237/1984, and 282/1987.

¹⁰ Constitutional Court, Decisions 217/1996, 79/1992, and 217/1997.

¹¹ The Constitutional Court’s caselaw also presents significant variations. Compare, for example, Decisions 212 /1985 and 214/1996.

¹² Constitutional Court, Decisions 139/1984, 167/1984, 216/1997, and 403/1991. On the irrelevance of *de facto* disparity, see Constitutional Court, Decision 417/1996.

¹³ Constitutional Court, Decisions 453/1992 and 119/1997.

¹⁴ Constitutional Court, Decisions 353/1994 and 259/2002 and Ordinance 46/1996. There are several exceptions: for example, Constitutional Court, Decisions 37/1977, 178/1987, and 185/1995.

¹⁵ Constitutional Court, Decisions 81/2006, 433/2005, 438/2005, 444/2005, and 493/2002. Other cases uphold, by contrast, a differential treatment under the law because it is found to be reasonable: see Constitutional Court, Decisions 442/2005, 82/2003, 89/2003, 334/2002, and 71/2003.

resided in Italy *and* were Italian citizens. The judges found the provision unconstitutional because they considered the law's purpose (i.e., "solidarity") a "relevant point of view": they did not, by contrast, take Italian citizenship into account.¹⁶ In particular, the court did not recognize Lombardy Region's argument that citizenship, like residence, can be a precondition on which basis to provide a public service. In fact, the court continued, residence "appears a reasonable criterion for granting the benefit of the service" in relation to a public service provided by the region. "Citizenship, by contrast, represents a further condition, one that is incoherent with a hypothetical special status constituting a social measure in favour of people with 100% disability." It is thus "arbitrary to differentiate the application of the provision under discussion by distinguishing Italian citizens from aliens—EU nationals or non-EU nationals—or from stateless people. In fact, there is no reasonable correlation between the positive condition for entitlement to the beneficial treatment (citizenship) and the other specific requirements (residence and 100% disability) that define the law's *ratio* and function."

2.4 Case (b): Differentiating What Is Different

The reasonable-equality test does not only have the function of putting on a par what had been unreasonably differentiated. It is used in the first place in cases where "situations that are different are arbitrarily equally treated." What is unreasonable in such circumstances, and hence unconstitutional, is not the different treatment of like situations but rather an equal treatment of situations that should, from a constitutional point of view, be differently treated. The leading case here is Decision 21/1961, which repealed the rule of *solve et repete*. This is the rule on which basis a claim against an allegedly unjust fiscal investigation can be filed only after payment of what is due. The Court found the law unconstitutional because the lawmaker unreasonably treats equally different types of taxpayers: richer taxpayers, who can pay first (*solvere*) and then file a claim (*repetere*), are treated under the law in the same way as poorer taxpayers, who can find themselves in financial difficulties upon paying what is due and could therefore find it impossible to seek justice. A similar example is that of career mobility, and in particular of access to lead positions in the fire-fighting service.¹⁷ The law required a minimum height for all candidates, men and women alike, as a condition to cover the lead position. This law was found to be unreasonable because it was based on an incorrect empirical assumption that the average height of men and women is the same. The court thus struck down the law because, in establishing conditions for taking part in the selection process, it did not differentiate between men and women with regard to minimum height.¹⁸

¹⁶ Constitutional Court, Decision 432/2005.

¹⁷ Constitutional Court, Decision 163/1993.

¹⁸ See also Constitutional Court, Decision 104 /2003.

2.5 Case (c): Extension of a Derogating Provision

Second, reasonable equality is used in cases that can be defined as an “extension of a special or derogating provision.” This is a variation on the main model, the model on which the principle of equality is a means for reviewing statutory classifications. As a result, the model should only be used to bring a certain situation under a general rule when the law has, without any justified reason, regulated the situation in a derogative way. In other words, even when the principle of equality is inflected as a principle of reasonableness, it is used to make sure that similar situations are regulated in the same way, i.e., under the terms of a general law.

The case dealt with in this section is the exact opposite: we have here not a general provision that broadens its scope as a consequence of a derogating rule being declared unconstitutional but, conversely, a derogating rule that broadens its scope as a consequence of a general rule being declared unconstitutional. In other words, the derogating rule is applied to all those situations that had unreasonably come under the general rule. It should be underscored that the reasonableness test applied to a derogating or special provision is not aimed at extending the *ius singulare* to all the cases in life that come under the scope of the general rule (such an extension has been excluded by the Constitutional Court).¹⁹ The reasonableness test is aimed, on the contrary, at determining whether the special rule’s *ratio derogandi* is such as to extend the rule’s own application to other situations. The most emblematic example of this reasoning is the caselaw on the minimum pension.²⁰ The Constitutional Court has progressively extended the derogating rule to the general pension law so as to apply the rule to situations that the lawmaker had previously excluded. As a result, on the basis of the principle of reasonableness, the court has turned an exception into a general rule.

2.6 Case (d): The Unreasonable Tertium Comparationis

The reasoning described in the last section tends to overcome the traditional model based on comparing different rules. It also tends to overlap with the “material” review of the law, as happens when special provisions can be applied to individuals originally excluded. Constitutional caselaw, however, also has a more “extreme” case, which is when the constitutionality of the term of comparison is questioned. This is defined as the “unreasonable *tertium comparationis*.” The review thus aims at eliminating the unjustified privilege granted by a law used as a term of comparison in a judgment on an unreasonably discriminatory rule.²¹ As a result, the *tertium*

¹⁹ Constitutional Court, Decision 298/1994; see also Decisions 162/1981, 2/1982, 35/1986, 132/1986, 508/1988, 8/1996, and 344/1999.

²⁰ Constitutional Court, Decisions 230/1974, 263/1976, 34/1981, 102/1982, 503/1988, and 104/1996.

²¹ Constitutional Court, Decisions 421/1995, 219/1995, and 62/1994 and Ordinance 294/1993; Constitutional Court, Decision 289/1994 and Ordinance 136/1982; Constitutional Court, Decision

comparationis is repealed and the application of the law originally questioned by the judge *a quo* is extended. It is therefore evident that the principle of equality is not used in this case to put different situations on a par (given that the law is general) but that, on the contrary, it tends to level down protection.

Without including the case of intrinsic lack of reasonableness of the law that is scrutinised without using a *tertium comparationis* (Section 3 below), the unreasonable *tertium comparationis* test works in a very different way with respect to the traditional model of judicial review. Conventionally, the reasonableness test can only be a judgment on equality carried out on the basis of a triadic scheme that brings into comparison a general provision, a derogating rule, and a *tertium comparationis* (which has to be a legal provision, and necessarily a general one). Otherwise, the judgment cannot be considered judicial review. In other words, if the reasonableness test is not based on a triadic scheme as per Article 3(1) of the Italian Constitution, it becomes a test by which to judge whether a law is fair, which is somewhat problematic.²²

This analysis shows evident limits in light of the developments in the Constitutional Court's caselaw. In fact, reasonableness has taken on the traits of a constitutional principle and also of an autonomous parameter for judicial review. Reasonableness as applied in the conventional judgment on equality only involves one aspect of the content of Article 3 of the Italian Constitution, i.e., equality of relationships or legal classifications in the context of the legal system. The reasonable-equality test, by contrast, also involves equality *in* relationships, an equality related more to the *individual situations* underlying each law than to the law itself. Similarly to the principle of substantive equality (Article 3(2) of the Italian Constitution), equality *in* relationships implies not only equal treatment but also the promotion of equality through reasonable legal discrimination. In a nutshell, reasonableness is a correction of equality and is aimed not only at equal freedom but also at equal rights.²³

3 Reasonableness as Rationality

3.1 Reasonableness and Coherence of the Legal System

Reasonableness and equality were empirically separated from each other when the Constitutional Court started declaring laws unconstitutional not by comparing them with other provisions, but simply by judging them as inherently unreasonable. The first official signal of this new course came with the annual report issued in 1987 by Saja, who was then serving as president of the Constitutional Court. In this report

128/1983 and Ordinance 95/1980; Constitutional Court, Decision 20/1982 and Ordinance 230/1975; Constitutional Court, Decision 179/1976 and Ordinance 100/1970; Constitutional Court, Decision 190/1970.

²² On which point, see Paladin (1965), who is influenced by Esposito (1954).

²³ Constitutional Court, Decision 50/2006.

Saja stated that “the court opted for an evaluation of the intrinsic unreasonableness of the law when comparison with other provisions is impossible. Decision 560/1987 found it unreasonable that the solidarity fund for victims of automobile accidents had not been adjusted to the cost of living.” This statement is an explicit recognition of what had already emerged *de facto* from the court’s caselaw.

Reasonableness, from this new perspective, seems to more clearly require “rationality” on the part of the lawmaker. More specifically, reasonableness overlaps with the general need for coherence in the legal system. Decision 204/1982 frames this concept as follows: the “essential value of a civilized country’s legal system” is founded on “the coherence obtaining among the system’s components. If this essential value is ignored, the legal system will be like a flock of sheep without a shepherd.”

It should be stressed here that, even in this case, there is no exact semantic correspondence between reasonableness and rationality. The legal system’s coherence, which is one of the possible variants of the principle of reasonableness, is neither the demonstration of a geometry theorem nor the outcome of deductive logical analysis. The legal system is dynamic and far from being a purely static and formal entity. Reasonableness as rationality, or coherence, has to do with the legal system as influenced by the experience of law, where written provisions form only a small part, albeit an important one, together with all the other legally relevant factors that come to light from context. The rationality/reasonableness test of law consists of three elements: *logical coherence*, *teleological coherence*, and *historical and chronological coherence*.

These three elements are different but have a *quid commune* (which is part of all reasonableness tests): the law is examined from the standpoint of the *ratio legis* in relation to the legal system (as a whole and with the relevant meaning) as well as from the standpoint of the context the law applies to. When the Constitutional Court uses the rationality test, it traces the provision’s origin back to the constitutional principles that are relevant to the context. Even though the rationality test is applied to a single provision, it does only involve a scrutiny of the provision itself but takes into consideration the legal system as a whole.

3.2 Rationality as Logical Coherence

At a minimum, the rationality test scrutinizes a law’s logical coherence. It should be underlined that mere nonconformities in a law’s wording, content, or structure are not enough to qualify a provision as illogical. In fact, these elements do not constitute a breach of the Constitution but are rather mere inconsistencies. A law is deemed, by contrast, illogical and constitutionally illegitimate when there is a contradiction either within the law itself or between the law and other parts of the legal system: in the former case, there is a contradiction between the provisions contained in the same law (*intra legem* illogicality); in the latter case, the conflict is between the law under review and the part or subpart of the legal system which the law refers to (*intra ius* illogicality).

Intra legem illogicality is inclusive of conflicts among a law's provisions, but also conflicts between the law and its own *ratio legis*.²⁴

Intra ius illogicality transcends the limits of the law under the court's consideration and gains a wider relevance. The law contrasts with the relevant part of the legal system, a part identified on the basis of the law's *ratio* or objective function, and with respect to which the law under review represents an inconsistent *quid*.²⁵ On other occasions, one has *intra ius* illogicality when the law under review is in contrast with the principles or the *rationes decidendi* contained in previous decisions handed down by the Constitutional Court and used as a parameter. The contradiction is not with a particular *dictum* of a previous decision²⁶ but with the legal reasoning that can be derived from one of the following: caselaw, the court's doctrine, or previous trends in the caselaw.²⁷

Referring to the language of logic to define *intra legem* and *intra ius* illogicality is a purely pragmatic choice. In fact, through the principle of reasonableness, conflicts between provisions translate, in both theoretical and practical terms, into mere incompatibilities between rules that "do not match or are not consistent with one another" (see Fuller 1964). In any case, the Constitutional Court is very cautious, especially in controversial cases. For example, the court may avoid declaring a law unconstitutional on the basis of its logical-systematic incoherence, that to provide the lawmaker with an opportunity to rationalize a legal framework that may have become incoherent by way of intervening new statutes or new caselaw.²⁸

3.3 Rationality as Teleological Coherence

Issues concerning teleological coherence regard cases of an unreasonable relation between the aims of the law and the means provided through which to achieve such aims. There are three tests that apply to these cases: coherence, adequacy, and proportionality, and there is also a suitability test.

The coherence test merely checks to see whether the law under scrutiny is compatible with its own aim.²⁹

²⁴ For an example of contradiction between provisions, see Constitutional Court, Decisions 25/1970 and 328/2002.

²⁵ See Constitutional Court, Decisions 98/1967, 344/1993, 520/2002, and 393/2006.

²⁶ More specifically, the contrast is with a *res iudicata*, i.e., with a previous decision the Constitutional Court has issued which is considered an *in terminis* precedent.

²⁷ Constitutional Court, Decision 61/1995. For examples of contradiction with previous decisions, see the caselaw on minimum pensions (Constitutional Court, Decisions 184, 1086, and 1145 of 1988; 81, 142, 179, 373, 488, 502, and 505 of 1989; 69, 70, 182, and 547 of 1990; 114, 164, 165, 257, and 438 of 1992; 495/1993; 15 and 376 of 1994; and 104/1996), and also the caselaw on how different criminal judges use incompatible types of criminal procedure (Constitutional Court, Decisions 496/1990; 401 and 502 of 1991; 124, 186, and 399 of 1992; 439/1993; 453 and 455 of 1994; 432 and 448 of 1995; 131, 155, 177, and 371 of 1996; 66/1997; 290/1998; and 241/1999).

²⁸ Constitutional Court, Decision 22/2007.

²⁹ Constitutional Court, Decisions 198/1986 and 361/1993.

When the court uses the adequacy test, it checks to see whether a law is adequate to its aim.³⁰

The proportionality test is made up of three criteria: (a) proportionality as progression of rules (especially with regard to inter-temporal laws³¹ or to laws concerning social rights, and social-security entitlements in particular)³²; (b) proportionality as a prohibition against legislative automatism, as with any law that causes unfavourable consequences because it is disproportionate with respect to a case it applies to, or because it fails to provide for adjustments at the implementation stage³³; and (c) proportionality as excess of power, meaning that a provision's prescriptive content is excessive with respect to its aim.³⁴

The above-mentioned proportionality tests have all the same goal: to moderate the strictness of the law when applied to cases in life. Not so in the case of the derivation of the *regula legis* from the *ratio legis*, also definable as *aberratio legis*: this is a totally different case, and it could in fact be ascribed to what in Italian administrative law is known as the class of *ultra vires* acts.³⁵

Finally, the court uses the suitability test to ascertain the rationality of provisions used to calculate, or measure, certain elements. This test is typically used to calculate compensation when private property is expropriated (by eminent domain) for reasons of public interest.³⁶ It is also used to calculate the deadlines established by law,³⁷ as well as for criminal provisions, especially ones establishing the *quantum* of a sentence.³⁸

3.4 Rationality as Historical and Chronological Coherence

When the Constitutional Court uses rationality in terms of historical and chronological coherence, it uses historical arguments to carry out judicial review. Historical arguments highlight what consequences derive from changes that have occurred over time, on both a strictly legal level and a factual level. Anachronism, heterogeneity of aims, evolution, and tradition are all typical instruments of judicial review based on the time factor.

Anachronism, in particular, applies when a legislative scheme loses its reason to exist because time has passed and the scheme no longer answers the needs (or rather, the aims) with respect to which the lawmaker was originally operating. For

³⁰ Constitutional Court, Decision 102/1991.

³¹ Constitutional Court, Decisions 43/1963, 209/1076, and 281/1984.

³² Constitutional Court, Decisions 54/1987, 94/1987, 244/1990, and 426/2006.

³³ Constitutional Court, Decisions 82/1966, 267/1998, 438/1995, 971/1988, 40/1990, 16/1991, 32/1991, and 2/1999.

³⁴ Constitutional Court, Decision 415/1996.

³⁵ Constitutional Court, Decision 142/1991.

³⁶ Constitutional Court, Decision 5/1980.

³⁷ Constitutional Court, Decisions 139/1967, 156/1988, and 15/1982.

³⁸ Constitutional Court, Decisions 67/1963, 323/1991, 341/1994, and 519/1995, 354/2002. See Manes (2005).

example, this test was used in the decision on the obligation to maintain in commercial use the old hotels that had survived World War II bombings.³⁹ This obligation had been established in the wake of the war to guarantee a minimum of hotel rooms for tourists visiting Italy, but the same obligation did not also apply to newer hotels. The court found the aim of the law “out of date” because “the need, surely a pressing one at the time of its introduction, has ceased to be owing to the present number of hotels available in Italy; the discrimination, introduced by the law, between old and newer hotels has lasted too long, and it oversteps the limit of a reasonable exercise of legislative discretion.”

The so-called “unreality,” or “outdatedness” test was also applied in a decision that declared unconstitutional a prohibition against issuing patents for pharmaceutical products.⁴⁰ The court found not only that the prohibition reflected “an outdated view of the function of patents,” but also that “the reasons for derogative treatment are obsolete, thus breaching the Constitution in relation to the criterion of correspondence with reality (correctly ascribed to the review of the law based on the principle of equality).” In fact, “there are a number of factors accompanying our increased awareness that all rational foundation was lacking for the derogative treatment [. . .]: the consolidation of the importance of technical and scientific research and of the Republic’s duty to promote such research; the increased ability of the Italian pharmaceutical industry to organize its research sectors and compete with those from other countries; and, closer relations with foreign markets.” There are many other examples of anachronism of the law, and they regard the most diverse subjects.⁴¹

Heterogeneity of aims occurs when the *ratio legis* changes over time (it is transformed or replaced with another *ratio legis*). In particular, the test is used to verify the enduring legitimacy of the law. In practice, it is used to uphold laws of dubious constitutional legitimacy. Therefore, it is applied to safeguard an existing law that—however much it may be inspired by aims or goals that are no longer not compatible with the contemporary context—is kept from being struck down thanks to an interpretation in keeping with the Constitution. The court thus sets new aims or functions for the law in order for the provision under review to be in keeping with the Constitution.⁴² It is evident that heterogeneity of aims is a mirror image of anachronism, and is particularly problematic when used uncritically and deferentially to review laws that are incoherent with constitutional principles.⁴³

Two different attitudes are expressed, on the one hand, by legal tradition (inclusive of practice, historical tradition, legislative tradition, comparative legal tradition, customs, “common sense,” etc.) and, on the other hand, by positive law: the former

³⁹ Constitutional Court, Decision 4/1981.

⁴⁰ Constitutional Court, Decision 20/1978.

⁴¹ Constitutional Court, Decisions 189/1987, 108/94, 254/2002, 318/2002, and 445/2002.

⁴² Constitutional Court, Decision 5/1962.

⁴³ Constitutional Court, Decisions 9/1965, 87/1966, and 925/1988.

is a typical example of conservatism on the part of the court, while the latter is one of the possible grounds of unconstitutionality based on anachronism.⁴⁴

The court's caselaw nonetheless shows that tradition is never used alone: the court rarely uses tradition without making reference to constitutional principles,⁴⁵ but there have been important and controversial exceptions to this rule.⁴⁶

4 Reasonableness Understood as the Reasonable Balancing of Constitutional Interests

4.1 Reasonableness and the Balancing of Interests

Controversies over the law's constitutional legitimacy are not just conflicts between provisions on different levels but are instead conflicts between situations with legal implications that have to be worked out and solved in light of constitutional principles. As can be appreciated in other countries too, this premise contributes to qualify constitutional justice as jurisdiction over fundamental rights and freedoms. This is so even in countries where individuals cannot, directly or semi-directly, lodge a complaint with a constitutional court.⁴⁷ When reasonableness is applied to conflicts between legal situations, it technically works itself out as a balancing of interests. In the court's own words, the reasonableness test is aimed at determining whether "the peculiar balance established by the lawmaker for the case under review is consistent with the hierarchy of values a law must reflect as this hierarchy can be gathered from the Constitution."⁴⁸

Four preliminary questions will be considered in describing the relationship between reasonableness and balancing: What are the legal situations, or rather the interests, relevant to the review? What are conflicts between interests? How can these conflicts be solved? And, finally, what are the techniques used to balance interests?

4.2 Constitutional Interests and Balancing

Answering the first question requires analysing the Constitutional Court's caselaw and the balancing of both codified and uncodified constitutional rights. Relevant examples are all the rights afforded protection under Article 2 of the Italian

⁴⁴ Constitutional Court, Decisions 128/1981, 763/1988, 335/2002, 429 and 430 of 1993, and 440/2000.

⁴⁵ Constitutional Court, Decision 287/1974.

⁴⁶ Constitutional Court, Decisions 125/1957 and 79/1958.

⁴⁷ Cappelletti (1955) suggested reforming the Italian system of constitutional adjudication by giving it the form of a human rights court, one bounded by the structural limits characterizing the system provided for by the constituent assembly.

⁴⁸ Constitutional Court, Decision 467/1991.

Constitution. Article 2 is a so-called “open clause” that has been used to protect the right to life,⁴⁹ sexual freedom,⁵⁰ a child’s right to have a family,⁵¹ the right of disabled persons to social assistance,⁵² the right to privacy,⁵³ the right to expatriate,⁵⁴ the right to personal identity,⁵⁵ the right to housing,⁵⁶ the right to social freedom,⁵⁷ the right to have a name,⁵⁸ and the rights deriving from the *status filiationis*.⁵⁹

The extension of the list of constitutional interests considered to be relevant in judicial review also takes place with regard to the rights and freedoms contained in international charters and declarations. The Constitutional Court seems to have overcome the disputes concerning the efficacy of international catalogues of rights. In fact, after Decision 10/1993, which set out the doctrine of the “passive reinforced efficacy” of laws ratifying international treaties, the court consolidated a material interpretation of charters of rights. In fact, the court considers these documents relevant in judicial review because of the importance of the principles they declare and not because of the formal legal efficacy they have received with domestic ratification laws (see Tega 2006). Decision 388/1999 clearly states that “human rights, such as are also declared in universal or regional conventions signed by Italy, are expressed and equally protected by the Constitution, not only because of a general recognition of the inviolable rights of persons, increasingly perceived as essential to the concept of human dignity contained in Article 2 of the Constitution, but also because, even if the catalogues of rights do not coincide, the different texts integrate and complete one another when interpreted.”⁶⁰ The combination of these interpretations widens the horizon of the reasonable balancing test. In other words, judicial review is not confined to safeguarding interests outlined in the Constitution but also includes rights and freedoms recognized by the EU and internationally at large.⁶¹

Moreover, decisions issued by ad hoc bodies established under international and supranational charters have taken on greater importance. In fact, where fundamental rights are the matter, the Constitutional Court increasingly refers to the caselaw of the European Court of Human Rights and to that of the European Court of Justice. Reference to these two courts’ caselaw is usually made so as to integrate the

⁴⁹ Constitutional Court, Decision 223/1996.

⁵⁰ Constitutional Court, Decision 561 /1987.

⁵¹ Constitutional Court, Decision 183/1988.

⁵² Constitutional Court, Decision 346/ 1989.

⁵³ Constitutional Court, Decision 139/1990.

⁵⁴ Constitutional Court, Decision 278/1992.

⁵⁵ Constitutional Court, Decision 13/1994.

⁵⁶ Constitutional Court, Decision 119/1999.

⁵⁷ Constitutional Court, Decision 50/1998.

⁵⁸ Constitutional Court, Decisions 13/1994, 297/1996, 120 and 243 of 2001, and 268/2002.

⁵⁹ Constitutional Court, Decision 494/2002.

⁶⁰ Constitutional Court, Decisions 62/1992, 168/1994, 15/1996, 109/1997, and 270/1999.

⁶¹ Constitutional Court, Decision 445/2002; see also Tega (2002).

constitutional parameter. As a result, the number of constitutionally protected interests has been extended.⁶²

Balancing constitutional interests has had an effect on a traditional instrument that defines the “political” sphere: citizenship. The constitutional caselaw on rights does not only concern citizens. As a matter of fact, many scholars have already underlined that citizenship is losing (if it has not already lost) its natural vocation as a means of inclusion in the political community of those entitled to rights. Constitutional caselaw has contributed to developing fundamental rights as a concept that goes beyond the limits of both the nation-state and its corollary, citizenship. Taking into account the increasing integration of citizens and aliens, the Constitutional Court has issued more and more decisions expressly recognizing that the principle of equality does not tolerate discrimination between the two with regard to inviolable human rights.⁶³ Political rights are excluded because the right to vote still bears a close connection to citizenship as defined in Article 48 of the Italian Constitution.

There are many cases reinforcing this trend. In a paradigmatic example, the Constitutional Court granted to an illegal immigrant the right to have access to all essential, urgent health services.⁶⁴ The right to health care is therefore defined as a fundamental right of the individual as this right is set forth in Article 2 of the Italian Constitution. In particular, the right to have access to medical treatment for the protection of health is “constitutionally conditional on the need to balance this right against the other constitutionally protected interests, with the exception of the core protection of health, which the Constitution protects as an inviolable aspect of human dignity. The defence of core protection is intended to prevent an increase in the number of unprotected situations liable to jeopardize the protection of that right.” The core protection of this right will therefore be granted to all aliens, without taking into account their status—legal or illegal—as regulated under Italian immigration law. Another example of balancing is Decision 376/2000, on the familial relationships of aliens. The decision extended the suspension of deportation orders for a husband living with a pregnant woman and for the six months after birth, this in light of “the principles of protection of the family unit, with specific regard to the wellbeing of children as related to the educational responsibility that parents share.”⁶⁵ The right and duty of parents to support, teach, and educate their children and the child’s right to have a family “are fundamental human rights that, in principle, are to be granted to aliens, too.” Protecting and assisting children “is, regardless of one’s legal status as citizen or alien, a parent’s fundamental right, and it can be limited only for specific and motivated reasons protective of the rules of democratic cohabitation itself.”

⁶² Decisions making reference to the ECHR caselaw see Constitutional Court, Decision 299/2005, 61/2006, 120/2004, 154/2004. Decisions making reference to the caselaw of the ECJ see Constitutional Court, Decision 393/2006.

⁶³ Constitutional Court, Decisions 62/1994 and 432/2005.

⁶⁴ Constitutional Court, Decision 252/2001.

⁶⁵ Constitutional Court, Decisions 376/2000 and 224/2005.

A similar trend can be observed with respect to the binding duties of solidarity. In Decision 172/1999, the Constitutional Court established an obligation of stateless people to serve in the army (Article 52 of the Italian Constitution) in connection with the duty to “defend the country,” something that the Constitution expressly qualifies as a “sacred duty of all citizens.” The decision distinguishes the legal status of third-country nationals from that of stateless people. In the former case, extending to aliens the duty to serve in the army would raise an issue of “opposing loyalties,” whereas a stateless person can, by contrast, be considered part “of a community of rights, and being part of it justifies their being bound to a duty functional to the defence of the community itself.” The Constitutional Court introduced, in particular, a very innovative concept. It specifically referred to a “community of rights and duties which is broader than that founded on citizenship, and which brings together everyone (people with dual citizenship, for example) who is recognized as having rights and corresponding duties, as provided for in Article 2 of the Italian Constitution.” The court therefore seems to emphasise that the prescriptive effect of fundamental rights goes well beyond the narrow borders of the *πὸ λιλζ*.

Interests are relevant when they concern individuals and social groups alike. Conflict between the interests of heterogeneous social groups, especially in more recent Constitutional Court decisions, often regards religious pluralism. Religious pluralism has gained a central role because of the need to equally protect all religious confessions, eliminating from the legal system those provisions, introduced under the previous constitutional order, that favoured the Catholic Church. The Constitutional Court accordingly declared unconstitutional the obligation for religious instruction to be included in school syllabuses.⁶⁶ And it also abolished a series of crimes punished by law regarding the Catholic religion, such as blasphemy, i.e., speaking sacrilegiously about “the symbols or the people venerated by the state’s religion”⁶⁷; offending things pertaining to the state’s religion (Article 401 of the Italian Penal Code)⁶⁸; offending the state’s religion (Article 402 of the Penal Code)⁶⁹; disturbing Catholic religious services (Article 405 of the Penal Code)⁷⁰; offending people sacred for the state’s religion (Article 403 of the Penal Code).⁷¹ The court found that all these crimes contradicted the principle of the state as a secular entity, a principle that, as the court has put it, “implies an equidistance and impartiality of the state toward all religious confessions,” which confessions must coexist under equal conditions of “freedom, belief, culture, and tradition.”

⁶⁶ Constitutional Court, Decision 203/1989.

⁶⁷ Constitutional Court, Decision 440/1995.

⁶⁸ Constitutional Court, Decision 329/1997.

⁶⁹ Constitutional Court, Decision 508/2000.

⁷⁰ Constitutional Court, Decision 327/2002.

⁷¹ Constitutional Court, Decisions 168/2005, 195 /1993, and 346/2002.

4.3 *Balancing of Conflicting Interests (a): “Intra-Value” Conflicts*

A reasonable balancing of constitutional interests presupposes a concrete conflict or, in other words, a conflict between rights. Conflicts can be classified as *intra*-value or *inter*-value, referring to the conceptual distinction between values and interests.⁷² In fact, values have a polysemic structure because they are a synthesis of different interests. Conflicts can be classified as *intra*- or *inter*-value depending, in general terms, on the homogeneity or heterogeneity of the contrasting interests revolving around the values in question. There are two types of *intra*-value conflicts. The first is when homogeneous interests are the interests of different conflicting subjects (private, public, or collective). Decision 394/1999, for example, addressed a conflict between the rights of next-door neighbours, and in particular between one neighbour’s right to have a view from the house and the other neighbour’s right to privacy. A homeowner has an interest in receiving air, light, and other amenities, including the possibility of an external view. Neighbours, by contrast, have an interest in limiting the exercise of this right in order to secure their safety and privacy. The court invoked Articles 905, 906, and 907 of the Civil Code, establishing “a priority of the right to a view” and “a correspondent compression of the neighbour’s right to privacy.” In the court’s opinion, these provisions “must be interpreted as part of an entire area of the law regulating the above-mentioned conflicting interests. The limitations on rights are aimed at granting the greatest possible enjoyment of the two properties. To arrive at an objective meaning of the right to privacy, we must therefore consider this right as already part of a balance with an interest in protecting the right to a view. The right to a view has an undeniable social relevance because light and air ensure a building’s hygiene, thereby fulfilling an elementary needs of its residents.”

The second type of *intra*-value conflict can be observed in cases concerning the right to defence as against the right to engage in a private economic initiative. The Constitutional Court, for example, struck down a provision that precluded the right of the defendant, but not that of the public prosecutor, to appeal against a decision to not prosecute a crime because the fact committed does not constitute a crime.⁷³ The decision was based on the rule stated in Article 24 of the Italian Constitution, providing equal instruments to the two parties involved in a suit, and the court found that precluding the defendant’s right to appeal is a clear breach of this rule.⁷⁴ As for private economic initiative, the court looked to Article 41 of the Constitution as grounds for limiting the liability of a shipping company, but at the same time compensation was owed to its clients in case of fraud.⁷⁵ In fact, it is the court’s view that Article 41 protects *all* the economic interests involved in a business contract.

⁷² For a detailed analysis of this problematic issue, see Morrone (2001a, 277ff).

⁷³ Constitutional Court, Decision 2000/1986.

⁷⁴ For a ruling in the opposite sense, see Constitutional Court, Decision 26/2007.

⁷⁵ Constitutional Court, Decision 420/1991.

The second type of *intra*-value conflict is had when the subjective (personal) dimension and the objective (collective or public) dimension of the interests rotating around the same constitutional value are in contrast. Aside from the cases explicitly provided for by the Constitution,⁷⁶ one can also refer here to the core content of the principle contained in Article 51 of the Constitution, establishing at once the right to vote and an interest in having a transparent electoral campaign.⁷⁷ Another example is a teacher's interest in teaching and the public interest in a good educational system as can be gathered from Articles 97 and 33(2) of the Constitution.⁷⁸ Moreover, the subjective interest in a healthy environment may come into conflict with the objective or general interest in safeguarding the environment.⁷⁹

4.4 *Balancing of Conflicting Interests (b): "Inter-Value" Conflicts*

Inter-value conflicts are when the contrast between interests involves the content of heterogeneous constitutional values. The many examples that can be adduced in this regard can be broken down into three main types.

First, there are conflicts between heterogeneous subjective legal situations (private, public, or collective), as in the case of an adopted child's right to personal identity where the right to know who the parents are comes into conflict with the biological mother's right to anonymity.⁸⁰ Another possible conflict may arise when a differently-abled person's right to a social life translates into his or her interest in a right of way resulting in an easement of necessity on the condominium where he or she resides. This right can contrast with the right to undertake business initiatives, a right that admits such easement of necessity exclusively for agricultural and industrial reasons but not for social purposes.⁸¹

Second, we may have conflicts between a subjective legal situation and an objective interest of the constitutional system. Here too, numerous Constitutional Court decisions can be brought as examples: the conflict between the right to annual holidays of employed prison inmates and the objective need to secure the proper execution of prison sentences⁸²; the right to the *status filiationis* for children born of incest, a right that has been found to prevail upon the rules of so-called family public order, and so upon the protection the Constitution affords to legitimate families⁸³; the conflict between the right to defence and the judicial system's efficiency in case

⁷⁶ See Article 32 of the Italian Constitution, establishing the right to health care as a subjective right and as a collective interest.

⁷⁷ Constitutional Court, Decision 5/1978.

⁷⁸ Constitutional Court, Decision 212 /1983.

⁷⁹ Constitutional Court, Decisions 641/1987 and 281/2000.

⁸⁰ Constitutional Court, Decision 425/2005.

⁸¹ Constitutional Court, Decision 167 /1999.

⁸² Constitutional Court, Decision 158/2001, commented in Morrone (2001b).

⁸³ Constitutional Court, Decision 494/2002, commented in Tega (2003).

of long-distance discovery⁸⁴; the conflict between the right to initiate a legal proceeding and the general interest in not overloading the courts' docket (this last issue is one that comes up especially where the parties in civil cases are required to resort to alternative dispute resolution in civil cases and see if they can reach a pre-trial settlement)⁸⁵; the conflict between the right to due process (at both the discovery stage and the trial stage) and the interest in collecting taxes if payments have to be made to the judicial register in order to have copies of documents⁸⁶; the conflict between the right to an education and the interest in maintaining a balanced public budget (one that is not in deficit) despite limited resources⁸⁷; the contrast between freedom of expression (under Article 21 of the Italian Constitution) and the dignity of the state, as protected under the provision concerning the crime of desecration of the national flag.⁸⁸

Third, there are *inter-value* conflicts between two opposite needs. For example, in a decision that upheld the crime of incest (under Article 564 of the Criminal Code) the Court found that the *ratio legis* was the protection of the family and not a generic *ratio* linked to eugenetics. The court accordingly recognized that the lawmaker had found a reasonable balance between the need to punish an illicit act that is also socially reprehensible and the need to secure serenity and stability for the lives of families.⁸⁹

4.5 Balancing and Its Limits: (a) Is there a Hierarchy of Constitutional Interests?

How can conflicts among interests be solved? This question makes it necessary to take up another question, namely: Are there predetermined criteria (whether explicit or implicit) that guide the Constitutional Court in its judgments? This second question is essential because reasonableness is a form by which the exercise of legislative power is reviewed, and is thus closely connected to the Constitutional Court's legitimacy. The court has the power to strike down or substitute a law by looking at the balance of constitutional interests effected by the lawmaker. The issue, then, is how to define the limits of reasonableness, which is the equivalent of setting limits on both Parliament's discretionary power and the Constitutional Court's power of judicial review.

The issue concerns the existence in the Constitution of a hierarchy of values (or of Constitutional rights or interests). A widely shared opinion is that the Italian

⁸⁴ Constitutional Court, Decision 342/1999.

⁸⁵ Constitutional Court, Decision 276/2000.

⁸⁶ Constitutional Court, Decision 522/2002.

⁸⁷ Constitutional Court, Decision 219/2002.

⁸⁸ Constitutional Court, Decision 531/2000.

⁸⁹ Constitutional Court, Decision 518/2000.

Constitution does not establish a hierarchical order to values and rights.⁹⁰ German legal theorists, by contrast, acknowledge that the *Grundgesetz* does establish such a hierarchy. Since the Italian Constitution does not have a clear hierarchy of values, a pluralistic interpretive process and implementation of the Constitution is allowed, but at the same time, this also encourages a broad exercise of the Constitutional Court's powers, thereby making the limits of the reasonableness test that much more uncertain. Empirical analysis shows that no ranking of values has ever been formally or substantially established, but it also underlines that constitutional interests are fungible and that the scope of review based on the reasonable-balancing test is quite wide.

The Constitutional Court normally solves conflicts between rights by using criteria directly provided for in the Constitution. Article 21 establishes freedom of expression and also prohibits forms of expression that disregard "public morality," thereby entailing the need to carry out a balancing test based on the reasonableness of the lawmaker's choices. For example, when the Constitutional Court considered the law making it a crime to publish disturbing or otherwise repulsive material that could offend common morality, upset the family order, or induce people to commit murder or suicide,⁹¹ it rejected a claim filed by the judge *a quo*: the court found this law to be constitutionally legitimate, arguing that the primacy accorded to freedom of the press is limited, this on the basis of an understanding of public morality as the "common sense of morality."⁹² The balance found to exist between these interests (freedom of the press and public morality) cannot be made to derive directly from the Constitution itself. In fact, it is only in this particular case that the interests behind this provision of the Criminal Code override the opposite recessive interest, meaning that the primacy of freedom of the press is relative rather than absolute (in fact, it is *never* absolute). The limit posed by public morality, the court argued, should be interpreted as a diachronic criterion, i.e., as a *rebus sic stantibus*,⁹³ since it is a limit expressing "what is common not only to the different moralities of our time, but also to the plurality of ethics that coexist in contemporary society." Second, this limit is very narrowly construed as having a "minimum content," consisting in nothing more than "the respect owed to the human being, which is the inspiring value behind Article 2 of the Italian Constitution. The provision of the Criminal Code under review should therefore be read in light of this principle." In fact, "the legal system is legitimated to react to horrifying and repulsive publications or images only if they are repugnant to human dignity and therefore offensive to society as a whole. Such a prudent attitude towards limiting freedom of expression is reinforced by the duty of ordinary courts to carefully consider the facts relevant to

⁹⁰ The one exception in this regard is Baldassarre (1991; 1989). The first Italian scholar to introduce the concept of constitutional value was Barbera (1962).

⁹¹ See Article 15 of Law n. 47/1948 (regulating the press).

⁹² Constitutional Court, Decision 293/2000.

⁹³ Constitutional Court, Decision 368/1992.

the cases brought before them, and to recognize the fundamental role of freedom of expression. Notwithstanding the importance of freedom of expression in the specific case under review, the provision of the Criminal Code is legitimate because it has been introduced in order to protect the fundamental value of human dignity.”⁹⁴

4.6 Balancing and Its Limits: (b) Balancing and the “Supreme Principles” of the Legal System

The parameters of judicial review based on reasonableness are not codified in the Constitution and hence fall (or at least seem to fall) under such rubrics as the “supreme principles” of the Constitutional order and the “core content” of fundamental rights.

The Constitutional Court introduced the concept of “supreme principles” when it addressed the issue of the limits placed on the Constitutional-amendment procedure (Article 138 of the Constitution). The famous Decision 1146/1988 put an end to an ongoing debate by recognizing that “the Italian Constitution contains certain supreme principles that cannot be modified or overthrown in their essential content by any Constitutional-amendment law or any other Constitutional law. These supreme principles include not only those qualified by the Constitution as limitations on the power to amend the Constitution itself—an example being the principle establishing the republican form of state (Article 139 of the Constitution)—but also the unwritten ones that define the essence of the highest and founding values of the Italian Constitution.” The Constitutional Court affirms its jurisdiction to review the constitutional legitimacy of laws amending the Constitution itself and of other Constitutional laws, because if this were not possible “the jurisdictional system that safeguards the Constitution would be imperfect and ineffective when the most important of its rules are at stake.”

The decision in question does not actually list these principles, but by referring to them as a class, it seems to invoke Carl Schmitt’s famous distinction (2003, 20ff.) between the constitution (*Verfassung*) and constitutional law (*Verfassungsgesetz*). The supreme principles are thus the ones determining the “form and essential characteristics of the political unity” of a people. It is not incidental that among the principles outlined in the Constitutional Court’s caselaw, the court has made reference to the value of human dignity and of inalienable human rights and to the principles of popular sovereignty, of pluralism, of the separation between church and state, of equality, and of jurisdictional protection of fundamental rights.⁹⁵

⁹⁴ In a similar vein, see Constitutional Court, Decisions 243/2001 and 190/2001.

⁹⁵ Constitutional Court, Decisions 37/1992, 479/1987, 366/1991, 382/1992, 238/1996, 62/1992, 30 and 31 of 1971, 18/1982, 203/1989, and 232/1989. See, by contrast, Constitutional Court, Decision 2/2004.

Despite this decision—and a few other judgements where the court mentions the value of certain supreme principles as a rhetorical argument—the court has never taken these theories any further.

One can refer, for example, to the caselaw on fundamental rights, and particularly to its caselaw on what are qualified as primary rights or primary values, meaning all subjective legal situations relevant to the “supreme” value of the human being.⁹⁶ When one talks of the “primacy” of certain fundamental rights, this does not mean that these rights are univocal in meaning and in their concrete consequences. In certain cases, the term *primary* is used to define rights that are not subordinate to any other right or value. In other cases, a right’s “primacy” is relative. In fact, so-called primary rights can be treated as constitutional interests and hence brought into comparison with other interests by balancing the relative levels of protection.⁹⁷

One can certainly say that the concept of primary rights is a metaphor for the “primacy” of the human being and of his or her fundamental rights. Primacy is not only affirmed in abstract terms, i.e., as a matter of classification, but also in concrete terms. In fact, rights are “primary” not only when brought into comparison with interests having no constitutional status (the rights remain primary to the interests because the minimum condition of homogeneity is lacking which would admit of any balancing between them),⁹⁸ but also when they refer to subjects or legal situations whose peculiar status can justify a differential treatment (as in the case of human rights in so-called special jurisdictions, as in the armed forces or in prisons, that are increasingly influenced by an obligation to grant equal protection to all, as provided for in the Constitution).⁹⁹

Even if fundamental human rights are “primary” or the expression of supreme principles, it can be said of them that they inevitably get reshaped in the process through which they are balanced with other constitutional rights or interests or with

⁹⁶ Examples here are the right to defence (Constitutional Court, Decision 194/1992); freedom of expression (Constitutional Court, Decision 112/1993); freedom and privacy of personal correspondence (Constitutional Court, Decision 366/1991); freedom of religion (Constitutional Court, Decision 14/1974); the right to life (Constitutional Court, Decision 135/1985); the right to health (Constitutional Court, Decision 184/1986); the interest in protecting minors (Constitutional Court, Decision 1 /1987 and 215/1990); freedom of conscience (Constitutional Court, Decision 149/1995); the right to have a name (Constitutional Court, Decisions 13/1994 and 297/1996); the right to housing (Constitutional Court, Decisions 3/1976, 404/1988, and 559/1989); the interest in protecting the environment and the landscape (Constitutional Court, Decision 151/1986 and 259/1996); the right to be respected as a person (Constitutional Court, Decision 283/1997); the right to honour, respectability, reputation, privacy, and intimacy (Constitutional Court, Decision 38/1973). Moreover, it should be pointed out functional rights are sometimes also defined as primary. Examples are the right to participate in the country’s political life (Constitutional Court, Decision 84/1994); the “supreme” interest in national security (Constitutional Court, Decision 31/1969); the rights of political parties democratically taking part in the framing of national policy (Constitutional Court, Decision 84/1969).

⁹⁷ Constitutional Court, Decisions 151/1986 and 39/1986.

⁹⁸ Constitutional Court, Decision 41/1974.

⁹⁹ On the limits of special jurisdictions, see Constitutional Court, Decision 278/1987.

specific constitutional limits. Moreover, they are also influenced by the specific concrete context of implementation.¹⁰⁰

4.7 Balancing and Its Limits: (c) Balancing and the “Essential Content” of Fundamental Rights

The Italian Constitutional Court has been framing its caselaw in light of the German doctrine known as *Wesensgehaltgarantie*, thereby increasingly making reference to the so-called “minimum content” or “essential content” of fundamental rights, this to affirm the inviolability of such rights as well as to place a limit on balancing.

Decision 341/1999 was a clear example. The case was about the very delicate issue of the right to legal assistance of a profoundly deaf person under trial, and more in general, it was about due process protection in criminal trials. The Criminal Procedure Code stated that a profoundly deaf defendant who could read and write and wanted to give a statement before the court had to have all questions, warnings, and cautions put in writing. In the case of a profoundly deaf defendant who was also illiterate, one or more interpreters had to be appointed, preferably among the people from the public prosecutor’s office who usually communicated with him or her (Article 119(1)(2) of the Criminal Procedure Code). The judge *a quo* believed that this provision violated the defendant’s right to defence because it prevented this person from having a full understanding of what was happening during the trial sessions. Moreover, the judge also claimed that Article 119(1)(2) of the Criminal Procedure Code infringed the principle of equality because of the differential treatment it set up between three different legal situations: (i) a profoundly deaf defendant who was also illiterate (this person had the right to an interpreter); (ii) a defendant who could not speak Italian (this person had the right to the free assistance of an interpreter); and (iii) a mentally incapacitated defendant incapable, on that account, of taking part in the proceedings (this person had the right to the appointment of a special guardian). The court decided to review this case on the basis of Article 24 of the Italian Constitution because “the Constitutional protection of the right to defence includes the defendant’s effective and conscious participation in the trial, and especially during hearings and sessions; and so the right to defence also includes the effective possibility of the defendant’s perceiving [...], and communicating.” If this protection is not granted, “the defendant’s right to be informed personally, promptly, and fully of everything concerning the trial is irredeemably violated.” And it would constitute a breach of the “right of defendants to [...] defend themselves even when they are conducting their own defence without a lawyer.” It is evident that the lack of protection concerns the “essence” of the right. In fact, the court found that Article 119(1)(2) of the Criminal Procedure Code was “clearly insufficient [...] in satisfying the need for an effective protection of the

¹⁰⁰ See Constitutional Court, Decision 112/1993, on freedom of information, and Constitutional Court, Decision 264/1996, on the freedom of movement.

deaf or profoundly deaf defendant (but also of the mute defendant who can read and write and can only communicate in writing). Not only does the provision ignore that the defendant's right to comprehend and communicate, and more in general, the right to consciously take part in the proceedings, goes well beyond merely giving statements, but it also does not grant the assistance of an interpreter for a defendant who can read and write."

The court referred more explicitly to "minimum content" in the "Di Bella multi-treatment" trial, this in order to place limits on laws that balance fundamental rights. The Di Bella multi-treatment was a cancer treatment consisting of the administration of somatostatin. It was a free, experimental, and temporary treatment provided for a limited number of terminal patients. Patients who were not admitted into the program, and consequently had to purchase the medicine, claimed that this was a breach of the principle of equality with respect to the right to health care. Decision 185/1998 granted them protection by striking down the law. The Constitutional Court underlined in particular that "in cases of urgent therapy having no alternative, as in certain cancer pathologies, the expectations that may arise should entitle one to the minimum content of the right to health care." Protecting this expectation, understood as a "therapeutic hope" placed in presumably effective medical treatment, means that "the principle of equality requires the full protection of this fundamental right, which cannot depend on an individual's economic situation."

In conclusion, the Constitutional Court's protection of the essential content of rights amounts to bringing under judicial review the balance the lawmaker effects between constitutional interests. More precisely, in the words of the court itself, "the Court guarantees the minimum essential protection of subjective legal situations which the Constitution qualifies as rights."¹⁰¹

4.8 Conflict Resolution Techniques: The Necessity, Sufficiency, and Proportionality Tests

How does the balancing of interests work in practice? The Constitutional Court's review is aimed at evaluating whether the balance effected by the lawmaker is reasonable, and is an evaluation made by determining the law's coherence with three standards: necessity, sufficiency, and proportionality.

As previously discussed, balancing involves making a decision between several conflicting interests in a specific context. The lawmaker ranks interests according to the criterion of necessity, that is, there must be proof that the limitation of the constitutional interest in question is justified by the need to afford protection for an interest of equal importance. This test is clearly applied in Decision 219/1994, with which a law that admitted a protraction of pre-trial custody with a postponed hearing was struck down because it violated the right to defence. Article 24 of the Italian Constitution could be legitimately limited only to avoid completely sacrificing

¹⁰¹ Constitutional Court, Decisions 27/1998 and 432/2005.

another interest, that is, only for procedural efficiency. In fact, an anticipated hearing would have jeopardized the trial's efficiency, and the right to defence could have been protected anyway by following judicial instruments that the law already provides for. The court found that this could have applied only to so-called impromptu orders, as in the case of pre-trial custody ordered for the first time. In fact, these measures achieve their aim because the person under custody ignores them, but the same cannot be said of a reenacted measure, as in the case under review.¹⁰²

This same decision is also relevant to the test of sufficiency. In order to pass this test, the balancing behind a provision that limits a conflicting constitutional interest has to be such that the limitation is confined to what is strictly sufficient to protect the privileged interest. The court applies this test as follows: it "solves a possible conflict by taking into account the mutual interaction between one interest's increased protection and another interest's corresponding decreased protection resulting from a balance effected by the lawmaker."¹⁰³ If the test is not met and "insufficiency" is proved, the court will strike down the law, that is, it will strike down the lawmaker's transactional solution. For example, in a case concerning a conflict between the state's fiscal interest and the citizens' right to seek justice, the court struck down as unreasonable as law making the continuation of an executive proceeding conditional on the payment of the tax due for issuing a judgment or any other judicial order with executive effect. In fact, the law did not consider sufficient the court chancellor's obligation to inform the tribunal's financial office of the unregistered order. The court, by contrast, considered this obligation sufficient with respect to the delivery of documents necessary to continue or to close the trial's pre-executive phase. A provision that limits the right to seek justice in order fulfil the state's fiscal interest is therefore insufficient in one case and sufficient in the other.¹⁰⁴

Finally, the balance effected by the lawmaker must meet a standard of proportionality. The limitation of a constitutional interest must be proportionate, that is, it is permitted only if it protects the right's essential content. For example, Decision 27/1975 struck down a law that criminalized consensual abortion (Article 546 of the Criminal Code) when there is no state of necessity (Article 54 of the Criminal Code), even if the pregnancy posed a danger to the mother's physical or mental health. The mother's right to health (Article 32 of the Constitution) was clearly placed under a disproportionate burden, especially in the case of a physically and psychologically dangerous pregnancy, as a consequence of the balance effected by the lawmaker with the baby's constitutionally protected interest (as can be inferred from Articles 31(2) and 2 of the Constitution). The Constitutional Court underlines that "a pregnant woman's status is important in a very peculiar way, and her protection cannot be provided under a general rule, as in the case of Article 54 of the Criminal Code.

¹⁰² Constitutional Court, Decisions 366/1991 and 63/1994.

¹⁰³ As clearly stated in Constitutional Court, Decision 372/2006.

¹⁰⁴ Constitutional Court, Decision 522/2002; see also Decisions 310/2000, 341/1999, and 167/1999.

In order for this article to be applied, the threat or damage in question needs to be not only serious and unavoidable but also contextual, in contrast to the damage that can derive from carrying through a pregnancy, which can be foreseen even though it does not always immediately show its effects.” This application of Article 54 was based on the idea that the two interests at stake, the mother’s and the baby’s, were equivalent. Yet the facts show, by contrast, that “where the rights in question—not only to life but also to health—are rights ascribed to someone who already is a person, they are not equivalent to an embryo’s right to protection, since an embryo has yet to become a person.” The court thus relied on analogy and applied the same *ratio* the lawmaker had applied in excluding certain special states of necessity (Article 384 of the Criminal Code) from the common condition of criminal liability (Article 54 of the Criminal Code): the court decided by analogy that “the same consideration” had to be reserved to the “peculiar state of necessity of a pregnant woman whose health is in grave danger.”¹⁰⁵

4.9 The Result of Balancing

As the foregoing discussion shows, the judicial review the Constitutional Court carries out on the basis of reasonableness is not simply aimed at finding a compromise by which to solve a conflict; in fact, the balance contained in the law has usually already determined some kind of priority. Moreover, balancing of constitutional interests can have a range of outcomes because the Italian Constitution does not establish a hierarchy: the limits encountered in deciding on a reasonable balance are those determined by the reasonableness test itself. These limits must apply in the area covered by the supreme principles of the constitutional order and by the essential content of the fundamental rights. Other limits are those inherent in the logics of the balance itself, namely, the logic or relativity and that of concreteness. The priority of constitutional interests is not decided once and for all, thus crystallizing the Constitution as interpreted by the Constitutional Court, but rather derives from the constitutional framework’s interpretation as implemented by the lawmaker and as inferred from the context in which the decision will take effect. The right to annual holidays for employed detainees is justified on the basis of the values ascribed to the human being, such as these values are explicitly recognized by the Constitution.¹⁰⁶ However, this does not mean that the public interest in properly carrying out a punishment is shoved aside. In fact, guaranteeing effective punishment means implementing a series of provisions that will in practice reconcile constitutional interests whose conflict appears impossible to solve. Subordinating freedom of enterprise to the duty of acquiring “the most advanced technology available,” in order to reduce air pollution, is constitutionally legitimate because it protects the right to a clean environment and the right to health. However, this decision does not

¹⁰⁵ See also Constitutional Court, Decisions 127/1995 and 433/2002.

¹⁰⁶ The justification is found, among other places, in Constitutional Court, Decision 190/2001.

translate into a final order, nor would it justify limiting Article 41 of the Constitution to protect the environment and health: it simply upholds the limits deriving from the different contexts where the law in question is implemented.¹⁰⁷

5 Concluding Remarks

Reasonableness can be considered a general principle that forms the basis of and shapes all the decisions through which the Constitutional Court brings statutes under judicial review. The decisions previously discussed each have their distinctive peculiarities, to be sure, but they all share the common trait of proceeding on the principle of reasonableness. Reasonableness is the instrument used to identify valid law through a complex mediation involving the Constitution itself, the statutes through which the Constitution is implemented and developed, and the context of application. So it is not unwarranted to consider reasonableness a metaphor for the experience of law in pluralist constitutional state. In a legal system characterized by pluralism, one has to juggle the facts of life with laws and with fundamental principles in an attempt to construct a coherent legal framework.

One last point should be made with regard to the analysis carried out in this article. As much as the principle of reasonableness has a place in many different legal systems, its use entails many critical points where questions and doubts come up as to the validity of this method of reasoning. However, whatever opinion one may hold, any inquiry into reasonableness should not ultimately fail to take into account, among other things, a cost-benefit analysis. In other words, we should ask whether or not the solution the principle of reasonableness offers in meeting demands for equality, justice, and freedom has had a positive outcome. If we look at Italy's experience over the last sixty years and assess it in terms of the enhancement of freedom and equality, there is absolutely no reason to be pessimistic in this respect.

References

- Baldassarre, A. 1989. Diritti inviolabili. In *Enciclopedia giuridica*, vol. 11. Rome: Treccani.
- Baldassarre, A. 1991. Costituzione e teoria dei valori. *Politica del diritto* 4: 639–58.
- Barbera, A. 1962. Pari dignità sociale e valore della persona umana nello studio del diritto di libertà personale. *Iustitia* 1: 117–46.
- Cappelletti, A. 1955. *La giurisdizione costituzionale delle libertà. Primo studio sul ricorso costituzionale con riguardo agli ordinamenti tedesco, svizzero e austriaco*. Milan: Giuffrè.
- Cerri, A. 1994. Ragionevolezza delle leggi. In *Enciclopedia giuridica*, vol. 25. Rome: Treccani.
- D'Andrea, L. 2005. *Ragionevolezza e legittimazione del sistema*. Milan: Giuffrè.
- Esposito, C. 1954. Il controllo giurisdizionale sulla costituzionalità delle leggi in Italia. In C. Esposito, *La Costituzione italiana. Saggi*, 263–81. Padua: Cedam.
- Fuller, L. 1964. *The Morality of Law*. New Haven, Conn.: Yale University Press.
- Manes, V. 2005. *Il principio di offensività nel diritto penale*. Turin: Giappichelli.

¹⁰⁷ Constitutional Court, Decision 127/1990.

- Morrone, A. 2001a. *Il custode della ragionevolezza*. Milan: Giuffrè.
- Morrone, A. 2001b. Il diritto alle ferie per i detenuti. *Giurisprudenza costituzionale*, n.3: 1270–79.
- Paladin, L. 1965. *Il principio generale di eguaglianza*. Milan: Giuffrè.
- Paladin, L. 1984. Corte costituzionale e principio generale d'eguaglianza: aprile 1979-dicembre 1983. *Giurisprudenza costituzionale*, n.1: 219–62.
- Scaccia, G. 2000. *Gli "strumenti" della ragionevolezza nel giudizio costituzionale*. Milan: Giuffrè.
- Schmitt, C. 2003. *Verfassungslehre*. Berlin: Duncker & Humblot. (1st ed. 1928.)
- Tega, D. 2002. L'addio al celibato (e al nubilito) dei militari. *Giurisprudenza costituzionale* 6: 3652–58.
- Tega, D. 2003. Il principio di verità della nascita e il diritto all'identità personale del "figlio incestuoso": le colpe dei padri non ricadano sui figli! *Giurisprudenza Costituzionale*, n.2: 1076–83.
- Tega, D. 2006. Le Carte dei diritti nella giurisprudenza della Corte costituzionale (e oltre). In *Corte costituzionale e processo costituzionale nell'esperienza della Rivista "Giurisprudenza costituzionale" per il cinquantésimo anniversario*. Ed. A. Pace, 953–86. Milan: Giuffrè.

Some Critical Thoughts on Proportionality

Iddo Porat

1 Introduction

In this paper I wish to raise several critical thoughts on the doctrine of proportionality, which is arguably one of the leading manifestations of the concept of reasonableness in public and constitutional law.

The proportionality doctrine is a central part of a two-stage structure of human rights adjudication (see Weinrib 2006; Law 2005). In the first stage one must establish that a right has been infringed by governmental action. In the second stage the government needs to show that it pursued a legitimate end and that the infringement was proportional. Proportionality itself proceeds in three stages once the governmental end has been shown to be legitimate: first, the means applied must further this end; second, the government must show that it chose the least restrictive means to further that end; third, the benefits of achieving the sought-after objective must be proportionate to the extent of violation of the given right (proportionality in the strict sense. See Rivers 2006).

It is an undisputed fact that proportionality, thus described, has achieved unprecedented scope; this is what professor Stone Sweet has termed the “diffusion of proportionality.” The diffusion of proportionality is an amazing phenomenon, both in terms of its scale and in terms of the rapidity and the relative ease by which it has come about. Starting from the 1970’s proportionality rapidly migrated from its birthplace, Germany, to the European Court of Human Rights and European Court of Justice, to Canada and to almost every European country, as well as many countries outside Europe. Today, proportionality is an accepted doctrine in Ireland, South Africa, Israel, Australia and New Zealand (see Stone Sweet and Mathews 2008). Proportionality has won the ultimate victory—the victory of language and of discourse—because the legal discourse itself in many legal systems is by now taking place in terms of proportionality. Indeed, proportionality has infiltrated

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so deeply into public life that field commanders are thinking in proportionality terms before they embark on military actions.¹

That something major has happened with regards to proportionality is therefore indisputable. Nevertheless it would be worth while to ask the following three questions, which I would like to touch upon in this essay.

First, *what exactly has happened?* That is, what are the contours of this phenomenon, its inter-relations with other phenomena, its history, genealogy and meaning? In particular I would like to discuss one point, which has not received much attention to date: what is the relation between (American) balancing and (European) proportionality? That is, what are the analytical and historical differences between the way balancing has developed in American constitutional law, and the way proportionality has developed in German and other constitutional systems?

Secondly, and most controversially is the normative question: *is what happened good or bad?* There are several persuasive arguments in favor of proportionality review in the legal literature. Among others it is argued that proportionality is an inclusive and deliberative methodology, since it takes into consideration all interests in the review and engages in a deliberative weighing and balancing between them, rather than excluding any of them at the outset (see Alexy 2002; Beatty 2004; Kumm 2007) I would like to raise some possible difficulties concerning this argument.

Finally, there is a third, maybe surprising question. It addresses not what has happened, nor whether it is good or bad, but rather *what will happen next?* More specifically it asks whether what has happened is irreversible, and will it last?

I would like to start with this last question and then move on to discuss the other two.

2 What Will Happen Next?

In asking this question I have in mind an analogy from music. We tend to think of musical history as moving in cycles or as being involved in a pendulum movement: from the baroque, more emotional and less structured period, to the classical period with its claim to rationalism and order, back again to the emotional romantic period, and so on. The question is whether one cannot expect a similar pendulum movement in law, and whether we cannot expect therefore the proportionality age to

¹ In Israel, for example, the military regulations concerning the practice of "Targeted Killing" of terrorists, have been shaped according to the Israeli Supreme Court's definitions of proportionality. See HCJ 769/02 The Public Committee against Torture in Israel v. The Government of Israel (Court ruling that every individual instance of Targeted Killing should be examined in accordance with the principle of proportionality, i.e., whether the anticipated benefit to be gained from achieving the military goal is proportional to the harm which might be caused to innocent civilians in the vicinity of the target). Similarly, the decisions of the military commander in Judea and Samaria regarding the exact route of the security fence were framed by another judicial decision guided by proportionality HCJ 2056/04 *Beit Sourik Village Council v. The Government of Israel*, 58(5) P.D. 807.

start turning back to a more rational and conservative period, the way the classical era emerged in music in reaction to the baroque?² Are we at the far end of the pendulum movement, and should we now expect that it starts turning back?

American constitutional history is famously described as moving in such pendulant movement from a more formalistic age, during the Langdell and Lochner periods of the late 19th and early 20th century, to a less structured and more pragmatic legal atmosphere, starting with the legal Progressives and Realists and culminating in the liberal Warren Court, and back to formalism with the New Formalism movement that identifies the current Court.

In Israel a similar turn back of the pendulum is happening in these very days, when the minister of justice, a well-known law professor, is initiating a series of legal reforms that are intended to stop, what might be referred to as the age of proportionality.

The fact that America has witnessed several shifts in its history and that Israel is now showing signs of reaction against proportionality gives rise to three further remarks.

First, how can we account for the fact that there has been no reaction to the expansion of proportionality in Europe, and should we expect a similar reaction to proportionality in Europe as well?³

Secondly, the very question of what will happen next suggests the possibility that the preponderance of proportionality might change one day. However, such a contention is in tension with those accounts that regard proportionality as a logical necessity (Alexy 2002), or as following logically from the very idea of liberal democracy (Beatty 2004). The type of analysis suggested here therefore casts some doubt on such “logically-based” theories of proportionality.

The third remark regards the relationship between the issue of proportionality and all other phenomena that signal a turn of the pendulum and whether it can be dissociated from them or outlive some of them. The following are a few of those added ingredients that comprise together with proportionality what may be termed as the baroque age of judicial power, or what is otherwise termed the “New Constitutionalism” (see Henkin 1993; Ackerman 1997; Hirschl 2004).

The following ingredients represent a standard repertoire of the move towards “New Constitutionalism” that is manifested in one way or the other in all the countries that take part in the “age of proportionality”:

1. The stretching and flexing of rules of accessibility to constitutional courts, such as political questions, and standing
2. The vastly important issue of interpretation, and the move towards creative and purposive interpretation.

² Describing proportionality as romantic rather than rational may be disputed by those, such as professor Alexy (2002), that stress the more structured and predictable aspects of proportionality. However, we can also reverse the question and ask whether we are moving from a classical to a romantic period.

³ Frederich Schauer (2005) seems to argue for such a possibility out of his theory of a move from more standard based to a more rule based systems.

3. The diffusion of different areas of law, and especially the obliteration of the distinction between private law and public law.
4. The relaxing of the rules of precedent, such as, the distinction between *Ratio Juris* and *Obiter Dictum*, and majority and minority opinions.
5. The relaxing of the distinction between authoritative and suggestive text, among others by the extensive use of comparative law (either domestic or international) in judicial opinions.
6. The resistance to the idea of finality, and the move towards substantive rather than formal justice.

3 What Exactly has Happened? Balancing and Proportionality

Moving on to the first question that I raised in my introduction, I would like to discuss now some aspects of the relationship between the concepts of balancing and proportionality.

Defenders of proportionality use two arguments for establishing an analytical distinction between balancing and proportionality, and for favoring it over balancing. I will point at their deficiencies and then move on to discuss two further arguments that may establish a real difference.

The first argument is that proportionality is more developed doctrinally and more structured analytically than balancing. Hence, when applied, it results in more certainty and clarity and allows for less judicial discretion with regard to allowing offenses on human rights (Weinrib 2006, 96; Grimm 2007, 395).

The problem with this argument is that it is often based on an unfair comparison, because it compares between balancing on the one hand and all the three tests of proportionality on the other hand.⁴ However, only the final test of proportionality, termed in German law proportionality in the strict sense, is analogous to balancing. The first two tests are means-ends tests that do not involve balancing. Moreover, American constitutional law includes very similar tests. Therefore, if one makes the proper comparison between balancing and the third test of proportionality, the claim for doctrinal superiority of proportionality seems to lose ground.

There is, however, another attempt to show a distinction between proportionality and balancing and claim that the former is superior. The argument is that proportionality, even in its strict sense, does not include balancing, since it does not require the comparison between two incommensurable values.

There is a nice example that explains this claim.⁵ Consider a dog show, in which there are different contests: the contest for the best Bulldog in the show, best Schnauzer in the show, and so on. However, there is also a final contest for the best dog altogether in that show. Comparing one Schnauzer to another can make sense,

⁴ Under some versions of proportionality a fourth test is added—the legitimate and lawful means test.

⁵ The example is taken from Chapman (1998, 1492, n. 10).

but how are we to compare Bulldogs and Schnauzers? Proportionality seems to give us an answer: we take the Bulldog that won the Bulldog show, and the Schnauzer that won the Schnauzer show, and ask for each how close he was, in terms of the standards of his own species, to the ideal Bulldog or Schnauzer. Let us say that the Bulldog that won had in him 90% Bulldogness, but the Schnauzer that won had only 50% Schnauzerness. In that case the Bulldog wins, and we don't have to compare between Bulldogs and Schnauzers. Proportionality is said to evaluate each value similarly in its own terms, without the need to compare incommensurable values, and then ask, for each, how close the infringement in the case was to the core of this value. The closer it is to the core, the more protection it should have.

I give this example because I think that it reflects some of the intuitions regarding the superiority of proportionality over balancing. However, for reasons that I will not discuss here because of time constraints, I am very skeptical as to whether this could actually work in real life.

I move therefore to the two differences that I think could be substantiated. The first is a historical difference. I would like to put forward the following historical thesis, which I intend to address at length on another occasion⁶: I believe that balancing in American constitutional law has developed in a very different context than proportionality in German constitutional law (and other law systems as well). To put it in a nutshell, balancing entered into American constitutional law as a means for limiting rights that were given formal but absolute textual anchoring. On the other hand, proportionality entered German constitutional law as a means for promoting, or, more exactly, for introducing rights to a system with no textual support for rights. This I believe is true to some extent in Israel too. Balancing, therefore, came along with an anti-rights baggage, which admittedly changed over the years but retains some of its power to date, while proportionality came with the exact opposite baggage, and although here too we see some changes, it also retains some of its power.

The second difference relates to constitutional structure and ethos, rather than to constitutional history (see Cohen-Eliya and Porat 2009). There is an important difference in the way the State-individual relationship is framed in Germany and in America. In America the entire constitutional scheme is based upon a deep suspicion of the State and of its power to infringe upon individual rights. Accordingly, the task of the Court is to give strong protection to rights against governmental incursions. Balancing, which allows governmental interests to overcome individual rights, is therefore regarded with great suspicion, and it often comes with an extra-weight for the right in the balance—a thumb on the scales in favor of the right.

In Germany, however, the State-individual relationship is conceived in more harmonious terms, without an inherent suspicion of the state, and without the assumption that its interests would be contrary to those of the individual. The organic conception of the polity, which reflects German constitutional thinking,

⁶ The ideas here are part of the project sponsored by the Canadian government to compare aspects of proportionality and balancing. I developed the ideas regarding the history of American constitutional in Cohen-Eliya and Porat (2008a).

compares the entire political body to a living organ and conceives its different parts—the legislative, executive and judicial—as all taking part in promoting the same goals, values, and rights. The government as well as individuals promote rights, and both can equally also infringe upon rights. Under such a conception, the Court takes part in implementing and imposing the shared values and rights on the entire community, rather than protecting one part of the polity from the other. Proportionality review is therefore not conceived as inherently contrary to rights, the way American balancing is. On the contrary, proportionality is the methodology of the Court for harmonizing the different rights and values in the community. In addition, in the proportionality calculus no special precedence is given to rights and interests held by the individual over those held by the government (see Grimm 2007).

These two interrelated differences: the historical one and the structural one, can, I believe, substantiate a real difference in the way balancing and proportionality are implemented in practice, and in the way they are framed and conceived, despite the fact that analytically they are almost inseparable.

4 Is What Happened Good or Bad? The Question of Proportionality as Deliberative

Moving finally to the normative question—is the spread of proportionality good or bad? I would like to address one major trait of proportionality that is regarded as a normative argument in favor of the spread of proportionality, namely the fact that it (as well as balancing) encourages the inclusion of all rights and interests in the deliberative process of the Court, and does not exclude any interest at the outset. Proportionality, it is argued, is therefore both inclusive and deliberative, and hence it promotes the legitimacy of the Court.⁷

Although there is undoubtedly some truth in it, I would like to mention three difficulties with regard to this claim. First, and most important, proportionality would be truly inclusive of all interests only if it included all interests *substantively* and not only *formally*. By this I mean that the Court would in fact take every interest into account in the balance, rather than adding it in just formally, without actually giving it any consideration or weight.

Looking into case law wherever proportionality is applied, one can easily find many instances in which the Court includes an interest only formally, but not substantively (Porat 2006). When this is the case, proportionality is neither truly deliberative, nor does it induce judicial legitimacy, transparency or accountability.

Of course, one could argue that such instances are simply wrong applications of the proportionality principle. However, there is good reason to believe that, in

⁷ Indeed, the court that moves to balancing *stricto sensu* is stating, in effect, that each side has some significant constitutional interest on its side, but that the court must, nevertheless, take a decision. The court can then credibly claim that it shares some of the loser's distress in the outcome.

any type of system in which proportionality review is used extensively such formal inclusions would be inevitable, and even inevitably common. The reason is simply that not all interests could and should be given consideration, at all levels and in all contexts. Some interests are simply not important enough; other interests may be important but justly excluded from consideration at some levels of the decision-making process, or in some contexts. However, since the ideology behind proportionality promotes the inclusion of *all* interests in *all* contexts and at *all* levels, it inevitably ends up with many instances of formal rather than substantive inclusion of some interests.⁸

The second problem lies in the fact that proportionality is advocated as a method for *judicial review*, that is, as supplanting the political decision-making process (the political balance). Here, we must not forget the extensive body of literature that shows the deficiencies of judicial decision-making as compared to political decision-making, precisely because of its being less deliberative (Bickel 1970). The Court is limited to the specific case brought before it and to the interests that are involved in that case. It cannot initiate its own processes of decision-making; it is less accessible to all interests and interest-groups in society; it has deficient means of collecting information in order to identify all possible interests and assess their importance, and it is limited in its ability to reach compromises and find less formal solutions to clashes between interests. All these deficiencies raise a serious question as to whether judicial proportionality and balancing can justifiably supervene political decision-making frameworks, because of their being more deliberative.

Finally, the third problem with proportionality as deliberative has to do with the way judges actually deliberate. This point is often neglected, but the fact is that in practically all legal systems the actual manner of deliberation of different judges on the same panel is not made public nor is it regulated in any way. What happens in judicial chambers is kept completely out of the public's eye, and is in fact a black box.⁹ As such, it seems much less deliberative than political deliberation which is open to the public, and is often accompanied by public debate, lobbying and the like.

I would like to conclude by thanking again the organizers of this important and stimulating conference, through which we can strive to be more proportional with regard to proportionality (see Jackson 2004).

References

- Ackerman, B. 1997. The Rise of World Constitutionalism. *Virginia Law Review* 83: 771–97.
 Alexy, R. 2002. *A Theory of Constitutional Rights*. Oxford, N.Y.: Oxford University Press.

⁸ For a similar argument using Raz's distinction between first-order and exclusionary reasons, see Porat (2006).

⁹ For example, one cannot be certain that the process by which judges arrive at their balance of interests is inclusive and deliberative, rather than a process by which a more senior judge influences the decision of the less senior one, or two judges form a coalition against the third one, and so on.

- Beatty, D. 2004. *The Ultimate Rule of Law*. Oxford, N.Y.: Oxford University Press.
- Bickel, A.M. 1970. *The Least Dangerous Branch. The Supreme Court and the Idea of Progress*. New York, N.Y.: Harper & Row.
- Chapman, B. 1998. Law, Incommensurability, and Conceptually Sequenced Argument. *University of Pennsylvania Law Review* 146: 1487–582.
- Cohen-Eliya, M., and I. Porat. 2008a. *American Balancing and German Proportionality: The Historical Origins*. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1272763.
- Cohen-Eliya, M., and I. Porat. 2009. The Hidden Foreign Law Debate In Heller: The Proportionality Approach in American Constitutional Law. *San Diego Law Review* 46 (forthcoming).
- Grimm, D. 2007. Proportionality in Canadian and German Constitutional Law Jurisprudence. *University of Toronto Law Journal* 57: 383–97.
- Henkin, L. 1993. A New Birth of Constitutionalism: Genetic Influences and Genetic Defects. *Cardozo Law Review* 14: 533–49.
- Hirschl, R. 2004. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge, Mass.: Harvard University Press.
- Jackson, V.C. 2004. Being Proportional about Proportionality. *Constitutional Commentary* 21: 803–60.
- Kumm, M. 2007. What Do You Have in Virtue of a Constitutional Right? On the Place and Limits of the Proportionality Requirement. In *Law, Rights, Discourse: Themes of the Work of Robert Alexy*. Ed. G. Pavlakos. Oxford: Hart.
- Law, D. 2005. Generic Constitutional Law. *Minnesota Law Review* 89: 652–743.
- Porat, I. 2006. The Dual Model of Balancing. *Cardozo Law Review* 27: 1393–448.
- Rivers, J. 2006. Proportionality and Variable Intensity of Review. *Cambridge Law Journal* 65: 174–207.
- Schauer, F. 2005. Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture. In *European and US Constitutionalism*. Ed. G. Nolte, 49–69. Cambridge: Cambridge University Press.
- Stone Sweet, A., and J. Mathews. 2008. Proportionality, Balancing and Global Constitutionalism. *Columbia Journal of Transnational Law* 46: 26–59.
- Weinrib, L. 2006. The Postwar Paradigm and American Exceptionalism. In *The Migration of Constitutional Ideals*. Ed. S. Choudhry, 84–113. Cambridge, N.Y.: Cambridge University Press.

Part II
Private, Public and International Law

Part IIa
Reasonableness in Private Law

Reasonable Persons in Private Law

Arthur Ripstein

1 Introduction

The reasonable person is a central character in Anglo-American law. Although often introduced through examples, such as “the man on the Clapham Omnibus,” the reasonable person enters legal analysis not as a cultural stereotype, but as an embodiment of an idea of fair terms of interaction. Fair terms of interaction must allow people freedom to do as they please, but also make sure that each is secure from the activities of others. A world in which liberty alone is protected is one in which nobody is secure from the acts of others; a world in which security alone is protected is a world in which nobody is free to act for fear of injuring others. Instead of either of these extremes, legal institutions protect people equally from each other when they require each to sacrifice some liberty for the sake of the security of other.

There are two basic strategies available for reconciling liberty and security. One, familiar from the utilitarian tradition in moral and political thought, supposes that liberty and security (and whatever else) should be aggregated across persons, so that one person’s liberty might have to give way to another’s security. Another approach, which will be developed here, constructs an ideal of a representative person, who is supposed to have interests in both liberty and security. By integrating liberty and security within a representative person, this approach expresses an idea of equality, for it aims to protect people equally from each other, by supposing all to have the same interests in both liberty and security.

The familiar common-law idea of the reasonable person gives expression to this idea. The reasonable man has long been a central character in the common law, taking appropriate precautions against accidentally injuring others, making only allowable mistakes, and maintaining an appropriate level of self-control when provoked. The reasonable person is neither the typical nor the average person. Nor is the reasonable person to be confused with the rational person, who acts effectively

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in pursuit of his or her ends. Instead, the reasonable person needs to be understood as the expression of an idea of fair terms of social cooperation.¹

To talk about reasonableness in this sense is not to talk from the agent's subjective point of view. John Rawls's distinction between the rational and the reasonable elucidates this point: behave rationally when I act effectively to promote my own system of ends. I behave reasonably when I interact with others on terms of equality. As Rawls puts it, "Reasonable persons [are moved by a desire for] a social world in which they, as free and equal, can cooperate with others on terms all can accept. They insist that reciprocity should hold within that world so that each benefits along with others" (Rawls 1993, 50). Thus we can distinguish the rational person, who does what seems best from her situation given her ends, from the reasonable person, who takes appropriate regard for the interests of others.

On this view, reasonableness is tied to the idea of equality. The root idea is that reasonable terms of interaction provide a like liberty for all compatible with protecting each person's fundamental interest in security. There is no blanket protection of either liberty or security; the abstract idea of reconciling them with each other must be made more determinate in light of more concrete views. The concept of the reasonable person makes it possible to take account of competing interests without aggregating them across persons. Rather than balancing one person's liberty against another's security, the reasonable person standard supposes that all have the same interest in both liberty and security, and both are weighed within a representative person. The fact that particular people might not care about certain protected interests is not relevant, for the point of the reasonable person standard is to specify the respects in which people can be required to take account of the interests of others. The standard serves to protect people equally from each other by protecting the same interests of each.

Because they suppose persons to have the same entitlements to both liberty and security, reasonableness tests in the law abstract away from various details that might be thought relevant to a more complete assessment of responsibility. This is sometimes times represented as a pragmatic compromise between some independent conception of responsibility and the limited ability of various institutions to discover the full range of facts that might be relevant to it. Thus employment of the reasonable person standard is sometimes thought of as an operational test of whether someone was trying their best to avoid injury to others, or of whether they actually believed what they claimed to believe. I will argue, to the contrary, that the law's abstraction from detail reflects the ideal of equality at its core. Reasonableness tests are not a proxy for some other measure of responsibility; they are constitutive of responsibility, understood in terms of the ways in which people are accountable to each other.

The idea of reasonable persons expresses a distinctive conception of normative justification. Although a venerable tradition in political philosophy supposes that

¹ This idea has been developed in a number of places by T.M. Scanlon. See especially Scanlon (1998).

coercion can be justified only on grounds of consent, the most pressing questions about the use of force arise when people are *unwilling* to accept the claims of others against them. If one person injures another and is unwilling to pay damages, the question is not whether the injurer is really willing to pay after all, but under what conditions it is legitimate to require payment. Again, the fundamental question of punishment is not whether the criminal already accepts the punishment, but whether it is justified anyway. In the same way, the general question of justification is not whether everyone against whom coercion is exercised is somehow committed to acknowledging its legitimacy. Whether or not such a question makes sense as part of a more general account of morality, it is out of place in political philosophy. Political philosophy must ask whether there is some way to justify the use of coercion in cases in which it is unwelcome. To suppose that coercion is illegitimate unless the wrongdoer accepts the standard by which he or she is judged is to give up on the idea of fair terms of interaction, for it is to allow wrongdoers to unilaterally set the terms of their interactions with others. If one person is free to refuse responsibility, he is thereby allowed to set the boundaries of his own behaviour.

2 The Basic Structure

The idea that fair terms of social cooperation set the limits of allowable behaviour is familiar from discussions of distributive justice and public law. Rawls's influential formulation of liberal equality makes this idea central. Provided that what Rawls calls "the basic structure" of society is just, nobody has grounds for complaint if the outcomes of particular interactions are not what they might have hoped for. In Rawls's own account, a just basic structure must guarantee equality of opportunity, equal liberty, and contain redistributive mechanisms to ensure that any inequalities in income and wealth are to the advantage of all in real terms. A just society does not allow those with more bargaining power to renegotiate the basic terms of interaction, but once those terms are set, people are free to pursue their own advantage as they see fit. So, for example, people with unusual and highly valued abilities may not renegotiate the tax system to their own advantage. Once a just system of taxation is in place, however, they are free to negotiate their own terms of employment as they see fit. Fair terms of interaction set limits within which people must moderate their behaviour in light of the claims of others. Within those limits, people are free to do as they choose.

Exactly which terms of interaction are fair is controversial, and those who are dissatisfied with the results of their interactions with others might conclude that the terms were unfair. That those complaints are typically voiced in the language of fairness itself reveals the power of the basic idea of fair interaction. The boundary between fair terms of interaction and particular interactions is also not always clear; family structure, for example, is both pivotal in determining where benefits and burdens fall, yet in practice it is often open to renegotiation on an ongoing basis

(Cohen 1997). The basic distinction between fair terms of interaction and particular interaction is nonetheless important to political philosophy.

Without endorsing all of the details of Rawls's account, I adopt his basic strategy of drawing a distinction between fair terms of interaction and particular interactions. Rawls limits his account of the basic structure to what he calls "constitutional essentials." My account takes its focus as core areas of tort and criminal law. These are not areas that have been articulated within a constitution. Nor should they be. But they are the natural home of the idea of reasonableness. Both employ standards of reasonableness to mark the line between responsibility and luck.

Reasonableness standards enter tort law by dividing risks that accompany many ordinary and acceptable human activities. Those who fail to exercise reasonable care are responsible for the injuries caused by that lack of care. That is, whether or not someone has taken a risk with the safety of others depends on whether or not he was behaving unreasonably. Those who take risks with the safety of others must bear the costs that arise if those risks result in injuries. By contrast, any injuries that result from the acts of those who exercise appropriate care are simply the bad luck of those they befall. Further, whether or not the intervening acts of others serve to relieve a tortfeasor of responsibility depends on whether or not those acts are reasonable.²

Reasonableness standards set the limits of acceptable behaviour. A second set of issues of justice come up when people fail to behave reasonably. Tort and criminal law are both concerned with remedies. Although the basic terms of interaction are the primary subject of justice, results become an issue of justice in just those cases in which people violate the limits of acceptable behaviour. Properly understood, fair terms of interaction also make sense of the characteristic responses to violations of those limits, including both tort damages and punishment. Those remedies uphold fair terms of interaction in two ways. First, they uphold those standards by undoing the effects of violations, insofar as it is possible to do so. Second, and derivatively, they serve as incentives to acceptable behaviour, by raising the prospective costs of wrongdoing. The prospect of damages or punishment will deter those who consider pursuing their ends at the cost of the protected interests of others. Deterrence is a secondary concern, inasmuch as the magnitude of both damage awards and punishment is set retrospectively in terms of the wrong done, rather than prospectively in light of their likely effects.

This idea of the reasonable person applies only to responsible agents, because it is at bottom the idea that people should moderate their claims in light of the legitimate interests of others. At one level, the idea of responsibility is just the idea that people can in large measure be expected to respect each other's limits. When people fail to behave responsibly, they can rightly be held responsible for the results.

² In Ripstein (1999) I show that reasonableness tests have a parallel place in criminal law and distributive justice.

3 Responsibility as Political Morality

Philosophers frequently suppose that questions about the limits of the criminal law are best understood as questions in liberal political theory. For example, laws regulating abortion or pornography are seen as falling within the purview of political theory. I carry this general approach further in two ways. First, I argue that the core areas of tort and criminal law are best understood in terms of general considerations of political theory, and that they express important conceptions of freedom and equality. Second, I argue that the concept of individual responsibility found in tort and criminal law is itself the basis for an attractive conception of individual responsibility in matters of distributive justice.

My approach seeks to stay on the level of political and legal philosophy in that the conception of the person and responsibility I develop is meant to be specific to coercive institutions. The strategy is to make responsibility a question that is—to borrow another phrase from Rawls—political,³ not metaphysical (Rawls 1985). To say that it is political is not to say that it is always best decided by democratic assemblies, nor that it is inevitably the result of partisan struggles for power. It is to say instead that the account is specific to political morality, rather than dependent on a more comprehensive moral or metaphysical account.

To talk about responsibility as political in this sense is an application of the familiar liberal strategy of separation. The strategy has its origins in Locke's *Letter Concerning Toleration*, which seeks to show how we can regard toleration as a special duty imposed by the office of magistrate, and so in no way incompatible with taking one's own religious views seriously. Subsequent liberals have both sought to generalize this strategy and found its application in everyday life—as a professor, I can coherently both care very much how my students vote, while at the same time not allow it to influence my grading.⁴

Liberalism's great insight about responsibility is that one can be responsible for different things depending on what is normatively at stake. Thus, anti-discrimination laws typically include the categories of religion or creed as well as those of race and color. Race and color are plainly not things over which anyone can exercise control, and indeed it seems to be the very heart of racism to hold people responsible for such things by deeming it appropriate that their fate in life should reflect them. Religion and creed, in contrast, seem like things that are very much within an individual's control, and indeed it is central to most religions and creeds that they are a matter of individual responsibility. Anti-discrimination laws recognize that, although for religious purposes, religion can be viewed as a matter of responsibility, for political

³ By “political” here, I really just mean “for the purposes of public standards,” as opposed to either private or ultimate. Unfortunately there seems to be no political use of this term in contemporary debate—only various private ones claiming to be ultimate.

⁴ The most helpful commentary on Locke is Herzog (1989); a contemporary statement of the view can be found in Walzer (1984).

purposes it need not be.⁵ As a result, certain kinds of “costs” imposed by religious beliefs—those imposed on offended bigots, for example—are not the responsibility of members of the despised religious group. It goes without saying that this separation rests on controversial claims about political morality and the relations between state and religion, claims which holders of some religious (or political) views might reject. Those who think that state power should be used to promote one religion, or suppress all religion, will not be happy with such a solution. But it is important to recognize that their disagreement is not about the nature of responsibility, but about its occasion. Again, broadly democratic political views suppose the benefits of citizenship should not be distributed on the basis of party allegiance, despite that fact that each citizen is in another sense fully responsible for his or her own political views.

Understanding responsibility as a problem in political philosophy enables my account to avoid certain other philosophical disputes. For example, I rely only on commonplaces about action, and do not wade into disputes that have been central in philosophical treatments of the subject. The only features of human action that are of interest to the law are the uncontroversial features of action that accounts of action theory take as their starting point. Such questions as how acts are individuated, whether or how act descriptions are compatible with descriptive vocabulary of the natural sciences, and whether acts are distinct from bodily movements are of some interest in their own right, but make no difference to the issue considered here. Competing accounts of action divide on whether, for example, turning on a light, flicking a switch, lifting one’s finger, and surprising an intruder are different descriptions of a single act, or a series of distinct acts. But all competing accounts start from the shared belief that it makes perfectly good sense to say that someone did all of them. The choice of the appropriate description of an act depends on the perspective from which the question is asked. In the context of legal and political morality, the appropriate description of what someone has done will always depend in part on its relation to the protected claims of others. While I do not know how to establish such a claim in the abstract, the rest of the book can be thought of as attempting to establish it concretely, by accounting for and justifying familiar and important structural features of the law of torts and the criminal law without appeal to a developed theory of action.⁶

In the same way, my account of responsibility does not depend on a robust account of the capacity for choice. Philosophers have sought to explicate that capacity in terms of such things as reflective self-consciousness, the ability of the self to

⁵ Recent controversies about whether sexual orientation is innate turn in part on overlooking the idea of separation. Discrimination on the basis of sexual orientation is objectionable even if it is a matter of choice.

⁶ Legal philosophy is independent of the theory of action in another way as well. The criteria of adequacy for an acceptable action theory are at odds with those for an acceptable legal theory. A theory of action needs to account for the uncontroversial cases of action, and it is a virtue in such a theory to be compatible with all actions. The law, by contrast, is regulative, and seeks a unique characterization of various outcomes.

distance itself from its ends, and higher-order mental states, such as desires to act on one desire rather than another. I begin instead with the familiar fact that, apart from such notable exceptions as children and the mentally ill, people are by and large capable of moderating their behaviour in light of the interests of others. The basis, be it empirical or metaphysical, of that capacity is of no concern. That persons can choose makes them appropriate subjects of responsibility in a way that machines and (most?) animals are not. But the capacity for choice dictates neither the standards to which people are appropriately held, nor the appropriate remedies when someone fails to meet those standards.

Just as I do not turn to metaphysics to resolve questions of political morality, so I do not presume to solve metaphysical problems by looking at political morality. It is sometimes tempting to find a metaphysical message implicit in an account of agency and liability, and to trace the absence of responsibility in some circumstances to the absence of agency. Some philosophers who have reflected on legal liability have concluded that agency is always “ascriptive,” and that there is nothing to be said about human action except from some normative perspective (Hart 1968). While such proposals are not without appeal, it is important that the account developed here depends on no such claim. There is a perfectly straightforward sense in which the person who is free of legal responsibility still acts. The question of liability, though, does not depend on having solved the more general issues of the metaphysics of agency. Like those who suppose that assignments of liability are beholden to the results of more general philosophical accounts of action, those who suppose that there are no further metaphysical questions about responsibility once we have solved problems of liability presume that all questions about action must have a single answer. The claim defended here is that there is an account of agency and responsibility appropriate to public personae, which does not require vindication from other conceptions of responsibility. The account is agnostic both on questions about responsibility and agency more generally, and also on the question of its implications for a more general account of responsibility or agency.

4 Three Conceptions of Responsibility

The questions about responsibility in which the law properly takes an interest only have answers against the background of fair terms of interaction. There is, I will argue, no point in asking about whether or not someone is responsible for some outcome except in relation to questions appropriate standards of conduct. In deciding whether or not someone is responsible for some deed, we need to consider both fairness to that person and fairness to others. In cases of accidental injury, for example, questions of responsibility get their point from the fact that if the injurer is not held responsible for the injury, the injured party will be left to bear its cost. In the criminal law, the interests of others are implicated in questions of responsibility in a slightly different way. If a criminal goes unpunished, his victim is not punished instead. But the victim’s rights against intentional aggression mean nothing if the criminal’s

assessment of them is the only determinant of his responsibility. The criminal law's unwillingness to recognize a defense of mistake of law reflects the idea the limits of criminal responsibility are not given by the wrongdoer's own assessment of his responsibility.

That normative standards should be implicated in questions of responsibility may seem surprising. People often judge themselves and others to be responsible apart from any questions of what they owe to others. Outside of legal contexts, responsibility is sometimes tied to causation, apart from questions of duty. Other times its reach is limited, based on what a person can control. Both of these conceptions of responsibility are familiar aspects of ordinary moral thought.

People sometimes acknowledge responsibility for what they have caused, even if they exercised appropriate care for the interests of others. We can understand what it means to say that Oedipus is responsible for parricide and incest, despite the fact that he did not, and could not, know the identity of his parents. The story is tragic because Oedipus cannot disown his action, and cannot make things right, even though he could not have known. He holds himself responsible because the consequences of his deed make him the person he is, even though there is nothing he can do to make amends. This conception of responsibility also comes up in more prosaic cases: the careful driver who runs down a child rightly feels terrible about what she has done; others feel relief that they didn't bring about such a terrible outcome. Again, the gift shop sign warning that those who break things must pay for them expresses the same idea of responsibility.

People sometimes also deny responsibility, insisting that they meant no wrong, or that they did not mean for things to turn out the way that they did. On this view, actual control is essential to responsibility, and any element of luck is irrelevant to attributions of responsibility. This idea first surfaces in Stoic thought, finds its medieval expression in Abelard, and some claim it is an important element of Kant's moral (but not legal) philosophy.

I will call the conception of responsibility that emphasizes causation "causalist" since it ties questions of responsibility to questions of what happens. I will call the conception on which a person is only responsible for the aspects of his conduct with his control "voluntarist." Causalist and voluntarist accounts of responsibility divide on the relative importance of a person's thoughts and events in the world; the causalist emphasizes what happens, while the voluntarist regards consequences as arbitrary, and the person's intentions as central.

Both causalist and voluntarist views can be thought of as general views of responsibility. Both sever questions of responsibility from questions of what people owe each other, for both suppose that questions about whether or not a person is responsible for some outcome are prior to, and independent of, questions about the moral status of the person's act. Both might, for example, separate the questions of whether A is responsible for B's injury from questions about the appropriate response should A be responsible. On either conception, responsibility makes further responses appropriate. A person's responsibility for some event might lead that person to regret the event, or feel proud of it, to explain it to others (or some select group of others), to atone for it, or to seek to repair it. It might lead others to question, praise, blame,

reward, or punish the person, or to force the person to clean up the mess he or she has made. It might also lead others to let the person keep something.

Their very different attitude towards questions of control mark out extremes on a continuum, but causalist and voluntarist views are alike in supposing that questions of responsibility are at bottom questions of fact, whether about the impact some event had on the world, or the way in which an agent thought prospectively about his own act. Thus both seem to promise a way of getting behind questions of liability and culpability, to deeper questions of whether someone really is responsible for their act. The two perspectives can also be combined in a variety of ways, each setting limits on the apparent excesses of the other.

Not surprisingly, both causalist and voluntarist views have frequently found their way into discussions of legal and political morality. Both are sometimes put forward as an appropriate basis for coercion. The appeal of such an approach probably stems from the idea that coercion is not arbitrary if it is occasioned by acts for which the person being coerced already has independent grounds for acknowledging his or her responsibility. If someone really is responsible for something, there seems to be no further question about whether it is appropriate to hold her responsible.

I will engage both views in what follows. Here I will only advertise the problem that causalist, voluntarist, and views that seek to combine them, all face as accounts of legal responsibility. Because they make question of responsibility independent of questions of what people owe each other, they cannot be reconciled with the idea that holding people responsible is itself required by fair terms of interaction. Nor can they explain why particular coercive responses are appropriate in some contexts but not others. These points will, I hope, become clearer as we proceed.

5 Dividing Risks

Virtually all activities carry some risk of injury. The fault system serves to divide those risks fairly. It does so by supposing that all have interests in both liberty and security. The interest in liberty requires a protected space for freedom of action, the ability to carry out one's purposes in the world. The interest in security requires that the limits be imposed on the actions of others. To make injured plaintiffs bear the full risk of injury would forego the interest in security, and render each person's security is wholly vulnerable to the liberty of others. To make injurers bear the full risk would forego the interest in liberty, would subject each person's liberty to the vulnerability of others.

The fault system avoids these extremes by dividing the risks between potential injurers and those who are potentially injured. The basic strategy for dividing risks is to look to the interests in both liberty and security that all are presumed to share. If neither liberty nor security interests are to totally cancel the significance of the other, some balance must be struck between them. Rather than trying to balance those interests *across* persons—supposing, in some way, that one person's gain can make up for another person's loss—the fault system balances them *within* representative

persons. By supposing that all have the same interests in both liberty and security, the fault system treats parties as equals, by allowing a like liberty and security to all.

The fault system serves to divide risks at two levels. On the one hand, the duty of care—the specification of the interests of others with respect to which one must exercise care—serves to define the equality of the parties. Not all interests are protected from the risk of injury. Only some forms of attachment to particular goods are protected; protecting all economic interests would place too great a burden on the liberty of others (Benson 1995). If I could not act unless I was sure that your financial position would not be adversely effected, I could not act at all. Which interests in liberty and security are protected depend on substantive views of the importance of various interests to the ability to lead a life of one's own. Moreover, not all otherwise protected interests protected from all risks. Instead, one must only take precautions against those risks which are “apparent to the eye of ordinary vigilance.”⁷ So, although each person has a protected interest in being free of bodily injury, other need only take precautions with respect to certain ways in which bodily injury might come about. From the perspective of the injured party, all injuries are alike. But from the perspective of the reasonable person, injuries are differentiated in part on the basis of the burden to liberty that precautions against them pose. Each person accepts a certain level of risk in return for a measure of liberty; each accepts a restriction on liberty in return for a measure of security.

The standard of care—the amount of care one must exercise so as to avoid injury to protected interests—also expresses a conception of the parties as equals. Even where interests are protected, the risk of harm to them is divided between potential injurers and those who might be injured. The fault system does not require that unlimited efforts be taken to avoid injuring the protected interests of others. Instead, the risks are divided fairly, asking only that people moderate their activities in light of the interests of others.

Most liberty and security interests are utterly uncontroversial. Security from bodily injury is obviously important, as is the liberty to come and go as one pleases. In order to fill out the idea of protecting people equally, though, a more detailed account is required. The amount of care that is required of a person is set in relation to specific risks. In general, the fact that my activity might cause you some injury is not sufficient to require me to take care. Nor is the fact that my liberty is at stake sufficient to require you to bear risks. Instead, the question is whether or not I exercise appropriate care with respect to specific risks.

A fair division of risks requires that particular risks be assigned to particular activities, or, to be more precise, that they be assigned to activities in contexts (Perry 2001). This is a direct consequence of the idea that interaction is reciprocal. The fact that my hammer and your unprotected head meet is the basis of liability on a residential street, but perhaps not on a construction site. In determining where particular risks properly lie, it is important to remember that risks are the product of interactions, not of actions as such. Thus we might treat certain risks associated with driving differently than others, supposing that some are done at the driver's

⁷ *Palsgraf v. Long Island R.R.* 162 N.E. 99 (N.Y. 1928).

risk, others at the risk of those who might be injured. In so doing we might think it wise, for example, to assign risks posed to other drivers differently than those posed to pedestrians.

Parties engaging in potentially risky activities must show reasonable care for those who might be injured by those activities, not simply for the persons who turn out to be so injured. The abstraction of defining the standard of care in terms of the category of plaintiffs rather than the actual plaintiff follows directly from the requirement of treating the parties as equals. Each is required to show appropriate regard for the interests of others. Although fairness between the parties is the central issue in apportioning the risk, the relation between the parties is itself a microcosm of the more general relationship of equality in which all are supposed to stand. Sometimes injuries will still occur; allowing liberty its place requires that some risks lie where they fall. Provided that everyone takes only such risks as they are entitled to take, all injuries will properly lie where they fall. Here too the aim is to give expression to the twin ideas of moderating one's claims in light of the legitimate claims of others and of bearing the costs of one's own activities. Those who moderate their activities in light of the interests of others do not create increased risks. The idea of responsibility thus carries with it an idea of responsible agency. In order to be a responsible agent, one must be able both to pursue one's own ends and to moderate one's claims in light of the legitimate claims of others.

That is, the fault standard defines a situation of equality between the parties, and the payment of damages restores that equality.⁸ The defendant is selected to pay the costs because it is the defendant's deeds which have violated equality. That violation of equality is a problem because of its effects, and the appropriate remedy is to undo those effects. Provided that the more general relation of equality is preserved through each person's exercise of appropriate care, there is no need for any party to restore the losses of another. Again, if someone fails to exercise appropriate care, but no injury results, there is no need to compensate, because the failure does no effect anyone's holdings. The need for compensation only arises if an injury results from one party's failure to show appropriate care. In such circumstances, compensation serves, as far as possible, to undo the effects of that failure.

6 Risks and Outcomes

An account of the fault standard must do two things: first, it must offer a principled account of the kinds of behaviour that are unreasonable. Second, it must explain why liability for damages is the appropriate remedy. In this section I offer an account of both in terms of the idea that the person who exposes another to a risk "owns" the risk, and if the risk ripens into an injury, that person owns the injury. The basic idea is simple: in assigning liability, the fault system determines whose problem a certain loss is. When a risk ripens into an injury, the injury belongs to the person to

⁸ Much of my account of the structure of negligence law follows Ernest Weinrib's important work on Private Law (1995).

whom the risk in question belongs. Reasonable risks—those risks the imposition of which is compatible with appropriate regard for the interests of others—lie where they fall. Unreasonable risks belong to those who create them; as a result the injuries that result from unreasonable risk imposition belong to the injurers. Since they are the injurer's problem, the injurer must make them up. Hence damages provide the remedy.

As I said at the end of the previous chapter, the vocabulary of ownership is potentially misleading here; my use of it is meant to draw attention to a familiar point. When confronted with an accidental injury, tort law asks whose problem it is. Just as we can say that an injury is one person's problem, and not another's, so we can say that a risk is one person's risk, and not another's. When a warning on an unattended beach says "swim at your own risk," no puzzling claims are being made about property rights in risks. When I speak of one person owning a risk, I mean nothing more puzzling.

The allocation of risks can be thought of as part of the specification of fair terms of interactions. The fault system has two roles in filling out this idea of fair interactions from fair starting points. First, it gives content to the idea that people should moderate their claims in light of the interests of others. People should not, and cannot, avoid imposing some risks on others; the fault system serves to distinguish acceptable from unacceptable risks. Second, it also provides the grounds for undoing the injuries that result from unacceptable risks.

Now imagine that as well as assigning rights and resources, we have also somehow determined where various familiar risks lie. As we saw in the last chapter, no assignment of rights and resources is possible except against the background of an assignment of risks. That is, in order to specify which interests are protected, we must also specify the risks against which they are protected. The risks that are assigned in this way are specific risks of particular injuries, rather than either total amounts of risk across a lifetime, or some general schedule of benefits and burdens, discounted for their likelihood. The risk of bodily injury through negligence, or of damage to one's property as a result of particular acts of others are assigned. The risk of having one's life go well or badly is not.

Any such assignment of risks must not be understood as the provision of a certain level of security to everyone in the society. Whatever might be said for such an approach to risk, and whatever might be done to make it workable, this is not the suggestion I am making. While everyone does enjoy the same protected liberty and security interests, their actual level of security may vary. Nor is it a matter of the libertarian's provision of a certain level of liberty to all. Nor is security protected only in cases where risk-imposition is non-reciprocal (Fletcher 1972). Taken alone, the idea of reciprocity has no necessary upper bound, and might in principle allow important security interests to give way to unimportant liberties, provided that all are free to take them.⁹ Instead, specific liberty interests and security interests are

⁹ For example, driving at high speeds might threaten security without violating reciprocity, provided that people all expose each other to the same unreasonable risk.

protected, based on a conception of their importance to leading an autonomous life. Thus risks are distributed in light of the interests that all have in both liberty and security. Risks that result from the acceptable exercise of liberty lie where they fall; risks beyond that lie with those who create them.

The specification of important liberty and security interests and a fair division of risks generates a conception of the reasonable person. The reasonable person is, as always, the person who moderates his or her actions in light of the legitimate claims of others. Applied to circumstances of risk, the reasonable person does not expose others to more risk than is reasonable in light of fair terms of cooperation. The basic strategy is the one I outlined in chapter 1: we look to the liberty and security interests of representative persons—the reasonable person—and protect all equally with respect to those interests. To protect all equally requires weighing liberty against security, but any weighing that is done is done within the representative reasonable person, rather than across persons. The point of weighing interests within a representative person is to avoid allowing the particularities of one person's situation to set the limits of another's liberty or security. Each of us is presumed to have the same interests in both liberty and security. To be sure people, may disagree about the importance of various liberties and security interests. Those disagreements are about particular interests in liberty and security, not about the relative importance of liberty or security in general. The law does not, and could not protect a general interest in liberty (understood as doing as one pleases) or security (understood as being free of the unwanted effects by others.) Instead, certain specific interests are protected.

A fair distribution of risk is a general matter, while courts are called on to decide liability in specific cases. The reasonable person provides the standpoint from which the general distribution of risks can be applied in particular circumstances. Just as the background distribution of risk is tied to the importance of protected interests in both liberty and security, so the reasonable person moderates his or her behaviour in light of the importance of those interests. Thus in deciding liability, courts must decide whether or not a person showing appropriate regard would have taken a particular risk into account.

Suppose that given a background distribution of risks, one person behaves unreasonably by exposing another to some further risk. In such a situation, the person who imposes the risk can be thought of as doing so at his or her own risk. Just as I am responsible for my own injury if I take risks with my own safety, so your injury becomes my problem if I take undue risks with your safety. Either way, if an injury occurs, the costs of the injury properly lie with the person who created the risk. If no injury results, the risk-imposer is just lucky, for there is no injury to make up. It is because the injury is the injurer's problem that the injured party has a right to repair. Should the injured party fail to seek damages, the loss will not be returned to the person to whom it belongs. This poses no problems from the point of view of risk ownership; the injured party need not exercise the right to be relieved of the loss (any more than anyone else need enforce their private rights against another person.) The idea of risk ownership explains why there is a right the injured person may enforce, not why the injured person must enforce it.

Particular liberty and security interests are protected. As a result, only particular risks are distributed. As a result, only some consequences of risk imposition will be significant. If one person exposes another to a risk, and that risk ripens into an injury, the injurer is responsible for the injury, even if the injured party turns out on balance to gain some other benefit as a result. If the plaintiff meets a future spouse while hospitalized as a result of an injury, the benefit that the defendant accidentally conferred on her is irrelevant to the assessment of damages. Again, if a negligent driver causes someone to miss a plane, and the plane crashes, leaving no survivors, the negligent driver cannot claim to have conferred a benefit (a saved life) rather than caused an injury (a missed flight).¹⁰ The risk of a plane crash was the ticket holder's risk, not the driver's, and the fact that the driver eliminated that risk is of no more significance to questions of liability than if the driver had made a large gift to the passenger some time before the accident.¹¹ The readiness to sue in such cases may reflect badly on the plaintiff's character, but from the point of view of liability, such matters questions are irrelevant.

The idea that those who fail to exercise appropriate care own the risks they create accounts for the fault system's characteristic approach to questions about the duty of care, the standard of care, and the measure of damages. The duty of care is given by the fair background division of risks—our interests in both liberty and security determine where various types of risks lie. Some interests are not protected against injury, others are. The standard of care is set in the same way: interests in both liberty and security serve to set the degree of care required in various interactions. When someone fails to take appropriate precautions, the new risk created belongs to them, so the measure of damages is set by the extent of the injury that results from the wrongful risk creation.

Understanding tort law in terms the ownership of risks and injuries lets us see why money damages would be an appropriate remedy to a wide range of injuries. Commentators have puzzled over how a sum of money can really serve to make up a bodily injury, emotional loss, or pain and suffering (see for example, Radin 1994). The person who is injured and unable to work is entitled to money damages to make up lost income. Missing work may have other social and emotional costs which do not fall under the head of lost income, and which are at best very difficult to make up in monetary terms. As a result, money is an imperfect means of making it as though an injury had never happened. In that sense, though, nothing could make it as though the injury had never happened. Insofar as the costs of injury cannot be made up, money damages are problematic. But insofar as they enable a plaintiff to adapt to his or her situation, money damages are an appropriate way of transferring the loss so that it becomes the injurer's problem to decide how to deal with what is properly his or her loss. The idea that people should bear the costs of their choices requires that the defendant bear the costs of such adjustments as must be made.

¹⁰ See the discussion of this issue in Weinrib (1989) and Chapman (1995).

¹¹ Someone who would turn around and sue someone who has conferred a benefit in that way may not be an admirable character, but that is a separate issue.

Once we understand the fault system as an expression of fair terms of interaction in a world of risks, we can see why it imposes a general requirement on agents that they take into account the costs their actions may impose on others. The question is not whether I am being careful by the standards of what I am doing, but whether I am being appropriately careful in light of my neighbour's interests in security and mine in liberty. The importance of my particular activity enters into defining the appropriate degree of care, by fixing the degree of liberty appropriate to those engaged in that sort of activity. Only this conception of fault can provide an objective measure of the costs of my activity that will enable us to honour the principle that one should bear the costs of one's own activities.

7 Some Contrasts: The Learned Hand Test

This understanding of the fault system is importantly different from Judge Learned Hand's influential test for liability, or at least the standard reading of that test. Hand emphasised the need to balance the costs of accident avoidance against the likelihood and extent of injury. In a case concerning a barge that had broken loose while unsupervised, he offered the following formula for balancing them "[T]he owner's duty [. . .] to provide against resulting injuries is a result of three variables: (1) the probability that she will break away (2) the gravity of the resulting injury, if she does (3) the burden of adequate precautions [. . .] if the probability be called P, the injury L; and the burden B; liability depends upon whether B is less than L multiplied by P."¹² Although the test is often translated into monetary terms, it need not be—costs on both sides of the "equation" can include non-monetary factors.

So understood, Hand might be thought of as pointing to the importance of both liberty and security interests. The dominant reading of Hand's test is at odds with the idea of a fair division of risks, though. On this economic reading, the standard of reasonable care is a standard of individual rationality, which justifies outcomes by their beneficial consequences for the decision maker. So long as compensating would be cheaper than taking precautions, the injurer is free to regard the costs to others as acceptable side effects of his activities. If it is cheaper to compensate, though, no compensation is needed, because the injurer has taken all of the precautions that *would be* justified by their costs. Those who fail to take more generous precautions are not liable if someone is injured as a result of that failure. This has two consequences at odds with the idea of fair division of risks. First, the costs of precautions to the particular tortfeasor are relevant to setting the standard of care he must meet. Thus if a precaution is particularly difficult in the circumstances, that potentially counts as a reason not to take it. As a result, the security of others is subject to the costs precautions pose for particular injurers. Second, the anticipated extent of damages enters into setting the standard of care. If those who might be injured have smaller incomes to replace, for example, correspondingly less by way

¹² *United States v. Carroll Towing Co.*, 159 F.2d 169, at 173 (2d Cir. 1947).

of precautions are justified by their costs. On the Hand test, care for the interests of others is only justified when the costs of taking care are less than the costs of compensating injured parties.

On the risk-ownership conception, by contrast, fundamental interests in both liberty and security are protected even in cases where compensation would be cheaper than precautions.¹³ The idea of the reasonable person allows us to define both the duty of care and standard of care without reference to the extent of damages in any particular case. As a result, reasonable care is defined in terms of fair terms of interaction *in general*. If a security interest is protected against a certain type of risk, that protection is not lost because precautions would be more expensive than compensation on a particular occasion; if a liberty interest is protected, it does not need to be compromised, even if it could be at low cost. If injuring someone with a small income to replace would be cheaper than taking precautions, no liability would lie on the economic test, but it would on the reasonableness test. Conversely, my liberty interest in driving my car is protected even in those cases where driving it probably does not make my life any easier or less expensive. And if a security interest is not protected, no questions can even arise about the costs of protecting it.

The fault system thus provides a way of *measuring* costs across persons without *aggregating* them. On the economic test, tort liability serves two distinct purposes. First, it serves as an incentive to take appropriate precautions. Second, it serves to compensate those who are injured so as to provide them with an incentive to sue—thus underwriting the first incentive. Neither incentive is needed when injurers already take such precautions as are justified by their overall costs. Both are needed when the failure to take precautions increases overall accident costs. There is much that is puzzling about such a picture, notably its readiness to leave costs where they lie in just those cases where it would have been more expensive for *the injurer* to take precautions than for *the victim* to bear them. The risk-ownership conception avoids these difficulties because it ties liability to particular risks. Those who create wrongful risks are liable if those risks ripen, even if injuring others was less expensive than being careful would have been.

8 Insurance

For related reasons, the fault system's conception of risk treats considerations of insurance as secondary to questions of liability. Just as first-person insurance enables people to protect themselves against any losses that they might suffer, so liability insurance allows parties to protect themselves against losses they might be left with as a result of their negligence. Injuries occasioned by wrongful risk imposition belong to the people who wrongfully cause them. If others contract to assume those

¹³ The incentive effects of such an imbalance of costs might lead some to decide to injure and pay rather than take precautions, thus substituting private rationality for public standards of reasonableness.

risks, such contracts and their terms are a matter between the defendant and those with whom such agreements are made, in which the law takes no interest. Conversely, if an insurer has indemnified a plaintiff against a certain loss, the insurer has a right of subrogation against those who negligently injure the plaintiff. Because the insurance contract passes the risk of injury onto the insurer, the insurer can collect from the person to whom the risk properly belongs. If, as is often the case, both plaintiff and defendant have made prior arrangements, litigation will involve the two insurers. That this should be so reflects the way in which the tort system supposes that risks can be owned and traded.

In part because so many suits directly involve insurers rather than the parties to an injury, insurance is sometimes thought to play a more fundamental role in tort liability. Judgments of liability are sometimes thought to rest on questions of which party was in a better position to insure against a category of loss. For example, the law's unwillingness to compensate for the sentimental value a plaintiff attaches to some injured object is sometimes explained in light of the fact that the plaintiff was in a better position to insure against such losses than was the defendant.¹⁴ The idea of fair terms of interaction stands in the way of arguments of this sort on the same two grounds as it rejects the economic interpretation of the Hand test. Just as the Hand test makes judgments of liability depend on whether it would be rational for *this* defendant to avoid injuring *this* plaintiff, rather than asking about the importance of the liberty and security interests to reasonable persons, so insurance arguments look to whether it would be rational for plaintiff or defendant to insure against his kind of loss. The resulting inquiry looks to questions about both plaintiff and defendant that are both too idiosyncratic and too general. They are too idiosyncratic, because the extent to which the plaintiff's security is protected depends on the particular interests of the defendant who has caused the injury, and the extent of the defendant's liberty is fixed by the particular sensitivities of the plaintiff. Each party is limited in this way precisely because insurance allows parties to protect idiosyncratic interests. At the same time, they are too general, because whether or not it is rational for a particular person to insure depends on that person's general pattern of activities. Whether or not a defendant will insure against injuring a certain class of plaintiff depends on the overall likelihood of that defendant causing that type of injury. Those who repeatedly expose others to a similar risk of injury will insure; those who are repeatedly exposed to those risks will insure themselves against injury. Thus both liberty and security are hostage to the overall patterns of activity of particular plaintiffs and defendants. Making liability turn on which of the parties is in the best position to insure rests on the idea that the loss is the common problem of both parties. Once the loss is thought of in this way, the liberty and security of each depends on the particular situation of the other.¹⁵

¹⁴ See for example, Alan Schwartz's (1992, 820, 832–40) argument that American products liability law leads consumers to purchase more insurance than they want.

¹⁵ Insurance arguments sometimes take another form, which faces additional difficulties as well. Courts sometimes appeal to the availability of standard types of insurance in determining who should bear the costs of and injury. In *Lamb v. Camden London Borough Council*, (1981) QB 625

9 The Disproportion Test

But if the fault system does not reduce reasonableness to overall rationality by aggregating injury and avoidance costs across persons, it also does not require the “disproportion test” sometimes enunciated by English courts. That test supposes that security enjoys a special priority, and so looks only to the danger posed by various acts, and assigns a lesser weight to liberty interests. In *Bolton v. Stone*, Lord Reid, after conceding the importance of the likelihood and severity of injury to fixing the standard of care, said that he did “not think it would be right to take into account the difficulty of remedial measures.”¹⁶ Reid later qualified the test, acknowledging that precaution costs could be taken into account if the costs were large and the danger small.¹⁷

No such disproportion is appropriate when we consider that both liberty and security interests are always involved in setting the standard of care. While we might agree with Lord Reid’s sentiment that if cricket cannot be played safely, it should not be played at all,¹⁸ other liberty interests may be important enough to justify exposing others to risks. Driving a car safely almost certainly creates greater risks than does cricket. So too do countless other activities. To be fair to Lord Reid, he concedes this, noting that “in the crowded conditions of modern life even the most careful person cannot avoid creating some risks and accepting others.”¹⁹ He also couches the disproportion test in terms of the risks a reasonable man would think it right to neglect. A reasonable man, or better, a reasonable person, would not think in the terms suggested by the Learned Hand test, weighing precaution costs against compensation costs. Instead, the reasonable person thinks from the perspective of equality, and takes such care as is required by a like liberty and security for all. Because the only way of increasing the sphere of liberty of defendants is to increase it for all, some genuine and avoidable risks may be disregarded by the test, not because they are mere possibilities or cost-justified, but because the liberty interest at stake is so important.²⁰

(C.A.) Lord Denning pointed to the availability of homeowner’s insurance to spread the costs of the damage to the plaintiff’s home caused when squatters moved in after the defendant’s negligence rendered it uninhabitable. Yet in order for such considerations to arise, the regime of legal rights needs to be determined. Insurance contracts ordinarily include a right of subrogation against tortfeasors; pointing to the availability of an insurance policy presumes the absence of liability.

¹⁶ *Bolton v. Stone*, (1951) App. Cas. 850, 867 (H. L.) (Per Lord Reid) I presume “remedial” here means “risk reducing,” rather than the cost of damages.

¹⁷ *Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Pty. Ltd (The Wagon Mound n. 2)*, (1967) 1 App. Cas. 617, at 641 (P.C.) On appeal from Australia.

¹⁸ *Bolton v. Stone* at 867

¹⁹ *Bolton v. Stone* at 807.

²⁰ Both the Hand test and the disproportion test are potentially misleading, because both talk about the risks that may be disregarded, as though negligence is a matter of consciously considering a risk and deciding whether or not to ignore it. But the standard of care in negligence law is not centrally concerned with the injurer’s state of mind, only with outward behaviour. Whether or not one exposes others to risks through ones voluntary actions is not in the first instance a matter of whether or not one pays attention to those risks. Instead, it is a matter of the risks one poses.

10 Explaining Tort Doctrine

In the remainder of this chapter I show how the ideas of risk ownership and the reasonable person serve to make sense of three important features of tort law. The first three are respects in which liability is limited. First, tort law combines an “eggshell skull rule” according to which an injurer is liable for the full *extent* of injuries, no matter how unusual such injuries are, with a “ultrasensitive plaintiff rule” according to which an injurer is not liable for unusual *types* of injury, no matter how severe those injuries are. Second, the standard of care in tort is objective, so that due diligence is not a defence to a tort action. Third, tort doctrine draws a sharp line between nonfeasance and misfeasance, as a result of which there is no tort duty to rescue. My discussion aims to show the sense in which these tort doctrines reflect an attractive underlying conception of fairness even when they at first seem cold and unfeeling. Looked at from the perspective of binary adjudication between two parties, that conception of fairness may appear to leave too many misfortunes where they lie, but, as I explain in chapter 9, a fuller application of the same conception of risk leads to the conclusion that some of those misfortunes should be held in common as part of a larger pool.

11 Reasonableness and Objectivity

The idea that those who create unreasonable risks are responsible for them shows why the idea of fault must be objective in a strong sense of that term. The fact that someone was trying their best does not excuse them from liability. The classic illustration of this point is the 19th century case of *Vaughan v. Menlove*.²¹ Menlove, who had limited mental abilities, left a rick of hay on the edge of his property, close to Vaughan’s barn. The hay spontaneously combusted, taking the barn with it. Vaughan sued for damages. Menlove’s lawyers argued that because he was not intelligent enough to understand that hay was susceptible of spontaneous

Avoiding risks to others is my problem, but I need not adopt any particular solution to it. If we think of liability in terms of the economic conception of the Learned Hand test, the difficulties attendant on paying attention would seem to be among the costs to be taken into account in determining the optimal level of precaution. Paying attention is a cost, and like other accident avoidance costs, its expenditure must be justified. However, if we think of liability in terms of a fair distribution of risk, the level of compliance is always incorporated into the standard of reasonableness. The fact that on some particular occasion someone has difficulty complying with a fair standard is not more significant than the fact that someone has difficulty repaying their debts. In each case, it is not up to the particular others with whom they interact to bear the costs of that difficulty. Fault liability is not a sort of queer hybrid between strict liability and recklessness—as suggested by Larry Alexander (1992). While it is trivially true that all cases of risk imposition involve agents who either did or did not avert to the risk, it is the risk, rather than the advertence or nonadvertence to it, that provides the basis for the liability. Negligence liability is defined in terms of the appropriate distribution of risk, and as such is prior to questions about the tortfeasor’s mental state.

²¹ *Vaughan v. Menlove* (1837) 132 E.R. 490 (C.P.)

combustion, he should not be liable for the resultant damage. The court rejected the argument, for reasons that have broad significance. Because of the binary structure of adjudication—because it had to be somebody’s bad luck—the court had to decide whose it was. Here nobody could in fact have controlled the outcome, but the bad luck must be borne by someone. If we relieve Menlove of responsibility for something he cannot control, we saddle Vaughan with a cost the origins of which *he* could not control. There is no way to retreat to equating responsibility with control. Yet the decision is not just an administrative one in a situation in which nobody could control the loss.²² Rather, holding Menlove liable is the only way to treat the parties as equals, by protecting them each from the activities of others, and leaving each with room to pursue his or her own purposes. The only way one can be exempt from the need to bear the costs of one’s activities is to not be an agent at all. Had the court relieved Menlove of responsibility, and treated the bad luck as Vaughan’s, they would have been treating Menlove himself as a mere natural thing rather than as an agent. At the same time, had they refused to make Menlove bear the costs of his activities to others, they would have been treating Vaughan as less than an equal, making him bear the costs of a broader range of others’ activities than they must bear of his own.²³

Put slightly differently, while we hesitate to blame Menlove for his incapacity, we hold him liable because the risk that he imposed on Vaughan was rightly his. We hold him liable without supposing him to be morally tainted because a fair distribution of risks requires that the risk lie with him. His liability can also be restated in terms of his responsibility to moderate his activities in light of the legitimate claims of others. Those who engage in the activities of ordinary life have a responsibility to take account of the dangers their activities pose. Those who are genuinely incapable of assessing risks and taking precautions—incapable, that is, of moderating their pursuit of their own ends in light of the legitimate claims of others—cannot be held responsible for the consequences of their deeds, but they also can be prevented from exposing others to those risks. Those who have the requisite capacities cannot excuse themselves on those occasions on which they fail—for whatever reason—to exercise them adequately. That is, the general capacity for responsible agency is the capacity both to pursue one’s ends and moderate one’s claims in light of one’s duties to others. In the next chapter I will say more about how that capacity is specified. For now, the crucial point is that those who have the general capacity are required to moderate their behaviour in light of the interests of others. The extent to which that

²² It is not merely administrative for two reasons: First, it does nothing to prevent future losses, for those in Menlove’s situation are *ex hypothesi* incapable of appreciating the risks. Second, it is plainly administratively simpler to let losses lie where they fall, unless there is some pressing reason to do otherwise.

²³ Holding Menlove liable is just the flip side of a principle we have already seen. If you injure me in spite of taking reasonable care, you are not liable, even if I injure easily. To hold you liable in such circumstances would mean that you could only act subject to my idiosyncrasies. In just the same way, Vaughan’s interest in security cannot be made to depend on Menlove’s lack of intelligence.

capacity must be exercised is given by those terms. In the case of accidents it is thus given by the standard of reasonable care. Menlove cannot both claim incapacity in a particular case, yet also insist on the liberty to engage in risky activities. Insofar as he escapes responsibility, his liberty can be constrained for the safety of others.

The details of *Vaughan* have led some commentators to suggest that it is a misleading example of the principle for which it is supposed to stand. The defendant had been warned of the dangers, and declared that his stock was insured and he was “willing to chance it.” This might suggest that he really was in control of the situation and could have avoided the injury, but chose not to.²⁴ Certainly, if we broaden the time frame, there must be some precautions which he could have taken—selling his land and moving to the city, if nothing else. But the problem of limited foresight recurs even on this broader time frame. His failure to recognize the seriousness of danger prevented would have prevented him from taking further precautions. Moreover, the question of whether he is responsible for the earlier failure to take precautions is objective in just the same way. He did not realize further inquiries were necessary; the question remains of whether or not he should have.

Vaughan v. Menlove is a particularly dramatic example of a far more general principle. The same requirement of treating parties as equals by holding them responsible for the risk they have created regularly plays itself out in more mundane examples. Rather than asking everyone to expend the same degree of effort, thus leaving each person’s security dependent on who their neighbours happen to be, the law demands the same degree of care from everyone and protects all to the same degree. If I am tired or distracted, and carelessly injure you as a result, I am not excused because at the time of the accident I could not control its outcome. Nor am I excused because I didn’t realize the activity was risky. My inattention may itself be a reflection of my preoccupation with higher things, it may be the result of exhaustion because I busied myself with good works, or it may simply reflect inappropriate priorities on my part. From the point of view of liability, none of these things properly matters, because none of these things entitle me to put you at risk. Likewise, I am not excused if I didn’t know of the dangers my activity, but should have, quite apart from any questions of what, if anything, else occupied my mind. In each case, I remain liable even though I was doing my best at the time, for the alternative would be to make your security dependent on what I happened to be capable of. As was the case with *Vaughan v. Menlove*, it is always possible to widen the time frame and ask if I could have taken precautions earlier. To answer that question, though, we must ask about my duties, not my efforts.

The same principle requires that those who do not try their best—those who can see that some accident is possible or even likely—, do not always incur liability. By driving an automobile carefully, I may know that if I drive frequently enough I am likely to injure others. Nonetheless, I can drive and even injure others and escape liability. In such cases, I avoid liability because I exercise the care required of me. It may be that I could have driven even more carefully, and reduced the risk of injury

²⁴ I am grateful to George Christie for pointing this out to me.

still further. Indeed, in the case of automobiles, this is plainly possible. Driving at 3 miles per hour is very safe, however annoying it might be to other drivers. Yet the person who drives much faster is not liable. In the same way, the person who is just attentive enough avoids liability, even though by being more attentive risks could have been reduced further.

The outcome in *Vaughan* may nonetheless strike some as unfair. If so, it is perhaps because they suppose that the costs of Menlove's lack of intelligence should not be borne by him alone. Though the general idea is surely appealing, it does not lead to the conclusion that Vaughan should not be allowed to recover. If we wish to distribute the costs of Vaughan's misfortune, it is difficult to see why Vaughan in particular should bear a disproportionate share. We might wonder instead whether those costs might be treated as everyone's bad luck. That question is a political one, because the only *kind* of answer it can receive will depend on our view of the importance of various types of activities.

12 A Clarification About Objectivity

Talk about objective standards makes some people uneasy. The idea of objectivity may suggest that such standards are somehow eternal and exist quite apart from questions about which interests people have and how important they are. Any such conception of objectivity might well be suspected of being little more than a smoke-screen for interests that are already well-entrenched. But I mean something considerably more modest. Precisely because the fault standard turns on substantive views about the importance of various activities, its contours will always be open to debate. It is objective in a negative sense, inasmuch as it is not subjective, that is, the limits of liability are not fixed by the views, interests, or abilities of either of the parties to a tort action. Instead, it protects the interests in both liberty and security that everyone is assumed to have. On the basis of those interests, it asks whether a reasonable person is entitled to have a particular interest protected. The importance, and even existence, of particular interests is often controversial, and the common law has sometimes been indifferent to what now seem significant interests, and concerned about insignificant ones. Clear examples of such indifference can be found in the absence, until recently, of any legal recognition of the interest that women have in being free of sexual harassment. But the very possibility of identifying the problems shows the way to the appropriate response to them: moving to a more nuanced objective standard.²⁵

In cases in which parties are asymmetrically situated with respects to information, power, or vulnerability, risks must be divided accordingly. The law never had conceptual difficulties taking account of such asymmetries in cases of professional

²⁵ See e.g., Estrich (1991, 842), for an exploration of the possibilities of a reasonableness standard in sexual harassment cases that recognizes the seriousness of women's interests and the limited importance of men's interests in harassment.

negligence. The fact that a physician exposed patients to risks to which patients do not expose physicians leads to a different sort of division of risks. The law has not always been good at understanding such asymmetries, and there are cases, most notably around issues of gender, in which its misunderstanding of power relations has been appalling. A particular objective standard is always an expression of particular views about the importance of various interests. As a result, in an important sense it is always political, and in principle subject to contest. It is also political in a less appealing sense, inasmuch as it expresses power relations in the society. Yet in this sense, no way of ordering any aspect of social life can be free of such effects.

13 Unusual Sensitivities

The converse of the refusal to make special accommodations for those trying their best is tort law's lack of solicitude for plaintiff's with unusual sensitivities. It too is a direct consequence of the idea of risk ownership. If an interest is not protected, the fact that someone's conduct foreseeably may injure it does not create liability. The law of nuisance is fully explicit on this point. If my singing in the shower gives my neighbour headaches, it may be awful of me to continue, but my neighbour cannot enjoin me to desist. In the extreme and leading case, a church bell which caused a neighbour to suffer seizures was allowed to continue.²⁶ The example is striking because the injury was extreme and certain. In cases of negligence, the situation is only slightly more complicated. The person who fails to take care when someone may be injured in an unusual way does not incur liability if they are injured. Suppose you get a severe allergic reaction from the plants in my garden. I do not need to compensate you for your injury unless it is a sort against which I ought to have taken precautions.²⁷ On the other hand, if I keep plants known to be toxic to humans, I may be liable. The basic principle is that the risk of certain idiosyncratic injuries lies with those who are injured. The fact that others cause them is not more relevant than the fact that various acts of careful people may be causal antecedents of an injury. This is, of course, just another application of the general principles of duty and remoteness: one can only become responsible for a particular risk if one has a duty to others to avoid injuring them in some particular way.

But if unusual types of injury do not create liability, unusual extent of injury does. The idea of risk ownership explains what is called the "eggshell-skull rule." If I injure you through my negligence, and unbeknownst to me, you have an unusual susceptibility so that the extent of your injury far exceeds the ordinary extent, I am nonetheless liable for your entire injury. The parallel with lost income is instructive here: if I injure you and must make up the income you lose as a result, the amount

²⁶ *Rogers v. Elliott* 15 N.E. 768 (Mass. 1888).

²⁷ This extends even to American products liability. An unusual sensitivity, rather than a failure to warn, is treated as the proximate cause of an allergic reaction. *Adelman-Tremblay v. Jewel Cos.*, 859 F.2d 517; (7th cir. 1988).

I must make up depends on your earning capacity, whether or not I was aware of it. Having taken a risk with some aspect of your security, I own the full extent of the injuries connected with that aspect. Just as I escape liability if, by good fortune, you are not injured, so I am liable for the extent of the injury that is within the risk that makes my conduct negligent. That is, the thin skull rule only applies if the injurer was behaving unreasonably with respect to the risk in question. At the same time, if I am careless with respect to one aspect of your security and, because of your unusual susceptibility, I injure you in some other respect, the thin-skull rule does not apply. Because liability is tied to the creation of particular risks, my failure to show appropriate care with respect to one risk does not lead to liability any more than it would if different people were involved, as in the *Palsgraf* case.

The idea of risk ownership lets us see that, far from being opposed principles, the thin-skull rule and the ultrasensitive plaintiff rule are actually expressions of a single underlying principle. My liability does not depend only on what happens, but rather on the risks to which I expose you. If you are sensitive in unusual ways, the injuries that come out of that are yours. Were others liable for them, their liberty would be subject to your security, no differently than if your security was limited by the good faith efforts of others. And the boundaries of reasonable care depend on interests in both liberty and security. The problem with making defendants liable for unusual injuries is not that it would create crippling liability—that may or may not be the case—but rather that it would encumber liberty too much, as people seeking to avoid wronging others would need to moderate their activity to too great an extent. By contrast, liability for the full *extent* of injury, no matter how surprising, places no burden on liberty. For no extra precautions are required to avoid injuries severe in extent than are required to avoid less severe injuries. The standard of reasonable care is not a proxy for the price of injury. The relation between the thin-skull rule and ultrasensitive-plaintiff rule thus illustrates the difficulties of economic approaches to tort liability, which collapse unreasonable risk imposition into expensive risk imposition. So long as these are kept distinct, the thin-skull rule and ultrasensitive plaintiff rule can be seen as complimentary. From the point of view of the reasonable person, the relevant risks are the risks of injury, not of being out-of-pocket.

In each of these three cases—thin skulls, ultrasensitive plaintiffs, and those who try their best—a fair distribution of risks allows some plaintiffs to collect from a defendant who wasn't morally bad, and bars other plaintiffs from collecting from defendants who were. The result may make tort law seem like a cruel and cold system, a shocking illustration of why Hume described justice as a "jealous virtue." In particular, it allows someone to knowingly expose another to injury, standing narrowly on his or her right to do so, and utterly lacking in compassion. While such concerns are not without force, it is important to remember that the underlying issues are not about blame but about coercion and equality. A kinder, gentler regime of individual responsibility would lead to even less appealing results. To require each person to limit their activities because others might be made worse off by them is to give up on both the idea of individual liberty and the idea of people moderating their activities in light of the legitimate claims of others. If all of a person's vulnerabilities limit the liberty of others, none is free to go about their own affairs.

14 Misfeasance and Nonfeasance

The law's lack of solace for unusually sensitive plaintiffs whose vulnerabilities are known is of a piece with the legal distinction between misfeasance and nonfeasance. The distinction between misfeasance and nonfeasance is not the same as that between acts and omissions, nor even to that between harm and benefit. Tort duties are often breached by omission—the failure to take precautions is the most obvious example—and when people occupy special roles or stand in special relations, liability can follow on the failure to confer a benefit. Instead, the distinction between nonfeasance and misfeasance is the distinction between unreasonable behaviour that injures and reasonable behaviour that does. The most striking consequence of this distinction is the absence of a tort duty to rescue. There is surely a moral duty to rescue in some situations. The failure to fulfill such a moral duty might be enforced through a criminal penalty, but does not provide the basis for tort liability. Now it might be thought that if anything is reasonable in such cases it is to take small easy steps in order to aid another. But although there is a clear sense of the word “reasonable” on which this is true, it is a sense which is foreign to tort law and the idea that particular risks belong to particular people. The fact that you are in peril, and I know of your peril, does not make that risk mine. As a result, if it ripens into an injury, it is not my loss to make up. The idea of risk ownership offers a simple explanation: mere knowledge of another's needs, no matter how pressing, is not enough to shift a risk from one person to another. To shift risk in this way would be unduly burdensome to liberty, because it would always require people to give up what they were doing whenever they had a prospect of aiding others in distress (McCaughey 1897, 497). Moreover, those who failed to aid would be responsible for the full extent of the other person's injury.

Now it might be thought a more moderate tort duty to rescue is appropriate, such as a duty that was limited to *easy* rescues only. As morally attractive as such a proposal might be, it would sit uneasily with the rest of tort doctrine. For in cases of misfeasance, the existence of duty of care does not depend on the ease with which it can be discharged in the particular instance. Instead, it depends on the significance of the relevant interests in liberty and security. Once account has been taken of those, the costs of care to the defendant counts for nothing. Put differently, rights in tort law are not defined in terms of prices or welfare. That is also why the frequency with which someone engages in an activity is irrelevant to questions of reasonable care. The same point applies to any imaginable duty to rescue: if the existence of the duty depends on the ease with which it is discharged, it would fail to express the idea of reciprocity, because it would make the security of those in peril depend on considerations about the welfare of those positioned to rescue them. Conversely, it would make the liberty of those in a position to rescue others depend on the welfare of others. The point is not just that this would import an element of chance into the situation. That much is inevitable, since the opportunity to rescue is largely a matter of being in the right place at the right time. From the point of view of risk ownership, the real problem is that who owned which risks would be tied to shifting welfare considerations. Here again we see the difference between a conception of

tort law that focuses on fair terms of interaction and one that focuses on costs. From the point of view of costs, the costs of discharging a duty on a particular occasion might well be relevant to whether there was such a duty. From the point of view of fair terms of interaction, they are not.

While the absence of a duty to rescue may seem yet another example of a cruel and unfeeling doctrine, it is important to recognize that it does not stand in the way of considerable mandatory redistribution. Many misfortunes can and should be held in common. The distinction between misfeasance and nonfeasance is simply the requirement that a particular misfortune not be shifted from one person to another.²⁸

References

- Alexander, L. 1992. Foreword: Coleman and Corrective Justice. *Harvard Journal of Law and Public Policy* 3: 621–36.
- Benson, P. 1995. The Basis for Excluding Liability for Economic Loss in Tort Law. In *Philosophical Foundations of Tort Law*. Ed. D.G. Owen, 427–58. Oxford: Oxford University Press.
- Chapman, B. 1995. Wrongdoing, Welfare and Damages: Recovery for Non-Pecuniary Loss in Corrective Justice. In *Philosophical Foundations of Tort Law*. Ed. D.G. Owen. Oxford: Clarendon.
- Cohen, G.A. 1997. Where the Action is: On the Site of Distributive Justice. *Philosophy and Public Affairs* 1: 3–30.
- Estrich, S. 1991. Sex at Work. *Stanford Law Review* 43: 813–61.
- Feinberg, J. 1992. The Moral and Legal Responsibility of the Bad Samaritan. In Id., *Freedom and Fulfilment*. Princeton, N.J.: Princeton University Press.
- Fletcher, G.P. 1972. Fairness and Utility in Tort Theory. *Harvard Law Review* 85: 537–73.
- Hart, H.L.A. 1968. The Ascription of Responsibility and Rights. In H.L.A. Hart, *Punishment and Responsibility*. Oxford: Oxford University Press.
- Herzog, D. 1989. Liberal Neutrality. In Id., *Happy Slaves*, 148–81. Chicago, Ill.: University of Chicago Press.
- McCauley, T.B. 1897. Notes on the Indian Penal Code. In Id., *Works*, vol. 7. New York, N.Y.: Longmans Green.
- Perry, S. 2001. Responsibility for Outcomes, Risks, and the Law of Torts. In *Philosophy and the Law of Torts*. Ed. G.J. Postema, 72–130. Cambridge: Cambridge University Press.
- Radin, M.J. 1994. Compensation and Commensurability. *Duke Law Journal* 43: 56–86.
- Rawls, J. 1985. Justice as Fairness: Political Not Metaphysical. *Philosophy and Public Affairs* 14: 223–51.
- Rawls, J. 1993. *Political Liberalism*. New York, N.Y.: Columbia University Press.
- Ripstein, A. 1999. *Equality, Responsibility, and the Law*. Cambridge: Cambridge University Press.
- Ripstein, A. 2000. Three Duties to Rescue. *Law and Philosophy* 19: 751–79.

²⁸ Still, if a tort duty to rescue is difficult to justify, criminal sanctions for failure to make easy rescues is not. Joel Feinberg offers the example of a statutory duty to report fires to the fire department (Feinberg 1992). Such a duty would appropriately be limited to easy reports, and failure to report might be punishable by a fine. Feinberg's example is illuminating in this context because the penalty that would appropriately attach to such a crime would be nowhere near that attached to arson, quite apart from the magnitude of the fire. Instead, the duty to report could be thought of as part of a more general obligation to contribute to a scheme of public cooperation. With this model in hand, Feinberg suggests a parallel duty of easy rescue in emergency situations. Such a duty would fall randomly, though presumably not in an unfair way, and its burden would be small. I take up this topic in more detail in Ripstein (2000, 2004).

- Ripstein, A. 2004. The Division of Responsibility and the Law of Tort. *Fordham Law Review* 5: 1811–44.
- Scanlon, T.M. 1998. *What We Owe to Each Other*. Cambridge, Mass.: Harvard University Press.
- Schwartz, A. 1992. The Case Against Strict Liability. *Fordham Law Review* 60: 819–42.
- Walzer, M. 1984. Liberalism and the Art of Separation. *Political Theory* 3: 315–30.
- Weinrib, E. 1989. Right and Advantage in Private Law. *Cardozo Law Review* 10: 1283–309.
- Weinrib, E. 1995. *The Idea of Private Law*. Cambridge, Mass.: Harvard University Press.

The Reasonable Consumer under European and Italian Regulations on Unfair Business-to-Consumer Commercial Practices

Chiara Alvisi

In *The Oxford Companion to Law*, Walker defines the legal concept of a reasonable man with this closing remark:

It has been observed that Lord Bramwell occasionally attributed to the reasonable man, the agility of an acrobat and the foresight of a Hebrew prophet, but the reasonable man has not the courage of Achilles, the wisdom of Hercules, nor has he the prophetic vision of a clairvoyant. In truth the reasonable man is a personification of the court of jury's social judgement. There is, however, apparently no "reasonable woman" known to common law (Walker 1980, 1038).

In what follows, I will present my own view of the reasonable man as consumer, a view to some extent different from that which Walker presents in *The Oxford Companion to Law*.

I will start with the EU Directive 2005/29, which amended the EU directive on misleading advertising by introducing a general prohibition against unfair business-to-consumer commercial practices. This means that misleading advertising can henceforth be construed as an unfair commercial practice, and it is on this last topic that I focus here.

Unfair business-to-consumer commercial practices are defined in the directive in a general clause:

A commercial practice shall be unfair if it is contrary to the requirements of professional diligence and it materially distorts or is likely to materially distort the economic behaviour of the average consumer whom it reaches or to whom it is addressed, or of the average member of a group when a commercial practice is directed to a particular group of consumers (Article 5(2)(a)(b) of Directive 2005/29/EC).

1 What Does "Contrary to the Requirements of Professional Diligence" Mean?

The directive explains that professional diligence is connected to the duty of good faith and describes the "standard of special skill and care which a trader may reasonably be expected to exercise towards consumers" (Article (2)(h)).

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This means that it will not suffice for traders (tradespeople and merchants) to act honestly in carrying out their trade or to comply with commercial standards of fair dealing. They are also required to make their business interests secondary to the consumer's whenever it is reasonable to expect this in the context of the case at hand.

For Italian scholars, this reasonable expectation expands the concept of good faith and professional diligence in the consumer's favour, because it might require traders to undertake further activities beyond those they are normally required to carry out in fulfilling a duty of good faith.

Therefore, it seems to me that, according to the directive, the term *reasonable* does not mean "normal" nor "statistical". In fact, it is not sufficient that the trader acts diligently according to the *id quod plerumque accidit* rule. In my opinion the use of the word *reasonable* in the directive should be interpreted as meaning correspondent to an expectation which is adequate in the context of the individual case concerned.

2 Whose Reasonable Expectation is it that Counts as a Measure of the Trader's Fairness and Diligence?

The directive does not answer this fundamental question for it is cast in the passive voice and so omits to identify a party whose expectation is relevant. We just see this definition: "professional diligence means the standard of special skill and care, which a trader may reasonably be expected to exercise towards consumers". Hence the question, reasonably expected by whom? The general public? The judiciary? Lawmakers?

Italian law, by contrast, clearly states (in implementing the EU directive) whose reasonable expectation it is that the trader should take into account, and so who it is that can expect diligence and care from the trader: the consumer. Under Article 18 (h) of the Italian Consumer Protection Code, professional diligence is "the standard of special skill and care that *consumers* may reasonably expect a trader to exercise toward them commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity".

The directive was open to interpretation, and so the Italian legislator had to decide how to read it. Whether the legislature's decision was itself legitimate or reasonable is a matter for discussion, but I believe it to be in keeping with the purpose of the directive and it protects the interests the directive is designed to safeguard.

The purpose (as set forth in Article 1 of Directive 2005/29/CE) is to help the European internal market function properly and to provide a high level of consumer protection within this market by harmonizing the member states' laws, regulations, and administrative provisions on unfair commercial practices harmful to the economic interests of consumers.

Among these interests is the consumer's interest in maintaining an ability to make an informed transactional decision. Indeed, a practice is unfair if it "is likely to

materially distort the economic behaviour” of the consumer (Article 5 of Directive 2005/29/CE).

Therefore, a consumer can seek an injunction against a trader even if there is only a risk that an unfair commercial practice could appreciably curtail the consumer’s freedom of choice, “thereby causing the consumer to take a transactional decision that he would not have taken otherwise” (Article 2(e) of the Directive 2005/29/CE). This option is extremely relevant to consumer protection. Indeed, Article 11 (2) of the directive allows member states to prohibit unfair practices “even without proof of actual loss or damage or of intention or negligence on the part of the trader.”

To seek an injunction it is not necessary for a consumer to have actually entered into a contract. In the event that a misled consumer has entered into a contract, it may not even be valid. In addition, the consumer may be able to successfully sue the trader for damages under applicable national law on the invalidity of contracts and on pre-contractual liability. (As is stated in Article 3(2), the “Directive is without prejudice to contract law and, in particular, to the rules on the invalidity, formation or effect of a contract”).

Consumers can also seek an injunction even if they have not been harmed and have not suffered any loss through their use of an advertised product, and even if they have not purchased the product. In addition consumers who do get harmed or do suffer a loss are further entitled to sue the product’s manufacturer or the trader, or both, on the grounds of product liability for defective products (as is stated in Article 3(3), “the Directive is without prejudice to Community or national rules relating to the health and safety aspects of products”).

In conclusion, commercial practices are deemed unfair and are accordingly prohibited if they threaten the consumer’s freedom of choice. This freedom is protected by the directive on the theory that an informed choice is an efficient one (see the directive’s 14th whereas).

It seems to me consistent with the directive’s purpose, and with the interests protected, that the trader’s professional diligence toward consumers should be measured by reference not just to market standards but also to the consumer’s reasonable expectation.

3 To Understand What a *Consumer’s Reasonable Expectation* Means, We Need Also Clarify the Meaning of *Reasonable Man*, or, More to *the Point*, of *Reasonable Consumer*

There are a few questions that need to be asked in working toward an adequate definition of a consumer’s reasonable expectation: How do consumers see the world? What do they think? What do they want? How do they feel? What is their understanding? What do they know? What is their experience? What is their history?

To answer these questions, we need to decide whether the consumer’s reasonable expectation corresponds to the average man’s normal—and perhaps optimistic—expectation, or to the many individual cases where consumers are anything but average and have to deal with possibly dubious business practice.

It is also important to point out that a reasonable expectation of professional fairness may in fact not be the average person's expectation, which is understood as "what most people expect". The *average person* is a notional concept, and this "he" or "she" in fact represents a myriad of very different people. So we can begin to see here that the term *reasonable expectation* needs to be carefully defined, which is precisely what will be attempted in this short article. I submit that we should not box it into a fixed, rigid, or statistical formula. *Reasonable expectation* should not just mean "*suitable for market practice*", consistent with trade usage, or in keeping with the *id quod plerumque accidit* rule. If we are not clear about what *reasonable* is and what *average* is, we may end up with too lax a standard; that is, we may end up requiring the trader to exercise toward the consumer a lower standard of diligence than European advertising regulations previously required.

In real life, consumers are that flesh and blood people whose expectations can be deemed reasonable if appropriate to their circumstances and to their ability to understand those circumstances. An unusual expectation is in this respect reasonable only if it can "reasonably" be predicted by the trader concerned. Traders and judges alike need to take into account such factors as age, physical or mental infirmity and naivety in thinking about the concept of reasonable expectation. Reasonableness is a term that by definition entails an understanding of the realities of life: that is, an adequate awareness formed by day-to-day contact with the real world, taking into account the individual circumstances of the person concerned, their problems, vulnerabilities, and so on. This means that professional diligence may have to be held to a higher standard if it is to respond to the individual nature of reasonable expectation. Therefore, traders should take into account not only market practice but also their customers' ability to understand what a trader says to them—whether they are young or old, healthy or ill, experienced or inexperienced.

The directive seems to suggest a notion that is in some respects realistic about the average consumer. As its 18th *whereas* states:

- "It is appropriate to protect *all* consumers from unfair commercial practices";
- in enforcing the national regulations implementing the directive, "national Courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case";
- in order "to permit the effective application of the protections contained in it," the "directive takes as a benchmark the average consumer," but it "also contains provisions aimed at preventing the exploitation of consumers whose characteristics [young age, physical or mental infirmity, or naivety] make them particularly vulnerable to unfair commercial practices";
- the average consumer is "reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors";
- "the average consumer test is not a statistical test."

The phrase "reasonably well-informed" has been translated in the Italian version of the directive as "normalmente informato", which means "normally informed".

So, according to this version of the directive, the average consumer's only standard characteristic consists in having the usual amount of information about a product, that is, he or she is a "normally informed" person.

However, the consumer is not expected to have a normal ability to understand but need only be "reasonably observant and circumspect, taking into account social, cultural and linguistic factors".

If you look at the Italian translation of the directive, you could come to the conclusion that EU legislators have adopted a mixed solution, a solution based in part on the facts specific to the case in question, and in part on statistical evidence.

If we take into account the proportionality required for the provisions' enforcement (a requirement set forth in the 18th whereas), we might conclude that the trader is entitled to assume the consumer would have a normal amount of information (a consumer unfamiliar with the normal run of things will not be protected if a normally-informed consumer would not be deceived in the same circumstances). But since your being informed does not mean you understand, the directive states (under Articles 6(2) and (7)(1)) that the judge or the competent authority, in assessing the fairness of a commercial practice, must base this assessment on the consumer's "reasonable attention and shrewdness" in "taking account of all [...] features and circumstances" of the practice in question.

Among the things that need to be taken into account in properly *considering the circumstances* are the following two points:

- the limitations of the communication medium (Article 7(1) of the directive), considering that more information can be provided in print and on the Web than on TV or on the radio;
- the type of product advertised, meaning that traders are required to exercise more diligence with complex products (such as financial instruments, telephone plans, and insurance policies); but traders must also consider that the average consumer tends not to pay as much attention when considering everyday goods.¹

Another factor that must be taken into account in *considering the circumstances* is the consumer's cultural background, social context, and language skills as elements affecting his or her ability to have a proper appreciation and understanding of the product advertised. Advertising must accordingly be suitable in the sense of its protecting the freedom of choice of particularly vulnerable people, having a lower-than-normal capacity to understand owing to judgement that may be compromised by emotional factors related to age, illness, weight, appearance and the like. However, if a consumer's understanding is normal for the group the consumer belongs to (for example, children) but is still inadequate for a grasp of the trade situation at hand, then a practice that relies on (or at least ignores) such an incapacity is deemed unfair because the incapacity is one that a reasonable trader is expected to recognize and take into account.

¹ See C.G.C.E., April 29, 2004: Procter & Gamble v. UAMI.

4 The Average Consumer and the Vulnerable Consumer

The Italian law implementing Directive 84/540/EEC has always been enforced by the country's antitrust commission (*Autorità Garante per la Concorrenza e il Mercato*, or AGCM) in line with the notion of the average consumer as interpreted by the European Court of Justice and as recently defined in the directive on unfair commercial practices. A survey of the cases the AGCM commission has ruled on evinces a clear idea the commission itself has when it comes to the characteristics of the average consumer.

We thus come to discover an average consumer—a *reasonable man* by definition,—who, for the AGCM, is really a hurried and inattentive reader and viewer. For this reason the test the commission uses in assessing whether an advertisement is misleading looks at the advertisement's initial impact on the consumer. The commission assesses the ad's fairness (or lack thereof) against what can be assumed to be the initial thoughts of a hurried and inattentive reader or viewer, and not against the conclusions this person would come to on reflection, having thought the matter through. Consequently, a conspicuous warning on a package will not suffice if the ad for this product does not also include the same warning. If the ad does include the warning, but does so in fine print by way of a footnote or a super-fast banner running across a television or cinema screen, this too will not suffice to prevent the ad from being deemed misleading. Nor will it suffice to rectify deceitfully ambiguous or incomplete information at a later stage, by way of additions, corrections, or explanations the consumer can only become aware of afterward, as in the course of later negotiations or inspections, or in an instruction handbook, or in a contract clause revealed once a purchase is made, and so on.²

The principle that an advertisement must be complete and contain all important information relative to the product has been held up especially for complex products, ones that a reasonable consumer cannot be expected to understand. These products include financial instruments, telephone plans, and insurance policies. In these cases, advertisements are often held to be unfair because the prices and other advertised economic conditions will not suffice except in combination with footnoted information on further charges, taxes, and the offer's period of validity.³

The reasonable consumer believes in miracles when it comes to their health, beauty, and physical and sexual performance.⁴ Thus, ads for body treatments and cosmetics can neither use emphatic language nor promise amazing results or

² It is in the following rulings that the Italian Antitrust Commission (AGCM) has established this standard interpretation of the concept of an average consumer: AGCM 8 August 2006, n. 15823; AGCM 29 March 2006, n. 15330; AGCM 12 December 2002, n. 11517; AGCM 1 August 2001, n. 9848; AGCM 22 December 1999, n. 7888; AGCM 15 April 1998.

³ Two AGCM ruling in which this principle has been applied are AGCM 1 August 2002, n. 11068; and AGCM 5 July 2001, n. 9747. On the issue of ads for mineral water, see AGCM 13 December 2001, n. 10237.

⁴ Hence the provisions in Articles 21(a), 22(2), and 23(n) of the Italian Consumer Protection Code.

immediate and definitive ones. Claims such as *Thicker hair*, *Prevents cellulite*, and *You'll lose seven kilos in seven days* are always deemed misleading because there is no way that anyone can get these results using cosmetic products or physical and beauty treatments alone. Indeed, the simple fact that the problem of cellulite, baldness or obesity cannot be remedied with cosmetic treatments should be something that people understand immediately. However, finding a solution to problems relating to self esteem is very important for many people and they are often unable to apply normal standards of judgement for psychological reasons. As a result the trader's standards must be higher to compensate for this factor.⁵

Reasonable consumers are influenced by expert advice and by the endorsements of respected TV presenters who work on health-related TV programmes or write articles on this topic. Thus, a toothpaste or a brand of mineral water cannot be advertised by a doctor or an expert, because this leads the consumer to conclude that the product provides medical benefits that it does not in fact have.⁶

The reasonable consumer in Italy is familiar with only a handful of basic words and forms in English.⁷ Thus, an advertisement ascribing a "lifting effect" to a cosmetic lotion could be deemed misleading for the Italian consumer, the word "lifting" being a false friend in Italian, since it is typically used as a noun meaning a "facelift," and so any advertising that uses the word can be taken to suggest, to many Italian consumers, that the product achieves a permanent result.⁸ The same is not true of consumers from the countries of northern Europe, such as Holland, where English is widely spoken.

The reasonable consumer is superstitious. The AGCM commission has taken the view that the advertising of products and services relating to the paranormal obviously targets people who purchase these kinds of products on the basis of irrational beliefs born of superstition and credulity and not ascribable to the misleading nature of the message per se. This does not make it permissible, however, to advertise talismans or other objects to which magical powers are attributed, claiming they have the power to solve an array of problems involving health, work, or life at large: this is considered misleading because it exploits the consumer's superstitious insecurities, anxieties, and fears.⁹

The reasonable consumer is normally an apprehensive, even fearful person. Thus, it is misleading to advertise jackets affording protection against electromagnetic radiation, because to do so is to play on fears about the danger of exposure to electromagnetic fields. On top of that, such advertising is dangerous and reckless,

⁵ The following AGCM rulings, among others, are relevant in this regard: AGCM 13 December 2001, n. 10232; AGCM 13 December 2001, n. 10230; AGCM 11 October 2001, n. 10026; AGCM 6 September 2001, n. 9924; AGCM 8 August 2001, n. 9867; and AGCM 29 March 2001, n. 9367.

⁶ Two relevant rulings are AGCM 25 February 1999, n. 6937; and AGCM 1 August 2001, n. 9848.

⁷ Such a limited acquaintance is exemplified in a case heard by the European Tribunal of First Instance (<http://curia.europa.eu>, dated 23 February 2006, T-194/03), regarding the risk that trade names might be confused, both of them using the word "bridge".

⁸ It just so happens that this case (CGCE 13 January 2000, C-220/98) involved a *German* consumer, not an Italian one, but this is just to show that such confusions do become an issue.

⁹ On which see AGCM 21 February 2002, n. 3640; and AGCM 23 November 1995, n. 3412.

because in promoting an ineffective product it induces the consumer to ignore the standard cautions for exposure to electromagnetic waves.¹⁰

I should say at this point that if some of these examples seem a little far-fetched, they are in fact real cases.

The reasonable consumer is an anxious parent. Thus, it is misleading to advertise a food supplement claiming, under the slogan “More Milk,” that mothers will thereby have more and better-quality breast milk, since it has been indisputably proven that, while such a product may improve the mother’s overall health, it cannot do anything for her milk, whose quantity and quality depend instead on other aspects of the mother’s diet. Moreover, the advertisement can be exploitative—depending on the way the product is advertised, e.g. a mailing-list message sent to breastfeeding mothers; it is also manipulative, since its aim is to exploit a mother’s anxieties about her baby’s health.¹¹

The reasonable consumer is concerned about the environment. Thus, what makes the difference for a consumer deciding where to shop for food may well be a supermarket chain advertising its grocery bags as being “100% biodegradable” and hence “not harmful to the environment.” However, biodegradability is a standard defined by law, and so if the bag in question fails in any respect to meet this standard, the slogan will be considered misleading. Thus, the Italian antitrust commission has ruled that “biodegradability requires a complex assessment [. . .] that the average consumer cannot be expected to make. The slogan ‘100% biodegradable’ is accordingly misleading for any consumer who lacks specific knowledge of these complex environmental regulations.”¹²

The reasonable consumer is compassionate and moved by tragic events and adversities involving others. The European directive classifies as an aggressive commercial practice “the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer’s judgement” (Article (9)(c) of Directive 2005/29/EC). A rule along these lines had previously been established by the Italian antitrust commission, when it banned the Benetton group advertisement featuring an image of the activist and AIDS sufferer David Kirby on his deathbed. It was the commission’s finding that “the cruelty of commercially exploiting an image that depicts a dramatic family tragedy violates all sense of respect for a gravely ill human being and threatens the psychological wellbeing of the more vulnerable members of society, such as children and adolescents.”¹³

The reasonable consumer trusts the press. Article 22 (2) of the Italian Consumer Protection Code makes it illegal in Italy to publish news stories in which a commercial advertisement is concealed: “It is considered a misleading omission in a commercial practice when a trader [. . .] fails to point out a commercial intent not apparent from context”. This applies to newspaper advertisements laid out in

¹⁰ See AGCM 29 October 1998, n. 6515.

¹¹ See AGCM 3 July 2007, n. 17063; and AGCM 6 April 2005, n. 14215.

¹² AGCM 11 January 2006, n. 15104.

¹³ AGCM 27 January 1994, n. o. 1752.

such a way that they cannot readily be distinguished from news stories on the same page. Moreover, under Article 23(m) of the same code, it is always misleading to publish an *advertorial*, whereby “a product is promoted on a publication’s editorial pages, with a trader paying for the promotion without clearly pointing that out to the consumer by way of graphics or a voiceover”. The rationale behind this prohibition is that the consumer cannot always be expected to be alert and have a critical attitude toward journalists and the press, which are assumed to be independent. Consumers thus give more weight to what a journalist has to say than to what an ad says, precisely on the assumption that a journalist does not operate on the motive of profit in giving an opinion—and the assumption is justified by the basic difference between journalism and commercial advertising, in that content is paid for in the latter case and it is not in the former. This basic difference is such that legal provisions applicable to advertising cannot be extended to the press, so much so that freedom of the press is constitutionally protected (Article 21 of the Italian Constitution protects the press and by extension journalism at large from outside pressures and restrictions, with the single exception of certain specific cases provided for by the law on anonymous press). It follows that the Italian antitrust commission can have jurisdiction over advertorials only insofar as an advertorial conceals paid-for communication.

To assess that, the commission makes use of presumptions. According to the previous decisions of the commission, an advertorial is a paid-for piece of communication if it focuses on just one product and promotes that product so enthusiastically as to be an advertisement. In this case the commission assumes the existence of an agreement between the business and the journalist, and thus the commission is entitled to prevent publication or broadcasting due to the hidden commercial nature of the advertorial.¹⁴

The reasonable consumer needs to be aware of fair-advertising issues. Thus, the commission can declare an ad misleading even if it is no longer in use and the product is no longer on the market. In this case, even though the message cannot have any current misleading effect on the consumer, there still exists a public interest in proscribing an unfair commercial practice, for in this way the public can see that the law is consistently being applied.¹⁵

Finally, the reasonable consumer expects traders to comply with self-regulatory codes they have accepted as binding in their trade.¹⁶ Thus, even violating a self-regulatory code may be deemed an unfair commercial practice. This provision is interesting and fairly innovative because it sets forth a legal penalty for violating self-regulatory codes, while previously the commission used to declare the decisions of self-regulatory bodies were outside its area of concern.

¹⁴ On which see AGCM 18 December 1997, n. 5572; and AGCM 18 December 1997, n. 5570.

¹⁵ AGCM 6 July 2005, n. 14487; AGCM 9 January 2004, n. 12792; AGCM 18 September 2003, n. 12437.

¹⁶ As stated in Articles 21(2)(b), 23 (1)(a), and 27(5) of the Italian Consumer Protection Code.

5 Conclusions

In short, the reasonable expectation of the consumer implies that the diligence traders must exercise in fulfilling their duty of fairness depends on the particular circumstances of the case, which involves the actual consumer's ability to understand the true meaning of the advertisement in question. This normally implies an increase in the level of diligence required by the trader and a reduction of *dolus bonus* cases (that is of the "common and legitimate advertising practice of making exaggerated claims or claims that are not meant to be taken literally").¹⁷

The trader's liability under the provisions of the unfair business-to-consumer commercial practices within the scope of the Italian Consumer Protection Code is a form of strict liability: unfair traders will accordingly be sanctioned even if they are not at fault. Thus, for example, even if the misleading advertising is due to a typographical error, it can still affect the consumer's freedom of choice, and so it is still the antitrust commission's duty to restore the market to conditions of fair competition.¹⁸

There are three main points I should like to make by way of a summary:

- The EU directive and resulting Italian regulation on unfair commercial practices make it clear that an assessment as to whether a trader has fulfilled the duty of fairness and good faith fundamentally depends on what can be taken to be the consumer's reasonable expectations with respect to the matter at hand: it is against the benchmark of these reasonable expectations that a degree of diligence must be determined for the trader to observe. This makes reasonableness in commercial practices clearly complementary to good faith and diligence: but in doing so, it also makes reasonableness distinct and separate from good faith and diligence.
- Reasonableness requires by definition an understanding of the realities of life, that is an adequate awareness of the real world arrived at by daily contact with real-life situations, and by also taking into account the individual circumstances (problems, vulnerabilities, and so on) of the person concerned. Reasonableness accordingly specifies a higher standard than that of what the market practice or trade usage is, for it must also take into account new, unusual, and marginal situations.
- The average consumer is deemed a *reasonable* man as he makes conscious choices. However, although reasonable, he may not be rational.

Reference

Walker, D.M. 1980. *The Oxford Companion to Law*. Oxford: Oxford University Press.

¹⁷ As stated in Article 20(3) of the Italian Consumer Protection Code.

¹⁸ AGCM 29 March 2006, n. 15330.

Part IIb
Reasonableness in Administrative
and Public Law

Reasonableness in Administrative Law

Giacinto della Cananea

Arbitrariness is incompatible with the existence of any government considered as a set of institutions.

Constant (1988, 291)

1 Preventing Arbitrariness: Procedural and Substantive Standards

It has traditionally been a concern of Western legal orders to keep arbitrariness at bay.¹ Benjamin Constant only emphasized this. The idea that administrative discretion must be limited, so as to prevent arbitrariness, was shared as well by the most prominent 19th-century Victorian constitutional lawyer, Albert Venn Dicey. Dicey held the view that administrative discretion can easily give rise to arbitrary decisions—unless it was kept in control by law, which he identified with the ordinary law of the land. This led him to reject the French paradigm of a separate legal regime for the administration, that is to say *droit administratif*, which, in sympathy with Alexis de Tocqueville, he saw as the realm of unbridled discretionary powers.² This was largely a myth, however, since Victorian England witnessed increasing intervention on the part of public authorities in the social and economic sphere. That said, it was a *useful* myth. Other lawyers, on the other side of the Channel, believed in the idea that discretionary powers could, and had to,

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¹ The existence of several, sometimes radical differences between Western legal orders cannot be denied. However, such differences are generally stronger when other legal cultures of the world are considered, which suggests a unitary perspective, as indicated in Kelly (1992).

² See Dicey (1956, esp. Chapter XII: “Rule of law compared with *Droit administratif*”). This edition, however, is supplemented with a short article that Dicey wrote in 1915, where he recognizes that in England there was “a considerable step towards the introduction among us of something like *droit administratif* of France” (Dicey 1956, 499). On Dicey’s legacy, see Loughlin (1992). See also Cassese (2003, 40), holding that in 1885 Dicey overemphasized the illiberal features of French administrative law.

be limited, on the model of the English example. One such person was Guido Zanolini, an influential Italian administrative lawyer. In the 1920s he worked out a sort of standard positivist view of the principle of legality, arguing that an administration can do only what is explicitly provided for by specific laws (see Zanolini 1956, 25).

However, such a narrow conception did not reflect reality—and still doesn't. Since the beginning of the 20th century, general and abstract legislative rules have been replaced by legislative programs administered by governmental agencies. Because these forms of governmental action were not suitable for the 19th century, they were viewed with suspicion and were often neglected. Over the years, however, there has been a growing recognition that a basic transformation has taken place. Statutes are often designed to achieve a plurality of interests, without setting out any precise or rigid ranking among such interests. As a result, an administration must not only identify the optimal measure by which to maximize a given public interest:³ it must also decide which interests are to be maximized. Discretionary powers, in sum, are inevitable and wide. The fundamental question, then, is not *whether* discretion ought be altogether eliminated but rather *how* discretion may be properly limited (to borrow a fortunate formulation), and how it may be structured and checked (see Davis 1969).

Procedural and substantive standards alike have been devised for this purpose. The growing demand for procedural standards is a consequence of governmental activism: the more public rules and decisions affect different and even contrasting interests, the greater will be the demand to include all such interests in the decision-making process. And so it is that procedural due process requirements have been developed by national and international bodies. These requirements include the right to have a hearing and to access relevant papers and documents, the giving-reasons requirement, and the right to effective judicial protection. However, these requirements do not ensure the fairness of rules and decisions. This has been pointed out in an oft-quoted remark by Lord Denning, M.R., who said: "I go further. Not only must he be given a fair hearing, but the decision itself must be fair and reasonable."⁴ This position reflects a tendency of courts in several jurisdictions to check for the reasonableness of administrative rules and decisions. Judicial decisions and EU directives also require that administrative and legislative measures be proportionate.

Methodologically, therefore, it seems useful to begin with an analysis of the different meanings that courts (mainly in the United Kingdom and Italy) ascribe to the concept of reasonableness. Next, I will compare such concept with that of proportionality, bringing out similarities and differences. And, third, I will consider the standing that reasonableness enjoys as a general principle of law.

³ For this model, see Mashaw (1985).

⁴ *Chief Constable of North Wales Police v. Evans*, (1982) 1 WLR 1155 at 1160 and 1174.

2 The Concept of Reasonableness

2.1 What Reasonableness Is Not: The *Wednesbury* Doctrine

Defining reasonableness in the positive—what it *is*—is not at all an easy task. This explains why the courts often find it easier to do it in the negative, pointing out what instead is *not* reasonable. This approach led English courts to identify what has come to known as *Wednesbury* unreasonableness.

This term was introduced in *Associated Provincial Picture Houses v. Wednesbury Corporation* ([1948] 1 KB 223). The plaintiffs were granted a licence by a local authority (the defendant) to operate a movie theatre provided that no children under fifteen be admitted on Sundays. The plaintiffs sought a declaration that this condition was unacceptable, and that the *Wednesbury* Corporation was acting beyond its legal powers in imposing it. The court held that it would correct a bad administrative decision on grounds of unreasonableness only if:

- the corporation made the decision taking into account factors that ought not to have been taken into account; or
- the corporation failed to take into account factors that ought to have been taken into account; or
- the decision was so unreasonable that no reasonable authority would in its right mind ever consider imposing it.

Two meanings of *unreasonableness* thus emerge.⁵ The first one encompasses a variety of flaws, such as giving weight to irrelevant considerations of fact. The second one expresses a more substantive concept, to be sure, but it also relies on a more extreme criterion, that is to say that an administrative decision will be overturned only if it is “so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it,” as was remarked in the *GCHQ* case,⁶ almost forty years later, by another famous English judge. Many commentators have since criticized that text as implying an abstentionist approach by the courts, because it permits judicial intervention only if a decision is so unreasonable as to be aberrant. Several scholars have called for a more searching criterion of judicial review. An important argument along this line of reasoning (see Elliott 2001, 301) is that the European Court of Human Rights adopts a more intrusive approach to substantive review, an approach founded on the principle of proportionality.

Although proportionality will be considered in Section 3 below, it is useful to observe here that the “narrow” or “weak” concept of reasonableness has been used by the courts in other jurisdictions, too, for example, by Italian

⁵ Craig (2003, 553) calls the first meaning the “umbrella sense” and qualifies the other as “substantive.”

⁶ *Council of Civil Service Unions v. Minister for the Civil Service* (1985) AC 374, 410 per Lord Diplock.

administrative judges, who understand reasonableness in a similar way. Their starting point is that when discretionary powers are entrusted to an administration, it is the judge's role to verify whether the latter has acted within the bounds of such discretion. When discretion is particularly out of bounds, an administrative decision may be quashed only if it evinces manifest unreasonableness (*manifesta irragionevolezza*). This applies, for example, to disciplinary measures taken against civil servants. In a recent case, an administrative court held that neither the allegations about the civil servant's conduct nor the administration's infringement of established rules and practices warranted judicial review: such review would have been available either if the allegations had been clearly wrong (gross error of fact) or if the disciplinary action was on its face unreasonable (*manifesta irragionevolezza*).⁷ As in the UK, in sum, the basic idea is that discretion comes in degrees, and only a very extreme degree of unreasonableness can bring a fully discretionary decision within the scope of judicial invalidation.

2.2 Reasonableness as Logic or Coherence

In other judgments, reasonableness is conceived as logic. One such judgment reveals one of the weaknesses of the Italian political and administrative system, namely, its lack of effective oversight and prompt measures against the unlawful construction of houses. Inevitably, a demand for "amnesty" grows and, from time to time, political institutions provide such a pardon by an act of Parliament.

Now, even if we sidestep the underlying moral question, we are faced with another set of complex issues in this regard. One of them is how to set the standards for fines that owners are required to pay. The higher administrative court recently specified that the "reasonableness principle" requires, first, that the day from which an amnesty becomes available (producing its legal effects) cannot be completely disconnected from the day in which the house was finished. Second, as the court observed, houses built infringing the *same* rules over the *same* period cannot be subject to different fines, and this brings in the principle of equality.⁸

Logic and equality both lie at the heart of another recent case, this time brought before the Italian Constitutional Court. Another weakness emerged from this case, namely, the use of retroactive and unclear fiscal rules by the Italian Parliament. The Constitutional Court consistently held that the legislator cannot use an interpretive, and retroactive, rule having a twofold, and contradictory, effect. This effect consists, on the one hand, in making certain sources of income tax-exempt and, on the other hand, in denying any right to recover sums erroneously paid to the government. The contradiction, then, is that the same income is at once deemed tax-exempt and not recoverable. This not only violates the solid principle prohibiting

⁷ TAR Sicilia–Palermo, Section II, 2 December 1991, n. 642 (TAR stands for Tribunale Amministrativo Regionale, the lower administrative court).

⁸ Consiglio di Stato, V, 11 October 2002, n. 5502 (my translation).

unjust enrichment but also violates logic—understood as straightforward Aristotelian noncontradiction—and it consequently also violates the principle of reasonableness, which the Court derives from the principle of equality (as contained in Article 3 of the Italian Constitution).⁹ A lack of coherence and consistency thus becomes in this sense the essential point of reasonableness.

A further question arises from this case, namely, whether reasonableness might be considered from the point of view of retroactivity. As Lon Fuller (1969, 51) pointed out, retroactivity raises serious questions from a normative point of view. His starting point is that, since a system of law has an essentially prospective value, a retroactive law is simply “a monstrosity.” This is plain logic, once we accept that the basic mode of regulating human conduct is “If A, then B.” However, he concedes that this is the way a prospective system of rules must *generally* work: it does not prevent a specific statute from producing effects retroactively, as in the case of a “curative measure.” And such a need (to cure what has gone before) does indeed arise if rules are pragmatically conceived as instruments with which to solve concrete problems. That said, the question arises whether the legislator enjoys full discretionary powers in this regard. Positive rules preclude such powers, especially in criminal law. Constitutional courts may admit retroactive effects in other areas of the law, as in administrative and tax law. For example, they may consider reasonable a statute designed to set straight a legislative incongruence. A retroactive statute may in this sense be reasonable to the extent that it answers a basic legal need, that is, the need to make sure that the laws can in fact be obeyed (*ibid.*, 54). But this presupposes a positive appreciation of what the legislator is seeking to do with a retroactive statute: if the legislator goes against logic or crafts a law harmful to individuals or businesses, then a negative judgment is more likely to ensue.

2.3 Reasonableness as Consistency

While the courts’ focus in assessing the reasonableness of legislation falls mainly or even exclusively on the final *outcome*, they often instead lay emphasis on *process* when reviewing administrative decisions. This connection between procedural (as opposed to substantive) due process requirements and reasonableness emerged, for example, in a dispute between Monsanto and the Italian government, in a case heard before both national courts and a panel of the World Trade Organization.

At the end of the 20th century, suspicion grew in Italy, as in other EU countries, about genetically modified organisms (or GMOs). This led to both a national and a EU-wide ban on the introduction of such products in the market. Monsanto and other multinational corporations persuaded the governments of three the WTO members—the United States, Argentina, and Canada—to challenge the ban. They held that the ban violated the Agreement on the Application of Sanitary and Phytosanitary Measures, an annex to the Marrakech Agreement, under which

⁹ Constitutional Court, 26 July 2005, n. 320.

the WTO was established. A panel was thus set up, and it recognized the applicants' argument as valid.

The panel did not in principle exclude the legitimacy of national measures limiting the import of products considered dangerous for human health. But it did observe that such measures must be based on an assessment of risk; otherwise, they are arbitrary. The problem with the Italian ban was precisely its not being based on the opinion of the competent scientific agency: the agency did acknowledge that the composition of OGM products does not entirely match that of traditional products, but it found that this posed no risks to the health of either humans or animals. According to the panel, the expression "based on" means not simply that the ban must be preceded by a scientific study but that there must be a rational relation between the two. The failure to show such a rational relation, then, was to account for the illegitimacy of the ban.¹⁰

The first thing to note here, for our purposes, is that the panel's decision was not prompted by the usual genuflection to a specific way of conceiving the precautionary approach but was instead focused on the ban's rationality and coherence: what specifically led the panel to judge the ban irrational was its inconsistency with any scientific assessment. The second thing to note is that the same conclusion was reached by the administrative judge in a parallel dispute regarding the same ban. The judge relied here on a more traditional legal principle, namely, *difetto d'istruttoria*, meaning that the process of discovery (the preliminary investigations of relevant facts, leading to the ban) was deemed inadequate. The outcome, however, is the same, which is that an administrative act was found to be unreasonable because incoherent.¹¹

2.4 Beyond Logic and Consistency: The Reasonable Time of Judicial Processes

There is still another way in which the courts understand reasonableness. This understanding centres on a basic element of human conduct that public authorities do not always consider with due regard, and that is time.

Unlike the American and Spanish constitutions, the Italian Constitution does not contain a due process clause. It only requires public administrations to uphold the principles of impartiality and sound administration (Article 97). In 1990, however, a general statute on administrative procedures was adopted partially modelled after the US Administrative Procedure Act of 1946 (see della Cananea 2006, 117). The statute requires all public authorities to provide individuals with a fair opportunity to be heard in procedures whose outcome is likely to affect their interests. As a

¹⁰ Report of the Panel, WT/DS291/R, *European Communities: Measures Affecting the Approval and Marketing of Biotech Products* (2006). For a detailed analysis of interests and processes, see Shaffer (2008).

¹¹ TAR Lazio, Section I, 3 December 2004, n. 14477.

result, notice must be given whenever an administrative procedure is commenced (Article 7, Law No. 241/1990). Unfortunately, public administrations will often ignore this requirement if they can. The courts may pass over such non-compliance in some cases, especially when the administration is under pressure to act urgently or when circumstances necessitate it, as when there is a serious risk that public property is damaged. But they will not *always* accept such non-compliance. Nor will they accept too short a notice to present evidence and arguments for and against the line of conduct the administration intends to follow. One administrative court found that three-days' prior notice will not suffice to meet the principles of sound administration and reasonableness.¹²

Time is crucially important in another context, too, where the length of public procedures is concerned. Particularly relevant in this respect are the implications of Article 6 of the European Convention on Human Rights (ECHR), entitling everyone "to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (Article 6). The only condition required by this provision is the existence of either a civil right or obligation or of a criminal charge. Article 6(1) applies, therefore, to both civil and criminal cases. The question arises, however, whether it *only* applies to such cases. Indeed, the terms "civil right," and "obligation" are not particularly clear, especially to English courts and lawyers. However, these terms have been broadly interpreted by the courts in Strasbourg to include disputes about land use and claims for certain types of social-security benefits. The scope of Article 6 has thus been extended to administrative cases and, more recently, to administrative procedure, too.¹³

One such case is *Procaccini v. Italy*, involving a woman working as a caretaker at a school owned by a municipality. She was not, technically, a civil servant with a permanent job, which incidentally explains why she had not been required to pass an open competition for that job. However, after several years, she brought an action before the administrative court, claiming that the court ought to recognize her the status of civil servant. The action was brought at the beginning of May 1990, but it took six years for her filing to reach the court's secretariat, and then another one and a half years for the court to issue a judgment. The caretaker therefore sought relief before the European Court of Human Rights in Strasbourg. The respondent state, Italy, argued that the general rule did not apply because of the exemption that public administrations were granted under established caselaw. However, the exemption is granted only if and to the extent that a civil servant has a part in pursuing the state's essential interests and exercises public powers, such as the power to issue or deny a license or to punish a certain conduct. The court found that none of these requisites applied to the activity carried out by the applicant, and it accordingly recognized her right, even though her employer was a public administration. Nor did the court hesitate to recognize her claim, since the seven and a half years it

¹² TAR Sardegna-Cagliari, Section II, 27 May 2005, n. 1271.

¹³ For a comparative analysis of how national courts interact with the European Court of Human Rights in three legal orders, see Mirate (2007).

took for the process to unfold was in excess of the reasonable time required under Article 6 ECHR.¹⁴ Interestingly, the court also pointed out that the national remedies showed themselves in several cases to be inadequate. Not only was the specific process unreasonably long, then, but this brought to light a broader problem, too. As a result, the court also recognized a claim for equitable compensation.

3 Reasonableness and Proportionality

3.1 Reasonableness as Proportionality?

The ECHR proves useful as well with respect to another possible meaning of reasonableness, that is, reasonableness as proportionality. The European Court of Human Rights has held on several occasions that differential treatment is discriminatory under Article 14 ECHR if it has “no objective and reasonable justification.” Such a justification is found to be lacking if:

- there is no legitimate public aim; and
- there is no reasonable relation of proportionality between the means employed and the ends pursued.

For example, in *Abdulaziz v. United Kingdom* and other cases, the European Court of Human Rights held that the UK Government had failed to provide a reasonable and objective justification for denying some women residing in the UK permission to be joined by their husbands, all of whom were non-nationals. The court found that the application of the relevant rules was disproportionate to the purported goals.¹⁵ In this sense, then, an administrative decision is unreasonable if disproportionate.

The question thus arises whether proportionality and reasonableness are essentially the same concept, and so whether proportionality should replace reasonableness. Some judges say it shouldn't, arguing that proportionality exists as a separate ground of review applicable to fundamental rights. This view seems to be shared in particular by the House of Lords, which has on several occasions recognized the continuing validity of the *Wednesbury* doctrine. Other judges have held that there is no solid justification for retaining this doctrine. For them, the time has come to use proportionality even in domestic cases, as Lord Slynn has argued in *Alconbury*.¹⁶ It may be correct to treat like situations alike, regardless of the traditional distinction between the national sphere and that of the EU. Still, it could be argued that proportionality and reasonableness are two distinct legal concepts with different standards of assessment.

¹⁴ European Court of Human Rights, case n. 31631/96, *Procaccini v. Italy* (2000).

¹⁵ European Court of Human Rights, case n. 9473/81, *Abdulaziz v. United Kingdom* (1985).

¹⁶ *R (Alconbury) v. Secretary of State for Environment, Transport and Regions*, 2 All ER 929 at 976 (2001).

3.2 *Proportionality as Balancing*

The concept of proportionality originates from German doctrines and was later borrowed into EC law by the European Court of Justice (ECJ). At the heart of this concept is the idea that a public authority must not only weigh public and private interests (this is the essence of discretionary power)¹⁷ but must also choose measures that imply the least burden on the private interests at stake. Even a quick glance at the ECJ's established caselaw reveals that the essence of proportionality lies in balancing. Proportionality involves a three-stage test, checking for adequacy, necessity, and proportionality strictly construed. Only if an administrative measure is deemed adequate and necessary will the ECJ assess whether the burden it entails is disproportionate to the aims the authority is pursuing through the same measure.¹⁸

The ECJ's established caselaw has influenced national courts, too. A recent example is provided by a dispute on environmental standards in Italy. A local government administration had issued an authorization requested by an enterprise and then decided (only afterward) to impose on the enterprise some conditions designed to raise environmental standards. The enterprise claimed that these conditions were inappropriate and unnecessary and that they entailed an excessive burden, and high costs in particular. The claim was recognized as valid by both the regional court and the higher jurisdiction (Consiglio di Stato), precisely on the basis of the balancing test.¹⁹

Balancing plays an important role with respect to positive norms, too. While there may be little scientific basis for the distinction between the use of proportionality in determining the legislative and administrative capacity of EC institutions and its use in dividing competences between the EC and its Member States,²⁰ there are two other areas where balancing can be a useful component of proportionality. First, we can appreciate that the idea of balancing was incorporated into the Treaty of Rome with a view to ensuring compliance with the principle of subsidiarity: the last paragraph of Article 3 states that "any action of the Community shall not go beyond what is necessary to achieve the objectives of this treaty." Second, EU directives require national regulatory authorities to carry out a balancing test when privatizing public utility companies, such as power companies and providers of electronic communications. For example, Article 9 of Directive 2002/21 (a framework directive) requires that the management of radio frequencies for electronic-communications services be carried out on the basis of a series of principles including objectiveness, transparency, non-discrimination, and proportionality. Article 4 of Directive 2002/19 (on services) requires national regulatory authorities to respect the same

¹⁷ For this thesis, see Giannini (1939).

¹⁸ The literature on proportionality is vast. For the view that proportionality originates from German legal doctrine and emphasizes balancing, see Stone Sweet and Mathews (2008).

¹⁹ Consiglio di Stato, Section V, 14 April 2006, n. 2087. The standard reference in Italy on the meaning and value of proportionality is Sandulli (1999).

²⁰ Usher (1999, 37) describes this as a "simple level of classification."

principles when imposing duties on providers. Once again, therefore, the emphasis lies on balancing means and ends.

3.3 *The Question of Standards*

Proportionality and reasonableness are both very broad principles of law designed to ensure the fairness of rules, and even more so of decisions. However, two main differences do emerge between them. The first of these is a functional difference. Proportionality implies balancing, and this means that the reviewing court has to carry out a sort of quantitative analysis: it must consider the relative weight accorded to the interests at stake. This implies the exercise of a strong judicial power, which sometimes comes very close to the line between legitimacy and opportunity and sometimes oversteps it. It therefore produces strong institutional consequences, making for a great deal of judicial exposure. Where reasonableness is concerned, the emphasis falls instead on logic and rationality, or it otherwise falls on consistency and coherence (see also Cassese 2006, 13; Craig 2003, 616). The second difference is a structural one: while proportionality involves the three stages previously identified (adequacy, necessity, and proportionality strictly understood), reasonableness involves a much less structured test, one that is not only broader but also much vaguer.

These features emerged in a recent case brought before a regional administrative court in Italy. A regional administration had issued the date and time for an open competition to qualify for medical training. One of the candidates, a young woman, showed up ten minutes late. The exam committee decided to admit her anyway and also gave her a passing grade. However, it later turned back on its decision and struck her name from the list of those accepted into the training program. Since the decision was upheld by the region, the woman brought an action before the regional administrative court, arguing that a few minutes' delay could not, and did not, give rise to any adverse consequence. Indeed, while the candidates did have to show up by 8:00 a.m. (so as to allow adequate time for a number of administrative activities, such as identifying the candidates and handing out multiple-choice tests), the exam would not begin until later, at 9:30 a.m. The administrative court recognized the claim, finding that a few minutes' delay did not compromise the equal treatment of all candidates. And the court adduced a further ground, this being the principle *Ubi lex voluit dixit* (where the law requires something, it expressly so states it), thereby arguing that since the administrative rules did not explicitly establish automatic disqualification for delay, the administrative decision contravened the principles of reasonableness and logic.²¹

This case gives rise to several questions. Did the court really attribute such importance to the literal interpretation of the text? Or did the court simply think the administrative decision was too strict or (stated otherwise) unfair, and so went

²¹ TAR Puglia–Bari, Section II, 15 January 2005, n. 590.

looking on that basis for an adequate legal ground with which to justify such a view? And, in this latter case, could the court have used the proportionality test? A possible answer is that, since proportionality requires a close balancing of all the interests at stake, public and private alike, as well as a more stringent judicial assessment of policy issues, and since the court was not ready or willing to undertake this effort, it chose to instead cloak its choice in the guise of reasonableness. This conjecture may also explain, as some observers have suggested (see Usher 1999, 40), the reluctance of some UK judges to apply proportionality in domestic cases not dealing with fundamental rights.

Finally, one could wonder whether the court might have reached the same result in another way. For example, it could have deemed contradictory the initial decision to admit the woman, only to disqualify her later, and having passed her in the meantime, too. But this is not what the court really said, for it instead lay emphasis on other factors, pointing out in particular the lateness of some of the civil servants entrusted with the task of test supervision. Another possibility was to see whether the administration offered any reasons in support of its decision. This is a check the courts must carry out under the giving-reasons requirement, yet the courts, as has been observed with regard to the US (see Shapiro 1992, 185), tend to instead judge on merits whatever reasons are offered, with the result that a procedural constraint is turned into a substantive one. Judicial activism is less apparent, on the other hand, when this more-searching scrutiny is based on substantive constitutional principles, such as equality under the law: the courts would try to determine, in this sense, whether there was an unfavourable outcome and, if so, whether such an outcome falls within the prohibition against unreasonable discrimination.²² A similar review was undertaken in *Abdulaziz*, where the European Court of Human Rights found that the reasons stated by the UK government did fall within the scope of such a prohibition and so could not justify the differential treatment in question.

4 Reasonableness as a General Principle of Law

4.1 *An Unwritten General Principle of Law?*

The fact that reasonableness is vaguer and less structured than proportionality may explain a further partial difference. Like reasonableness, proportionality was worked out by the courts on the basis of doctrinal theories about the legitimacy of administrative action. Both principles thus originate from *professorenrecht* and *richerrecht*, and they are accordingly reckoned among the *principes hors texte*, to use the French expression (Letourner 1951, 19 n. 5), by which is meant those legal principles that lack a textual basis.

²² See Ely (1970), for the thesis that the duty to state reasons often serves to identify “disadvantageous distinctions.”

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

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

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

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

4.2 Reasonableness as a Requisite of Validity

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

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

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

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

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

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

4.3 Implications for the Protection of Fundamental Rights

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

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

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

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

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

4.4 Toward Universal Principles of Public Law

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

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

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

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

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

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

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

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

References

- Cassese, S. 2003. *La construction du droit administratif. France et Royaume-Uni*. Paris: Monthcrestien.
- Cassese, S. 2006. Il diritto amministrativo e i suoi principi. In *Istituzioni di diritto amministrativo* Ed. S. Cassese Milan: Giuffrè.
- Cassin, R. 1951. Introduction. *Études et documents du Conseil d'État*.
- Constant, B. 1988. Principles of Politics Applicable to All Representative Governments. In *Political Writings*. Ed. B. Fontana. Cambridge: Cambridge University Press. (1st. ed. in French 1821.)
- Craig, P. 2003. *Administrative Law*. 5th ed. London: Sweet & Maxwell.
- Davis, K.C. 1969. *Discretionary Justice. A Preliminary Inquiry*. Urbana, Ill.: University of Illinois Press.
- della Cananea, G. 2006. The Italian Law on Administrative Procedures in Light of the US Administrative Procedure Act. In *General Principles of Administrative Action*. Ed. M.P. Chiti. Bologna: Bononia University Press.
- della Cananea, G. 2009. Procedural Due Process of Law Beyond the State. In *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law*. Ed. A. von Bogdandy, R. Wolfrum, P. Dann, and M. Goldmann. Heidelberg: Springer.
- Dicey, A.W. 1956. *Introduction to the Study of the Law of the Constitution*. 10th ed. London: MacMillan.
- Elliott, M. 2001. The Human Rights Act 1998 and the Standard of Substantive Review. *Cambridge Law Journal* 60: 301–336.
- Ely, J.H. 1970. Legislative and Administrative Motivation in Constitutional Law. *Yale Law Journal* 79: 1205–1285.
- Fuller, L. 1969. *The Morality of Law*. 2nd ed. New Haven, Conn.: Yale University Press.
- Giannini, M.S. 1939. *Il potere discrezionale della pubblica amministrazione*. Milan: Giuffrè.
- Harlow, C. 2006. Global Administrative Law: The Quest for Principles and Values. *European Journal of International Law* 17: 187–214.
- Kelly, J.M. 1992. *A Short History of Western Legal Tradition*. Oxford: Oxford University Press.
- Letourner, M. 1951. Les principes généraux dans la jurisprudence du Conseil d'Etat. *Études et documents du Conseil d'État*.
- Loughlin, M. 1992. *Public Law and Political Theory*. Oxford: Oxford Clarendon Press.
- Mashaw, J. 1985. *Due Process in the Administrative State*. New Haven, conn.: Yale University Press.
- Mirate, S. 2007. *Giustizia amministrativa e Convenzione europea dei diritti dell'uomo. L' "altro" diritto europeo in Italia, Francia e Inghilterra*. Neaples: Jovene.
- Sandulli, A. 1999. *La proporzionalità dell'azione amministrativa*. Padua: Cedam.
- Shaffer, G. 2008. A Structural Theory of WTO Dispute Settlement: Why Institutional Choice Lies at the Center of the GMO Case. *NYU Journal of International Law and Politics* 41: 1–102.
- Shapiro, M. 1992. The Giving Reasons Requirement. *University of Chicago Legal Forum* 180–220.
- Stone Sweet, A., and J. Mathews. 2008. Proportionality Balancing and Global Constitutionalism. *Columbia Journal of Transnational Law* 47: 73–165.
- Usher, J.A. 1999. *General Principles of EC Law*. London: Sweet & Maxwell.
- Zanobini, G. 1956. L'attività amministrativa e la legge. In *Scritti vari di diritto pubblico*. Milan, Giuffrè. (1st ed. 1922.)

Reasonableness in Administrative Law: A Comparative Reflection on Functional Equivalence

Michal Bobek

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

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

1 Reasonableness in Administrative Law

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

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1.1 Reasonableness as Legitimacy

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

1.2 Reasonableness in Statutory Interpretation

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

A generally shared principle going well beyond the English rules¹ of constructing statutes is the rule against absurdity, i.e., the presumption of a reasonable legislator, who did not wish to achieve absurd results. This approach is a kind of “consequentialist” reasoning, i.e., the reasoning out of a negative consequence one does not wish to enter. In the more modern continental guise, the call for accepting reasonableness in the statutory interpretation was connected with the struggle against the distended legal formalism. In this context, G. Calabresi² mentions the famous example of the medieval Italian law against shedding blood in the streets of Bologna. The object of the law was to ban duelling and fights in the streets. However, the question which later arose was whether or not the same prohibition, which was in itself clear and unconditional, applies also in the case of a doctor who, wanting to help a man who was sick and collapsed in the street, bled him, thus shedding blood in the street. Similar example (see Colt 1903, 670) would be the provision of a statute by Edward II., who decreed that every prisoner who breaks the prison shall be guilty of felony and hanged. Does this, again a very categorical statement, apply also to prisoners who break out because the prison is on fire?

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

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

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

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

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

1.3 Reasonableness in the Judicial Review

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

2 Reasonableness in Judicial Review of Administrative Discretion

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

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

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

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

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

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

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

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

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

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

⁵ *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* (1948) 1 K.B. 223.

⁶ *Ibid.*, 233–4.

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

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

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

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

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

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

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

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

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

¹¹ (1999) 2 S.C.R. 817.

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

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

2.2 *Intermezzo: The Functions of the Reasonableness Standards*

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

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

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

2.3 *The Austrian-Germanic and the French Traditions*

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

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

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

¹⁵ 389 U.S. 347 (1967).

¹⁶ *Ibid.*, 361.

of the word reasonableness, at least in its first dictionary meaning of “vernünftig” or “raisonnable” in the meaning of “equitable.”¹⁷

There is one notable exception: the issue of the length of proceedings under Article 6 (1) of the Convention for Protection of the Fundamental Rights and Basic Freedoms. This provision, which requires, *inter alia*, that “everyone is entitled to a fair and public hearing within a reasonable time,” exports and “Euro-notion” of reasonable period of time (*un délai raisonnable; eine angemessene Frist*) into all the legal systems of the signatory parties to the European Convention.¹⁸ This importation of reasonableness as far as the notion of time and the length of proceedings are concerned are nothing new in the signatory states of the European Convention; their domestic legal orders generally do provide, either directly in the constitutional law or the codes of procedure, a general requirement that judicial review or administrative decision-making must be concluded within reasonable, in the meaning of adequate (“angemessen”) period of time.

However, a different situation is the use of reasonableness as a *general standard* for judicial review of administrative action in the civilian legal tradition. In the countries of German or “German-Austrian,” legal tradition, to which I would also count Central European countries, such as the Czech Republic and Slovakia, the approach of administrative courts to functionally similar situations, i.e., to determining the scope of the competence and, within that scope, to the discretion exercised by the administrative authority, would be different.

2.4 Germany

In Germany itself, as far as the first use of reasonableness scenario is concerned, to demarcate the scope of the power of the administrative authority by the reference to “reasonableness” would be hardly imaginable in a legal system strictly bound by the law. Article 20 Section 3 of the German Basic Law provides that all the three

¹⁷ The standard dictionaries translate the word *reasonable* into German as (i) *vernünftig* (ii) *angemessen* (iii) *mässig*. See e.g., Messinger and Willmann (1989). *Langenscheidts Grosswörterbuch der Englischen und Deutschen Sprache*. Berlin: Langenscheidt, 1714; *Pons Collins Grosswörterbuch*. 1999. Stuttgart: Ernst Klett. The most frequent French translations refer to (i) *just, équitable* (ii) *raisonnable (pas excessif, modéré)* (iii) *raisonnable (démontré de la raison)*, see e.g., Correard, M.-H., and V. Grundy. 1997. *The Oxford-Hachette French Dictionary*. 2nd ed. Oxford: Oxford University Press, 1617; *The Collins Robert French Dictionary*. 1987. Glasgow: Harper Collins, 562.

¹⁸ The real content of the notion, however, appears to be far from clear; the European Court of Human Rights limits itself normally to stating that “the ‘reasonableness’ of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute.” See e.g., *Comingersoll S.A. v. Portugal* [GC], n. 35382/97, § 19, ECHR 2000-IV or *Frydlender v. France* [GC], n. 30979/96, § 43, ECHR 2000-VII. Such contextual study results into “reasonable” meaning anything between 3 years (*Bunkate v. the Netherlands*, series B, n. 248) and 9 years (*Van Pelt v. France*, decision of 23.5.2000 [Section 3], case n. 31070/96, unpublished).

branches of the government are bound by law and statutes (“an Gesetz und Recht gebunden”). The strict binding of the public administration by law is an extension of the principle of the rule of law (“Rechtsstaat”). The two out of many limitations flowing from this principle for the activity of public administration are that, firstly, public administration can become active and take any decision only if it has express empowerment to do so in the law itself. The competence as well as its scope must be laid down by law; otherwise, the public authority must not act.¹⁹ Secondly, the proportionality of the law itself as well as the proportionality of the application of it is also an extension of the state of the rule of law.²⁰

A different approach would also be present in the area of review of administrative discretion. The German legal theory would have first to agree whether there actually can be, in a democratic state based on the rule of law, anything as “free” administrative discretion at all. If the courts were to recognise that there actually is anything as free discretion, they would be anxious to limit it as much as possible.²¹ The German Federal Constitutional Tribunal (*Bundesverfassungsgericht*) has stated on many occasions that in German law, there is nothing as entirely “free” discretion.²² The administrative authority is always bound by the law, be it by the respective delegating provision or by the overall legal order and its guiding principles.

In the German doctrine and case-law, the review of the scope of administrative discretion would fall under two different headings: firstly, under the review of judicial discretion as such and, secondly, under the interpretation of undefined legal concepts (“unbestimmte Rechtsbegriffe”). Undefined legal concepts would contain notions like “public safety and order,” “public need,” “personal and professional aptitude,” etc.²³ Should the public authority fail to interpret these concepts properly, the administrative court might annul the administrative decision on the basis of error in law, as the interpretation of these notions is a question of law. Even if, for instance, the administrative court would be convinced that the administrative interpretation of the say notion of “public need” would be completely unreasonable, it would quash the authority’s decision because it “erred in law.”

The standard for review of the discretion in administrative law as such is provided for in § 40 of the Law on Administrative Procedure (*Verwaltungsverfahrensgesetz*²⁴) and § 114 of the Rules of Procedure for Administrative Courts

¹⁹ Klaus Stern (1977, 635) refers to this principle as “positive Gesetzmässigkeit der Verwaltung.” See also Schmidt-Bleibtreu and Klein 2004, 692; Denninger et al. (1984, 1375).

²⁰ See, e.g., Schmidt-Bleibtreu (2004, 687ff.) and the abundant literature and case-law cited therein.

²¹ A good and concise introduction is provided by J. Schwarze (2006, 270–9).

²² “Freies Ermessen.” See, e.g., BVerfGE 18, 353 (363) or BVerfGE 69, 161 (169).

²³ For ample examples of undefined legal concepts and their judicial interpretation in administrative law, see e.g., Stelkens et al. (2001, 157–60).

²⁴ Latest consolidated version published on 21.9.1998 (BGBl. I S. 3050), last modified on 5.5.2004 (BGBl. I S. 718).

(*Verwaltungsgerichtsordnung*²⁵). These two provisions mirror each other. In terms of § 114 of the Rules of Procedure for Administrative Courts,

Where the administrative is empowered to use discretion, the court will also examine whether the acts or omissions of the administration are not unlawful because the statutory limits of discretion have been exceeded or because discretion has been exercised in a manner not in conformity with the authority granted.

Here one finds again two aspects of reviewing discretionary administrative decisions: the scope and the existence of the competence proper and the manner in which it is exercised. The above-mentioned principles, inferred from the constitutional provisions of Article 20 GG, have been developed by the doctrine and the case-law into a very elaborate and complex set of guidelines, which are to apply in areas of administrative discretion. They narrow if not altogether exclude the discretion of administrative authorities. The limits on the administrative discretion are contained, *inter alia*, in systematic limitations in the law itself, limitations flowing from other laws, limitations following from the constitutionally guaranteed rights and the constitution,²⁶ limitation self-imposed by the administration itself, subjective public rights of individuals and, eventually, also the proportionality of the decision taken (in great details see Stelkens et al. 2001, 1–259; Schoch et al. 2007, 1–89). The key element is that, once reviewed and found perhaps “unreasonable,” the decision will be labelled as either an error in the interpretation of the law or “illegality.”

2.5 The Czech Republic

A similar approach to the review of administrative discretion can be found in the Czech legal system or in other Central European systems in the Austrian-Germanic legal tradition. In Czech law, for instance, the review of the competence of the administrative authority to act remains in the legality discourse: either there is a special empowerment of the administrative authority to act in a certain way or there is none. This rather strict distinction has its foundation in Article 2 Section 2 of the Charter of Fundamental Rights and Basic Freedoms,²⁷ which reads: “State authority may be exercised only in cases and within the bounds provided for by law and only in the manner prescribed by law.”

²⁵ Latest consolidated version published on 21.1.1960 (BGBl. I S. 17), last modified on 21.12.2006 (BGBl. I S. 3316).

²⁶ It serves to be mindful that under the German system, constitutional rights and fundamentals of the Basic Law are either to be applied directly by ordinary courts or they “radiate” through the entire system of the “mere law” (*einfaches Recht*) and oblige the ordinary judge to interpret the law in accordance with the constitution and the case-law of the Federal Constitutional Tribunal. This “intensity” of the constitutional presence in all branches of law and especially in the area of administrative law might have given rise to a strand of German legal thought which considers administrative law nothing more than a set of rules executing or implementing the constitution.

²⁷ Constitutional Law n. 2/1992 Collection of Laws.

The limitation in this provision is again twofold: firstly, the public administration can become active only if it has a special authorisation for its activity in the law and, secondly, it can only do so in a proportionate manner. The second limitation of the administrative activity should be read in conjunction with the provision of Article 4 Section 4 of the Charter, which also provides for the minimalisation (proportionality) of any limitations of basic rights and freedoms.²⁸

Interestingly, an opposite provision as far as the freedom of action of individuals is concerned is provided for in Article 2 Section 3 of the Charter: “Everyone may do that which is not prohibited by law; and nobody may be compelled to do that which is not imposed upon him by law.” These two provisions are read in conjunction: public power and its exercise are always and strictly bound by law, whereas the actions of an individual are by default always free. The existence of these default principles led some of the leading Czech theoreticians to conclude (most notably Knapp 1995, 17–8) that in the Czech law, there is no “normatively” space free. In other words, any single legal action can be classified as being either allowed or prohibited, but the law, by virtue of these two general principles, which are by their nature able to cover seamlessly the entire normative space, is never indifferent.

There is no need to address this, perhaps somewhat artificial argument, in a greater detail. The crucial message is, however, quite clear: in a system based on such constitutional premises, the issue of whether or not it would be reasonable for an administrative authority to issue a decision or whether or not the authority could have seized or searched a person in given circumstance or whether such a person might have had a reasonable expectation of privacy, would never be posed. The judicial review runs, at least in its external formal appearance, along the lines of strictly attributed competence and the dichotomy of legal/illegal (or constitutional/unconstitutional).

The review of the discretion itself and the manner in which it was exercised would, in the Czech system of judicial review, develop among similar lines to the German model. The Czech Supreme Administrative Court (*Nejvyšší správní soud*) has, for some time, struggled with the notion of free administrative discretion. Recently, the case-law heads in the direction of considerably limiting or even denying the existence of “free” area of administrative discretion; all decision-making of public administration must be reviewable in full jurisdiction and is limited.²⁹

Once made subject to the jurisdiction of administrative courts, the review of administrative discretion would of course involve some degree of the assessment

²⁸ “In employing the provisions concerning limitations upon the fundamental rights and basic freedoms, the essence and significance of these rights and freedoms must be preserved. Such limitations are not to be misused for purposes other than those for which they were laid down.” For the standard commentaries, see e.g., Klíma (2005).

²⁹ The Court has recently started reviewing areas of law, which were traditionally believed to be the realm of “free discretion” or “sovereign” powers of the state, such as the award of citizenship. See Order of the Grand Chamber of the SAC of 23. 3. 2005, case n. 6 A 25/2002, published as n. 950/2006 of the Collection of Decisions of the SAC or judgment of 4. 5. 2006, 2 As 31/2005-78, unpublished, accessible online at www.nssoud.cz.

of reasonableness and perhaps rationality. “Reasonableness” would, however, never form a formal or self standing standard for this review.³⁰ The word “reason” or “reasonableness” can be occasionally located in the case law of the administrative courts or the Constitutional Court (*Ústavní soud*) though, typically in three scenarios. Firstly, there is the presumption of a reasonable or rational legislator, which is employed in the field of statutory interpretation: where there are multiple possibilities of interpretation of a legal rule which enshrined the will of the legislator, the assumption is that the legislator’s intent was to regulate social relations in a reasonable and rational way.³¹ Secondly, “reasonable and objective grounds for differentiation” appear as the possible justification for discriminatory treatment in the case law of the Constitutional Court.³²

Finally, there is yet another instance of the use of the term “reasonable” in the case law of the Constitutional Court, which may also explain why the notion as such is rarely used. In a landmark decision on the production regulation of milk, the Constitutional Court generally agreed that state regulation is possible. It went, however, on as to state that “State intervention must observe a commensurate (fair) balance between the requirements of general public interest and the requirement of protection of an individual’s fundamental rights. This means that there must be a *reasonable (justified) proportionality relationship* between the means used and the aims pursued.”³³

The highlighted part of the text may offer some hints as to why the notion of “reasonableness” is very rarely used: the Czech Constitutional Court imported, about a decade ago,³⁴ one of the best German export articles: the proportionality test.

³⁰ One sole and somewhat curious exception is the finding of the Constitutional Court (full court) of 22.3.2005, case n. Pl. ÚS 63/04, published as n. 210/2005 Collection of Laws, where the Constitutional Court, in a rather miscarried comparative exercise, actually mentions the *Wednesbury* test (without mentioning the case by name, just by a reference to English doctrinal literature). The “reasonableness” criterion was, however, just mentioned in one line and never applied—the Court annulled the local by-law under review because of its illegality (the by-law introduced a new duty disregarding the fact that there is a constitutional guarantee that duties and taxes can only be imposed by a statute).

³¹ See above Section 1.2. In the case law of the administrative courts, see e.g., judgment of the Supreme Administrative Court of 13. 5. 2004, case n. 1 As 9/2003, published as n. 360/2004 Coll. SAC; judgment of the Supreme Administrative Court of 4. 8. 2005, case n. 2 Aps 3/2004, n. 720/2005 Coll. SAC; judgment of the Supreme Administrative Court of 24. 10. 2007, case n. 2 Ao 2/2007, www.nssoud.cz.

³² See e.g., finding of the Constitutional Court (full court) of 10. 3. 1999, case n. Pl. ÚS 25/98, published as n. 57/1999 Coll.; finding of the Constitutional Court (full court) of 26.4.2006, case n. Pl. ÚS 37/04, n. 419/2006 Coll. Further see Ščotková 2007, 187ff.

³³ Finding of the Constitutional Court (full court) of 16.10.2001, case n. Pl. ÚS 5/01, n. 410/2001 Coll., English translation available at http://angl.concourt.cz/angl_verze/doc/p-5-01.php. Emphasis added by the author.

³⁴ The proportionality analysis first appeared in the decisions of the Constitutional Court in mid-1990ies, for example in the finding of 30.6.1995, case n. Pl. ÚS 4/95, published in the Collection of Findings and Orders of the Constitutional Court, vol. 3, n. 29, 209; plenary opinion of 21.4.1996, case n. Pl.ÚS-st 1/96, Coll. vol. 9, p. 471; finding of 4. 2. 1997, case n. Pl. ÚS 21/96, Coll., vol. 7, n. 13, p. 87.

After the establishment of the Supreme Administrative Court,³⁵ the proportionality analysis was taken over in its case law as well. The proportionality analysis together with the prohibition on misuse of powers now create the two substantive points of review once it is established that the authority was competent to act, that it remained within its competence and that the procedure in issuing the act was correct.³⁶ As the quote from the decision of the Constitutional Court illustrates, in the view of the Court, proportionality and reasonableness are considered to be very close to each other, if not even equivalents.

2.6 France

French administrative law, albeit it has never articulated any overreaching theory of administrative discretionary power (see Schwarze 2006, 263), has established a complex system of judicial review of administrative action. The standard of review is to a large extent dependent on the respective type of review and action (*voies de recours*).³⁷ The existence of administrative competence and the manner in which the discretion within that competence was exercised will most typically be reviewed following an action for the excess of power (*recours pour excès du pouvoir*). Within this type of action, the administrative act will be reviewed on the grounds put forward by the applicant, such as illegality in relation to the object, illegality in relation to the motifs, the observance of the general principles of law and the absence of misuse of powers.

The French doctrine recognises, at least in theory, areas of free discretion of the administration.³⁸ This does not mean that the administration would be entirely free within these areas; the overreaching and binding principle is one of the legality of the public administration. It rather means that the control exercised by the administrative courts will be less detailed. The standard of review for these areas of administrative activity is the manifest error of assessment (*erreur manifeste d'appréciation*). Manifest error of appreciation would be closest the French law might be approaching the reasonableness standard: the administration can err in law and its interpretation, but it is not entitled to make absurd decisions (see Schwarze 2006, 267).

³⁵ As from 1 January 2003 by the zák. č. 150/2002 Sb., soudní řád správní [law n. 150/2002 Coll., Code of Administrative Justice].

³⁶ See, e.g., judgment of 27.9.2005, case n. 1 Ao 1/2005, n. 740/2006 Coll. SAC; judgment of 18.7.2006, case n. 1 Ao 1/2006, n. 968/2006 Coll. SAC, which concerned a situation comparable to the *Wednesbury* case—the issue of measures of general application (“by-laws”) by administrative authorities.

³⁷ For a basic classification, see, e.g., Gohin 2005, 175ff.; Chapus (2002, 185ff).

³⁸ “Pouvoir discrétionnaire,” as opposed to “pouvoir lié.” There is, however, a similar debate to the German one: whether the fact that even in areas of “free” discretion the decision can be reviewed, albeit on limited grounds, by the *Conseil d'Etat*, does not render the notions somewhat hollow. See e.g., Braibant and Stirn (2005, 282ff.); de Laubadère et al. (1994, 600ff).

2.7 Synopsis

Albeit “reasonableness” and common sense considerations will, in practical terms, be present also in German, Czech or French review of administrative action, it never is an openly acknowledged and self-standing yardstick for judicial review. The formal judicial discourse as far as the existence of the competence and the manner in which it is exercised will always be one of legality, potential excess of powers and their misuse and, within the Germanic legal cultures, one of proportionality. This is not to say that the word “reasonableness” or “rationality” may not occasionally appear in the reasoning of these administrative courts. If it does, however, it only appears as a supportive argument or sometimes perhaps an argument of last resort.

3 Explaining the Difference: Post-Dictatorial v. Evolutionary Experience

Why have the various “reasonableness” tests formed a key element in the Anglo-American judicial tradition and, at the same time, their role is limited in the here sketched continental systems? It is submitted that the answer may be found in the history and evolution of each of the systems of judicial review of administrative authority. The difference is best highlighted if we contrast the English and the Germanic tradition of judicial review.

In England and in other common law countries, the evolution of the system of judicial review was gradual and spread over long time. As A. Wharam notes, the administrative review in the Victorian period and before was mostly exercised vis-à-vis bodies acting under a charter or existing by immemorial user (see Wharam 1973, 615). The courts could thus not apply any doctrine of legality or *ultra vires*, because competences of the administrative or local authorities were nowhere laid down by a statute. Absent any express provisions what the competences of the bodies under review were, the only possibility in which courts could review the ever growing amount of delegated legislation and administrative decisions was by appeal to the “common reason,” i.e., common understanding what might be proper exercise of power and what might be not. In these systems, community “reasonableness” provided the external authority and grounding for the review.

The German or Czech traditions are, on the other hand, different. One may call it the “post-dictatorial” approach towards the public administration and the judicial review thereof. The characteristic element is distrust towards the public administration and its strict binding to the letters of the law. The above-described constitutional principles of the strictly legally limited administration provide a completely different starting point for the review of the administrative action. In the reaction to the dictatorial experience in both countries and the activities of state bodies which were beyond and often even in breach of the law, there is, at least in the constitutional theory, no normatively-free space. Administration can only act if it is able to demonstrate that it possesses express statutory empowerment in this respect.

The question of administrative action is thus exclusively a question of legality, not reason or propriety.

Within the manner in which the discretion itself is exercised, the “reasonableness” review is effectuated on the basis of checking the motifs for a decision and its proportionality. If motifs are incorrect, i.e., the authority acted in breach of the first and the second of the *Wednesbury* prongs of the test, there is the misuse of power. The rest of the functional equivalence of the possible “unreasonableness” is covered by the proportionality analysis, especially if it is taken as a three-step test in its potential fullness.³⁹

Where does this leave the public reason and the reasonableness? As the sketchy functional comparison effectuated here demonstrates, it would be incorrect to consider the debate on reasonableness in the judicial forum as being an exclusively Anglo-American matter with no parallel in the continental legal systems. Functionally same purpose as the review of reasonableness in say English or American law, i.e., the limitation of the administrative discretion, is achieved via the combination of legality of the activity of public administration and the proportionality of its actions. The same consideration may not always be labelled in the same way; they are, however, functional equivalents.

In practical terms, reasonableness will most commonly overlap with the review of proportionality: only administrative activity, which is narrowly tailored and respects the peculiarities of the individual case, is reasonable and vice versa. The difference between the both systems would be, however, as to where the public reason is to crystallize. In the civilian legality/illegality discourse, the preference for the distillation of the public reason, as to what the administration is reasonably allowed to do, is given to the legislative forum. The administrative courts are only there to interpret the legislative will, with, however, one strong safeguard: the existence of constitutional review. In the Anglo-American word, the preference has traditionally been given to the case-by-case basis development of the public reason: the broadly framed legal or constitutional categories are to be interpreted (or themselves created) in the judicial forum.⁴⁰

On a concluding note, it remains to be seen how and in what form the reasonableness test will survive in its country of origin. With the amount of legislation being annually passed in the United Kingdom, the original purpose of the reasonableness test is diminishing. The powers of public authorities are being put into clear statutory limits, custom and immemorial users as good as disappeared. This development,

³⁹ For a theoretical introduction into the balancing and proportionality discourse, see e.g., Alexy (2000, 294; 2003, 131). A comparative overview of the application of the principle in administrative law offers G. Gerapetritis (1997).

⁴⁰ Yet another explanation for the difference in the approach between the Anglo-American and the Continental traditions is offered by G.P. Fletcher. In his view, the prominence of “reasonableness” in the Anglo-American legal thinking is an evidence of pluralism in legal thought. “There are many reasonable answers to any problem. The common law does not insist upon the right answer at all times but only a reasonable or acceptable approach to the problem.” Fletcher (1998, 683, 699).

together with the strong impact of the both systems of European law⁴¹ and the principles enshrined in the 1998 Human Rights Act, make the discerning of public reason in the judicial forum somewhat difficult and perhaps not necessary. The assignment of competence became the question of *intra* or *ultra vires*, the motifs is the question of the misuse of powers and the proportionality analysis, which is doomed to be sooner or later be imported also into purely domestic cases,⁴² will take care of the rest.

What of the old *Wednesbury* then? Some may call it, out of historical sentiment perhaps, a residual test of judicial review. Others may argue that the criteria themselves are in substance preserved, they were just incorporated into the newly emerging proportionality analysis. If the latter explanation were to be true, it would support the central claim of this contribution: reasonableness in the narrow sense and proportionality are, to a great extent, functional equivalents and it does not matter that much under which label one puts the substantively same set of considerations for the review of administrative discretion.

References

- Alexy, R. 2000. On the Structure of Legal Principles. *Ratio Juris* 13: 294–304.
- Alexy, R. 2003. Constitutional Rights, Balancing, and Rationality. *Ratio Juris* 16: 131–40.
- Braibant, G., and B. Stirn. 2005. *Le droit administratif français*. 7th ed. Paris: Presses de SciencesPo.
- Calabresi, G. 2000. Two Functions of Formalism: In Memory of Guido Tedeschi. *The University of Chicago Law Review* 67: 479–88.
- Casgrain, L.-M., and J.H. Grey. 1987. Jurisdiction, Fairness and Reasonableness. *Dalhousie Law Journal* 10: 89–123.
- Chapus, R. 2002. *Droit du contentieux administratif*. 10th ed. Paris: Montchrestien.
- Colt, L.B.B. 1903. Law and Reasonableness. *American Law Review* 37: 657–74.
- Clayton, R. 2001. Regaining a Sense of Proportion: The Human Rights Act and the Proportionality. *European Human Rights Law Review*: 504–25.
- Craig, P. 2003. *Administrative Law*. 5th ed. London: Sweet & Maxwell.
- Cross, R., J. Bell, and G. Engle. 1995. *Statutory Interpretation*. 3rd ed. London: Butterworths.
- Delany, H. 2001. *Judicial Review of Administrative Action: A Comparative Analysis*. Dublin: Round Hall Sweet & Maxwell.
- de Laubadère, A., J.-C. Venezia, and Y. Gaudemet. 1994. *Traité de droit administratif*, vol. 1. 13th ed. Paris: L.G.D.J.

⁴¹ I.e., the law of the European Communities/European Union and the law (especially case-law) of the European Convention on Human Rights and Basic Freedoms.

⁴² It can be said that the classical European spill-over effect has already begun. See e.g., *Brind and Others v. Secretary of State for the Home Department* (1991) 1 AC 696, where their lordships were not entirely clear whether the principle of proportionality was a part of English administrative law, but some (see e.g., the speech by Lord Lowry) were ready to recognise it as such. From more recent case law, see e.g., *R (on the application of Daly) v. Secretary of State for the Home Department* (2001) 2 AC 532 and *R (on the application of Mahmood) v. Secretary of State for the Home Department* (2001) 1 WLR 840. The abandoning of reasonableness in favour of the proportionality analysis is advocated by Gale (2005). See also Clayton 2001.

- Denninger, E., H. Ridder, and H. Stein, eds. 1984. Art. 1–20. In *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland*, vol. 1. Neuwied: Luchterland.
- Devlin, P. 1976. Judges and Lawmakers. *Modern Law Review* 39: 1–16.
- Fletcher, G.P. 1998. Comparative Law as a Subversive Discipline. *American Journal of Comparative Law* 46: 683–700.
- Freund, G.K. 1991. Look Up in the Sky, it's a Bird, it's a Plane... it's Reasonableness. *Southwestern University Law Review* 20.
- Gale, W.S. 2005. Unreasonableness and Proportionality: Recent Developments in Judicial Review. *Scots Law Times* 4: 23–6.
- Gerapetritis, G. 1997. *Proportionality in Administrative Law: Judicial Review in France, Greece, England and in the European Community*. Athens: Sakkoula.
- Gohin, O. 2005. *Contentieux administratif*. 4th ed. Paris: Lexis Nexis SA.
- Klíma, K., ed. 2005. *Komentář k Ústavě a Listině*. Plzeň: Aleš Čeněk.
- Knapp, V. 1995. *Teorie práva*. Prague: C.H. Beck.
- Künnecke, M. 2007. *Tradition and Change in Administrative Law: An Anglo-German Comparison*. Berlin: Springer.
- Schmidt-Bleibtreu, B., and F. Klein, eds. 2004. *Kommentar zum Grundgesetz*. 10th ed. Neuwied: Luchterland.
- Schoch, F., E. Schmidt-Assmann, and R. Pietzner, eds. 2007. *Verwaltungsgerichtsordnung*. 14th ed. Munich: C.H. Beck.
- Schwarze, J. 2006. *European Administrative Law*. London: Sweet & Maxwell.
- Sčotková, A. 2007. Rovnost a zákaz diskriminace v judikatuře Ústavního soudu ČR. In *Rovnost a diskriminace*. Ed. M. Bobek, P. Boučková and Z. Kühn. Prague: C.H. Beck.
- Sossin, L. 2002. An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law. *Queen's Law Journal* 27: 809–58.
- Stelkens, P., H.J. Bonk, and M. Sachs, eds. 2001. *Verwaltungsverfahrensgesetz*. 6th ed. Munich: C.H. Beck.
- Stern, K. 1977. Grundbegriffe und Grundlagen des Staatsrecht, Strukturprinzipien der Verfassung. In *Das Staatsrecht der Bundesrepublik Deutschland*, vol. 1. Munich: C.H. Beck.
- Wharam, A. 1973. Judicial Control of Delegated Legislation. *Modern Law Review* 36: 611–23.

Part IIc
Reasonableness in Biolaw

Reasonableness, Bioethics, and Biolaw

Carla Faralli

There are two perspectives from which I will approach the topic of reasonableness in biolaw: I will take, on the one hand, a philosophical and conceptual perspective from which to consider the relation between bioethics and law, and on the other hand a legal perspective from which to instead consider the sources of biolaw.

Let me start, then, from the first of these two perspectives.

(1) As is known, the word *biolaw* is a neologism based on another neologism, this being *bioethics*, a word designating in a broad sense the area of the law that addresses the whole range of issues relating to the protection of life, human and nonhuman alike (inclusive of animal life and the environment) in the context of the ever-expanding technological applications of biology and medicine.

The relation between bioethics and law is a widely debated question, and it can be framed with some simplification in theoretical terms by singling out two opposing camps. On one side are those who question or even reject the idea of regulating bioethical issues by law, and on the other side are those who judge such biolaw to be useful and even necessary.

But these positions are in truth only two abstractions, for they each bundle together an assortment of views and concerns. Thus, a closer look at the first group will reveal that some believe that such legal regulation of bioethical issues may pose a hindrance to scientific development; others, especially those who are religiously minded, feel that by regulating such things as euthanasia, medically assisted procreation, and the like, we are thereby legitimizing these practices, even if the intent is to curb or stop them; some feel comfortable that the scientific community can provide effective self-regulation through its ethical committees, deontological codes, and declarations of principle adopted by the international community of physicians and scientists; and still others regard bio-legislation as a case of government interference in the private sphere, a practice that, in their estimation, amounts almost inevitably to forcing people to subscribe in action to particular conceptions of morality.

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A case apart in the group opposed to regulating bioethical issues by law are those who argue that the law we already have suffices of itself to do what biolaw is specifically designed to do: Why forge a dedicated law when we can easily bend existing law to do the same job, by reasoning from analogy, for example, or by invoking the principles embedded in the Constitution?

The brief words spent sketching out the criticism made against biolaw show that opposition to it comes in varying degrees, ranging from an unconditional no—that is, no form of law should ever be allowed to enter into bioethical issues—to a qualified rejection: Only the specific form of law which is legislation should be barred entrance.

Like the opponents of biolaw, its advocates make up a motley group, but the different positions on this side of the debate can be said to come down essentially to two. Thus, while everyone in this camp agrees that bioethical questions should come under the purview of the law, some believe that these questions must be regulated in conformance with specific moral values, whereas others reject this idea and maintain that law in bioethics must enable each person to pursue his or her own values, subject only to the condition that no harm be done to others in consequence of such a pursuit.¹

The first position entails strict, authoritative legislation establishing stringent prohibitions and rigid models. Indeed, it posits foundational principles which can be known and be recognized as absolutely right, or at least can gain wide consensus in society, and which therefore justify enforcing them by law. But this way we will end up holding up a single moral conception as superior, thereby undermining our ability to manage in any adequate manner the plural conceptions present in contemporary societies.

The second position entails, in the words of Stefano Rodotà (1995, 2006), a “lean” and “open-ended” legislation: lean because the rules should only be so many and not be densely packed with moral content, but should rather be focused on method and procedure; and open-ended because the law, rather than supporting a single, fully loaded moral point of view regarded as the highest good, should leave that choice up to its citizens and enable them to pursue different lives and conceptions.

Indeed, this second position appreciates the difficulty involved in appealing to widely shared moral principles, and so views the law not as a tool for enforcing particular moral conceptions but as a means with which to achieve a fruitful cooperation, coexistence, and dialogue among the members of society. We can recognize here Mill’s view that the task of law is not to force citizens to be virtuous, under this or that doctrine or conception of the good life, but rather to guarantee for them the right to live as they choose (according to their moral convictions) without thereby harming others or preventing them from exercising their equal rights.

¹ For different perspectives on this point, see Dalla Torre (1993); Santosuosso (1995); D’Agostino (1998); Borsellino (2009); Palazzani (2002); Casonato (2006).

This second position strikes me as superior to the first, not only for theoretical reasons but on practical grounds, too. Theoretically, this position is consistent with a noncognitivist metaethics, a view that does not espouse any moral truths. And on the practical side, the position seems better suited to a pluralist and multiethnic society such as ours. By this I mean a society governed by a constitution (an example being the Italian Constitution) among whose fundamental principles is that of the separation of church and state. As upheld in different decisions of the Italian Constitutional Court, this principle entails that “the state will guarantee protection of the freedom of religion in a system of cultural pluralism” (Faralli 2007, 353–62).

This latter position can be understood as providing the background for reasonable norms, if we mean by *reasonableness* (broadly understood) a willingness to take into account, with a view to achieving coexistence in a certain historical and social context, the need to reach an arrangement in which there is room not for a single reason but for many reasons.

Norms can be described as reasonable if they proceed from a shared method of discussion rather than from an antecedent doctrine—if they can achieve an “overlapping consensus,” in the words of John Rawls (1993), rather than making it so that a perfectionist conception of the good life should prevail upon other views.

If we can speak of reasonableness in biolaw, that is crucially because biolaw is grounded in premises that can reasonably be shared rather than in revealed premises or premises proper to a specific culture or moral option, as happens in the first of the two positions previously illustrated. After all, bioethics has been defined precisely in this spirit, as the domain of the reasonable (Battaglia 1999), that is, a sphere whose dilemmas cannot be resolved in the same way as we resolve logical contradictions, and whose outcomes make no pretence to be true but only pretend to be adequately argued and justified.

If we make a brief comparative assessment of biolaw, especially in Europe, we will notice that a patchwork of different legislative solutions have been offered in this regard, but here, too, in parallel to what can be observed in the theoretical debate, the different kinds of legislation can be reduced to essentially two models: a hands-off model, prevalent in common-law countries, and an interventionist model, which tends to be more entrenched in civil-law countries, and which comes in two forms, that is, a rigid one that sets out precise regulative frameworks and a lean one based on the use of principles.

At the same time, however, if we look beyond this basic difference between common-law and civil-law countries, we will find a common theme consisting in the role of the courts, which have been described as a “stealthy yet necessary” source of biolaw, since the courts find themselves taking up cases for which they will, in varying degrees depending on context, apply existing law, or modify precedent, or create a new precedent.

(2) That last point introduces us to the second of the two perspectives mentioned at the outset, namely, that from which to consider the *sources* of biolaw. This area of law brings into relief some of the knottiest and most important issues in the contemporary debate on the sources of law. Let us take the situation in Italy.

Article 1 of the preliminary provisions to the Italian Civil Code lists as sources of law statutes, regulations, corporative rules (later repealed), and customs. This is an article that, like many others in the same code, was framed in the mould of a strict legal positivism, a view that has waned as both a theory and a historical development. To see what this means, one need only consider the enactment of the Italian Constitution, with its provisions claiming the status of *leges legum*, and more recently the coming into effect of supranational sources of law (international and EU law), which too stand above domestic statutory law. What is more, the system of sources of law (meaning the system set up by the preliminary provisions just mentioned) has been coming apart not only from the top but also from the bottom. I am thinking here about a well-known essay by Francesco Galgano in which he observes that traditionally, court rulings and contracts have not been considered sources of law, but if we continue along this line—conceiving court rulings and contracts as mere applications of existing law rather than as sources of new law—we will preclude to ourselves any possibility of understanding how the law is changing in our time (Galgano 1990, 158).

So, when speaking of the sources of biolaw, we should proceed on a broader conception drawing on a larger pool of sources as follows:

We have, to begin with, the Constitution, in which are contained all the principles regarded as essential to bioethics: justice, autonomy, beneficence, non-maleficence, and so on. Thus, for example, we can look to Article 32, making health care a fundamental right and providing that no one may be forced to undergo treatment without consent, or we can look to Articles 3 and 13, setting forth principles of equality, nondiscrimination, and inviolability of personal freedom, among others.

We also importantly have entire tracts of international law, from the 1948 Universal Declaration of Human Rights to the Convention on Human Rights and Biomedicine, signed in Oviedo in 1997, as well as UNESCO's Universal Declaration on the Human Genome and Human Rights, also of 1997. (It should be mentioned here, in regard to the Oviedo Convention on Human Rights and Biomedicine, that uncertainties still linger in Italy about its force; indeed, the convention was ratified by way of Law 145 of 28 March 2001, but Article 3 of this law requires enactment of further rules by which to adapt the Italian legal system to the convention. Now, the decrees by which to achieve this adaptation have never been issued, so it remains an open question whether the Oviedo Convention is valid law in Italy, despite the fact that judges do often refer to it in their decisions.)

Another important supranational source of biolaw comes from the recommendations and directives of the European Union.

We then have our own domestic law. After a long period of idleness, the Italian government started enacting legislation relating to bioethics, including the laws on privacy, the certification of death, organ donation and transplant, and assisted reproductive technology. Unlike other countries, which have chosen to regulate by the use of principles, in keeping with the lean-intervention model, Italy has taken the route of crafting a close, tightly regulative legislation that goes into the minutiae of its subject matter. This stricter model is liable to carry two sorts of risks as follows.

For one thing, there is the risk of setting out a body of law likely to easily pass into obsolescence in a contemporary context of rapid societal change and scientific advancement: The risk, therefore, is that such law will always be outdated.

And, for another thing, a dense biolaw carries the risk of placing law in the service of moral values: As Rodotà (2006) observes, we live in a society that has emptied its stock of shared values, and this is not a void that can be filled through a majority ethics enforced by law, an ethics enacted by majority vote in a legislature.

By way of a typical example, we might mention Italy's Law No. 40 of 2004, on medically assisted procreation. This law espouses a specific moral option, making law subservient to certain values on which there is no consensus in society. In fact, it is proclaimed from the very start of this law (in Article 1) that its purpose is to secure "the rights of all those involved, including the rights of the conceived child," and that the foundation on which rests the entire framework of the law itself is the unconditional protection of the embryo. This introduces, in the words of Stefano Rodotà, a sort of "dictatorship of the embryo" in accord with a particular moral position. And that fits the description of an unreasonable law, a classic example of how *not* to frame a law in bioethics.

Let us continue, then, with our overview of the sources of biolaw. We mentioned the Constitution, international law, and domestic law. Let us introduce now uses and customs: This is not a source that can significantly be relied on in bioethics or be used for specific bioethical applications. Indeed, custom is based on two essential elements—uniform practices and consensus—neither of which is available here.

Thus, on the one hand, customs can only take hold against the background of a uniform substratum, this being the material element (the *usus* or *diuturnitas*) making it possible for fairly regular patterns of behaviour to obtain, but the biotechnologies seem to be advancing at a pace far too fast for that to happen.

And, on the other hand, custom requires as its other foundational element a consensus (*opinio juris seu necessitatis*). Yet this is precisely what a contemporary multiethnic, multicultural society cannot count on: It cannot draw on a fund of shared values, the basis on which a consensus can be built as to what we should take to be the guiding principles in addressing matters relating to bioethics.

Uses and customs are sometimes even viewed as the basis on which rest deontological codes, understood as codes of ethics, in which binding rules and principles are established setting out duties for this or that profession. But legal scholarship is divided on this issue: While some do regard these codes as grounded in custom, others construe them as belonging outside the province of the law, and still others point out their role as serviceable guidelines with which to fill gaps in the law.

Another source consists in the legal devices based on the principle of private autonomy, devices such as informed consent and advance medical directives (the latter still being debated in Italy): This is, in my view, an important way to protect personal autonomy and freedom of choice.

Finally, there is the case law of the courts, an important source not only in common-law but also in civil-law countries like ours. Indeed here, too, judge-made law fills the vacuum where statutory law is silent.

Thus, for example, before Law 40/2004 went into effect, there was no overall scheme in Italy under which to regulate medically assisted procreation. So, for a long time, the task of protecting the constitutional rights of those concerned (children, biological parents, social parents, physicians, and so on) fell to the judges, who in this role found themselves working on a case-by-case basis, often invoking the notion of reasonableness expressed by the Constitutional Court, which back in 1998 (in Ruling No. 347 of 26 Sept. 1998,² as on several other occasions) stated:

The task of working out a reasonable balance between the different constitutional principles involved in protecting human dignity is primarily entrusted to the legislator. However, in view of the current legislative void, it will be for the judge to search the entire normative system and find the interpretation best suited to securing the constitutional protections in question.

In keeping with this pronouncement, the Court of Cassation (Sezione I Civile) rendered a decision (with Ruling No. 2315 of 16 March 1999)³ on a case involving the contentious issue of whether a husband who initially consented to his wife's artificial insemination by donor (AID) has a right to disown the child so conceived. The court found that there is no such right of the husband:

A husband who initially consented to his wife's artificial insemination with the semen of a donor can have second thoughts about such consent, but this does not entitle him to disown the child so conceived, because to recognize such a right for the husband is to deprive the child of one of the two parental figures, thereby also taking away the care and love that such a figure can provide: By an act of the judge, the child would in effect become a fatherless child, considering that the donor's identity in artificial insemination by donor remains undisclosed by law, thereby making it impossible to establish the child's paternity. [...] If it were legally permitted to bring about a birth by committing to fatherhood, only to turn back on that commitment and disown the child, then we would have a law contrary to the very premises of the Constitution, and especially to the constitutional principle of solidarity.

In another case invoking the rule established by the Constitutional Court, the Tribunal of Palermo issued an order (08 January 1999)⁴ authorizing a woman to carry through an artificial insemination by husband (AIH) despite the husband's death, a death that occurred after the embryos had been cryopreserved. As the tribunal found:

A reasonable balance needs to be achieved between the different constitutional principles involved [...]: on the one hand, under Article 30, the Constitution establishes a child's right to psychophysical wellbeing, a right protected by making sure the child has a family with two parents providing two distinct parental models; but this principle needs to be weighed against Articles 2 and 32 of the Constitution, establishing the unborn child's right to life and the mother's right to psychophysical integrity. Indeed, it seems on balance more important to avoid the harm that *two* persons would be *certain* to suffer (these being the unborn child *and* the mother in case the embryo were destroyed after the husband's death) than the harm that *one* person *may* suffer (this being the child raised by a single parent), especially considering that the kind of harm involved in this latter case is a sociologically *constructed* harm framed

² Italian Constitutional Court, Ruling n. 347 of 26 September 1998.

³ Italian Court of Cassation, Sezione I, Civil Law, Ruling n. 2315 of 16 March 1999.

⁴ Tribunal of Palermo, ruling of 08 January 1999.

with reference to a family model, a model which may well be preferable to other models in the abstract, and which is rooted in the most widely espoused morality, but which certainly is not the *only* model the Italian society has taken up, as a moment's thought will reveal if we only take account of the countless single-parent families that have formed in consequence of a divorce.

But even *after* Law 40/2004 went into effect, some rulings were issued in which the criterion of reasonableness serves as a basis on which to interpret the legislative framework and adapt it to the Constitution.

In a ruling of 24 September 2007,⁵ the Tribunal of Cagliari recognized the legitimacy of preimplantation genetic diagnosis (embryo screening) on the basis of a constitutionally aligned interpretation of Law 40/2004. On this interpretation, preimplantation genetic diagnosis is at bottom consistent with prenatal diagnosis (carried out *during* pregnancy), a diagnosis deemed legitimate under current law. Indeed, both practices “are guided by the same purpose, that of making sure that those who are directly involved are properly informed about the health of the embryo, whether the embryo is already implanted in the uterus or is outside the uterus and waiting to be implanted.” A prohibition against preimplantation diagnosis would therefore amount to a differential treatment of essentially analogous situations, and this would be constitutionally dubious because unreasonable: It would be unreasonable for the law to recognize for one woman a right to be fully informed about the embryo's health during pregnancy, while denying another woman the same right before the embryo is implanted in the uterus as part of an assisted reproductive technology (or ART) treatment.

More recently, in Ruling No. 398 of 21 January 2008,⁶ the Tribunale Amministrativo Regionale of Lazio (Sezione III) weighed in on the debate by considering (among other things) the issue of whether Law 40/2004 should be deemed unreasonable for permitting practices that fail to adequately balance the need to protect a woman's health against the need to protect the life and health of the embryo.

The court described this law as “inherently irrational,” for it sacrifices the very interests it sets out to protect. This applies in particular to the two provisions in issue, one of which prohibits the cryopreservation and the destruction of embryos, (art. 14 co.1) and the other the creation of embryos “in any number greater than that which is strictly necessary to a single implantation, and so in any number greater than three.” (art. 14 co.2)

Indeed, the rationale behind the first rule is contradicted by the rationale behind the second, which, by making it possible to produce and at the same time implant three embryos to facilitate solving sterility or infertility problems, implicitly recognizes the sacrifice of produced and implanted embryos that fail to adhere.

Further, the obligation to contemporaneously implant no more than three embryos, independently of any medical evaluation, is unreasonable in another way, too, as remarked by Tribunale Ordinario in Florence in a judgment of 12 July 2008: by

⁵ Tribunal of Cagliari, ruling of 24 September 2007.

⁶ Tribunale Amministrativo Regionale del Lazio, Sezione III, Ruling n. 398 of 21 Jan. 2008.

ignoring that the likelihood of a successful implantation varies with the individual characteristics (age, health, and the like) of the women who undergo such treatment, the obligation in question unreasonably imposes an equal treatment on different classes of cases.

Both criticisms were ultimately heeded by the constitutional Court, which in Ruling No. 151 of 2009 declared Article 14(2) of Law No. 40/2004 unconstitutional, this on the ground that:

the law [40/2004] reveals [...] a limitation as concerns the protection afforded to the embryo, since even where you limit to three the number of embryos produced, you still concede that some of these embryos may not develop into a pregnancy [...]. And so, the protection provided for the embryo is in any event not absolute but is limited by a concern to strike an appropriate balance with the need to protect procreation. [...] the prohibition against creating no more than three embryos, without taking into account the woman's individual condition [...], ultimately comes into contrast with Article 3 of the Constitution, considered in a twofold way as a principle of reasonableness and equality, insofar as the law at issue reserves a like treatment for unlike situations.

We can appreciate from this discussion that the appeal to reasonableness necessarily involves a reference to the concrete case, and that the judgments involved in working out issues in bioethics are by and large *balancing* judgments, under a scheme in which the primacy of one interest, right, or value is established in relation to the specific case at hand, and in which the right or interest so defeated may instead prevail in a different case. Bioethics can be said in this sense to pertain to the sphere of the reasonable, which (as mentioned earlier) is understood to be the sphere in which the outcomes of an activity do not pretend to truth but only present themselves as grounded in argument with reference to the circumstances of the concrete case.

And this, in my opinion, explains why issues relating to bioethics do not pose as much a problem for the judge as they do for the legislator.

References

- Battaglia, L. 1999. *Dimensioni della bioetica*. Genoa: Name.
- Borsellino, P. 2009. *Bioetica tra morali e diritto*. Milan: Cortina.
- Casonato, C. 2006. *Introduzione al biodiritto: la bioetica nel diritto costituzionale comparato*. Trento: Università degli Studi.
- D'Agostino, F. 1998. *Bioetica nella prospettiva della filosofia del diritto*. Turin: Giappichelli.
- Dalla Torre, G. 1993. *Bioetica e diritto: saggi*. Turin: Giappichelli.
- Faralli, C. 2007. Laicità e bioetica. In *Laicità e diritto*. Ed. S. Canestrari. Bologna: BUP.
- Galgano, F. 1990. Le fonti del diritto nella società post-industriale. *Sociologia del Diritto* 17: 153–64.
- Palazzani, L. 2002. *Introduzione alla biogiuridica*. Turin: Giappichelli.
- Rawls, J. 1993. *Political Liberalism*. New York: Columbia University Press.
- Rodotà, S. 1995. *Tecnologie e diritti*. Bologna: Il Mulino.
- Rodotà, S. 2006. *La vita e le regole: tra diritto e non diritto*. Milan: Feltrinelli.
- Santosuosso, A. 1995. Bioetica e diritto. In *Medicina e diritto: prospettive e responsabilità della professione medica oggi*. Ed. M. Barni and A. Santosuosso. Milan: Giuffrè.

Reasonableness in Biolaw: Is it Necessary?

Amedeo Santosuosso

1 Framing the Issue

The concepts of reasonableness and biolaw may differ in kind as well as in content, but they share the characteristic of their each being at once elusive and multifaceted. Discussing them in the same context carries the obvious risk of colouring biolaw with the uncertainty of reasonableness, and vice versa. Thus, how to frame and discuss such heterogeneous concepts and retain a sufficient degree of consistency? It may help, in such a situation, to provide some preliminary definitions and clarifications.

Apart from a basic connection with rules that characterizes both legal reasoning and the legal community, they both seem to be quite anarchic (at least more so than is usually suspected) and to escape strict rational thinking, since both come under the influence of historical factors and political power, as well as of social and cultural factors at large. It is in this spirit that Jean Giraudoux (1882–1944) compares law and jurists to poetry and poets: “Le droit est la plus puissante des écoles de l’imagination. Jamais poète n’a interprété la nature aussi librement qu’un juriste la réalité” (Giraudoux 1967, 133).¹ So it is not surprising that the history of reasonableness in law looks more like an exercise in poetry than a strict construction in logic. It follows a course in large part parallel to, but independent of, the course followed by the history of reasonableness in political philosophy.²

It must also be considered that biolaw is a new field, multifaceted, fluid, and unstable, and still drawing the suspicion of being inconsistent. And so there is no accuracy that reasonableness might be able to gain by being associated with biolaw.

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¹ Law is the most powerful of the schools of the imagination. Never has a poet interpreted nature more freely than a jurist has reality.

² As a philosophical concept, reasonableness should probably be considered as having been firmed up only with John Rawls’s definition in Rawls (1971) and later works (on which point, see Richardson 2005).

If we consider Dolgin and Shepherd's remark that "countries in Europe and elsewhere have moved somewhat more rapidly from bioethics to biolaw (at least if law is viewed as legislative and regulatory rules) than has the United States" (2005, 13), it becomes at once clear that bunched together in here, in the short space of a few words, is a handful of very broad and elusive concepts (bioethics, biolaw, legislative, and regulatory rules) each of which should be defined all-around: in itself, in relation to the others, from an American as against a European point of view, and so on.

For one thing, are Dolgin and Shepherd talking about biolaw and thinking about bio-legislation? That would seem to be the case, if we are to judge by the clause in brackets ("at least if law is viewed as legislative and regulatory rules"). But then, this is true of only some countries, like France, whose bio-legislation is quite developed. By the same token, the very idea of a passage from bioethics to biolaw implies that law is external to bioethics, which is only one part of the story; and if we relate this to the history of bioethics in the United States, where the bioethical debate has largely been shaped through caselaw, the idea of law as external to bioethics is not exactly accurate: suffice it to mention, in this regard, that a well-known American casebook is significantly titled *The Law of Bioethics* (Schneider and Garrison 2003).

And, for another thing, formally establishing biolaw as a discipline in its own right may promote between it and bioethics a deep divide resulting in two drawbacks. On the one hand, bioethics would be deprived of its natural richness as an interdisciplinary field and would become an exclusively philosophical discipline. And, on the other hand, biolaw would find itself involved in a turf war with other legal disciplines (such as constitutional law, criminal law, and family law) in whose fold many "biolaw" cases have originated.

In other words, it is not clear that we really need a new formalized legal field called biolaw, nor do we know what contribution it could bring in assessing the impact the biological sciences have on law (on which see Casonato 2006). Be that as it may, I am deeply convinced that what matters is *how* we discuss cases and problems rather than the heading under which we discuss them, or the labels we use in doing so. I am also of the opinion that we must, in this process, keep firmly in view the special situation in which law finds itself *wherever* and *whenever* it stands affected by scientific innovation in the life sciences. Such a *wherever* and *whenever* look like a constantly shifting battle line between stagnation and anarchy, "the edge of chaos," the one place where a complex system can be spontaneous, adaptive, and alive (see Waldrop 1992). One of the reasons for the fascinating vitality of the interaction between law and the life sciences is definitely the destabilizing effect that science has on traditional legal assumptions and fields. Law finds itself on the edge between chaos and order. But what may look like a dramatic, catastrophic condition for the law to be in is at the same time an exceptional opportunity for it to intertwine and engage with the life sciences in managing the extremely dynamic state of the boundary between staidness and chaos (see Gross and Blasius 2007).

But if these premises are sensible and true, it is also sensible and true that, in discussing reasonableness and biolaw, we should accept a certain (reasonable?) degree of uncertainty.

2 Reason, Reasonableness, and Biolaw

In *Commentary upon Littleton* (1628), Sir Edward Coke—the jurist whose writings on the English common law remained essential legal texts for centuries—effects a close liaison between law and reason:

[R]eason is the life of the law, nay the common law itself is nothing else but reason. [. . .] This legal reason *est summa ratio*. And therefore, if all the reason that is dispersed into so many several heads, were united into one, yet could he not make such a law as the law in England is; because by many succession of ages it had been fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection, for the government of this realm, as the old rule may be justly verified of it, *Neminem oportet esse sapientiorum legibus*: No man out of his own private reason ought to be wiser than the law, which is the perfection of reason. (Coke 1985, 97)

Two and a half centuries later, Oliver Wendell Holmes would express, in his famous *The Common Law* (1881), a very different idea:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuition of public policy, avowed or unconscious, even the prejudice which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. (Holmes 1948, 1, from the incipit of Lecture 1).

These two statements of the matter at issue (law and reason) offer an opportunity to make three points.

First, the long period from Coke’s statement to Holmes’s can be taken as clear evidence of the enduring opposition between two approaches to law—the rationalistic one versus the pragmatic (or realistic)—which is arguably the most important divide in law and also cuts across the divide between civil law and common law.

Second, reason, rationality, and reasonableness have not always been understood as different concepts: it took centuries to forge distinctions between them, and they came about as a result of many different factors. William Shakespeare (1564–1616), a contemporary of Coke (1552–1634), was still using *reasonable* in a way closely associated with *reason*, as can be appreciated in this passage from *King John*, Act III, Scene III (1967, 82):

My reasonable part produces reason
How I may be deliver’d of these woes
And teaches me to kill or hang myself.

The modern sense of *reasonable* did not emerge until after the Enlightenment. It has been observed in this regard, by way of a general comment, that “the words *reasonable* and *unreasonable* carry with them a framework of evaluation that plays

an important part in Anglo/English discourse [. . .].” This framework of evaluation is language- and culture-specific and historically shaped, exactly a post-Enlightenment framework. And while this particular framework does not operate in other European languages—as “its roots must be sought in the *British* Enlightenment rather than in the Enlightenment as a whole.” The modern use of *reasonable* and *unreasonable* is clearly distinct from *rational* and *irrational*: “One can be ‘rational’ or ‘irrational’ on one’s own, but one is usually being ‘reasonable’ or ‘unreasonable’ when one is interacting with other people,” and so the reasonable is intrinsically bound up with “a normative spatial metaphor of ‘how far one can go’” (Wierzbicka 2006, 106–07).

The third point to be made with respect to the reasonable in law can be set up by this definition of what a pragmatist approach is about:

A jurisprudential theory rooted in sensitivity to context, a theory that functions without a belief in false foundations, one that is judged along explicitly instrumental criteria and that also acknowledges the inevitability of perspective, is better suited to bring about justice in a complex and unpredictable world than a theory that rests upon untested essentialistic assumptions and a non-experimental and universalistic view of reason. (Haack 2005, 71–105)

This shows how the pragmatist approach seems to be more attuned to a modern or post-Enlightenment understanding of the reasonable, suggesting that this approach is better equipped to handle the problems arising in the constantly shifting dynamics between stagnation and anarchy, forming the battleground where biolaw has its habitat.

We have considered, in summary, the highly unstable nature of the central terms of discussion (*bioethics*, *biolaw*, and *reasonable*, among others), the ever-changing boundary between the life sciences and law, and the fragmentation that any discourse in this regard is bound to have; and so it seems wiser to me, in light of this background, to confine the discussion that follows to a selection of legal cases where reasonableness is implicitly or explicitly invoked in what we accept as “biolaw.” A few concluding remarks will thereafter be made.

3 Caselaw (1): A Shift of Reasonableness

It used to be the standard practice, by long tradition, to put the *physician* at the centre of medical decision; and reasonableness was accordingly predicated of and tailored to the physician’s judgment and action.

In the leading U.S. negligence case involving medical malpractice (*Natanson v. Kline*, 1960), it was held that the duty of physicians to disclose to their patients the risks and hazards of a proposed form of treatment is limited to those disclosures “which a reasonable medical practitioner would make under the same or similar circumstances.”³ This established a professional standard of disclosure in such negligence cases.

³ *Natanson v. Kline*, Supreme Court of Kansas (No. 41, 476), 1960.

The *professional* standard of disclosure was finally replaced with the *reasonable person* standard: this change was effected by way of three 1972 cases—*Canterbury*, *Cobbs*, and *Wilkinson* (see Faden and Beauchamp 1986, 32)—of which we will only consider here the first one.

The judges in *Canterbury*, having surveyed all precedent bearing on the question of the information that patients ought to be provided with, and having also taken into account the courts' prevalent attitude in this regard, came at the conclusion that "the duty to disclose arises from phenomena apart from medical custom and practice."⁴ Framing the scope of such a duty exclusively in terms of a professional standard is at odds with the prerogative recognized for patients to decide for themselves the kind of therapy they will undergo. This prerogative forms the basis of the physician's duty to disclose, and to the extent that the scope of this duty is dictated by the medical profession, the patient's right to know and the physician's correlative duty to inform are both diluted. Here is the judges' reasoning in their own words:

In our view, the patient's right of self-decision shapes the boundaries of the duty to reveal. That right can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. The scope of the physician's communications to the patient, then, must be measured by the patient's need, and that need is the information material to the decision. [Thus,] the scope of the standard is not subjective as to either the physician or the patient; it remains objective with due regard for the patient's informational needs and with suitable leeway for the physician's situation. In broad outline, we agree that "a risk is thus material when a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy".⁵

There are a number of theoretical problems of great consequence that arise out of this shift in reasonableness from a professional to a nonprofessional standard, a standard initially framed by reference to a professional group (physicians) and then by reference to a group (patients) considered irrespective of profession. But there is one question that stands out: Who is this patient that we refer to? Might he be the man on the Clapham omnibus (a nondescript Everyman)? If he is, then we are left with an abstract description suggesting that the move from the doctor's reasonableness to the patient's is more of symbolic significance than anything else, and so that it does not really empower the patient. A meaningful passage in this regard comes from the very judges who wrote the opinion in *Canterbury*:

Of necessity, the content of the disclosure rests in the first instance with the physician. Ordinarily it is only he who is in position to identify particular dangers; always he must make a judgment, in terms of materiality, as to whether and to what extent revelation to the patient is called for. He cannot know with complete exactitude what the patient would consider important to his decision, but on the basis of his medical training and experience he can sense how the average, reasonable patient expectably would react.⁶

⁴ *Canterbury v. Spence*, 464 F. 2d 772, 150 U.S. App. D.C. 263.

⁵ *Ibid.*

⁶ *Ibid.*

If this is correct, we could conclude that the reasonable-person standard is deeply ambiguous. The question may be put thus: Is this standard a real (albeit initial) step toward patient-centred decision-making in medicine, or is it more like an attempt to dam up what, in essence, is subjective standard? This is a question properly pertaining to a history of informed consent, to be sure, but it could equally be taken up in a history of reasonableness: Is the ambiguity of the reasonable-person standard circumscribed to informed consent, or does it reflect an inherent ambiguity of reasonableness itself? Has the introduction of reasonableness served as a way of changing things without really changing them?

4 Caselaw (2): Reasonable Doubt and Euthanasia

In 1998, Enzo Forzatti, an Italian engineer, walked into the intensive-care unit where his terminally ill wife was being treated, and, while threatening the staff on duty by brandishing an unloaded gun, proceeded to switch off her life-support system. He was charged with murder.

He was found guilty as charged and sentenced to six and a half years in prison. In 2002, the Milan Court of Appeal overturned the conviction, finding that “withdrawing life support from a terminally ill patient is not a crime if the prosecution fails to produce evidence that the patient was still alive when the act was done.” The lack of evidence in question lay in the one-hour interval from the moment the woman’s status was last monitored to the moment her life-support system was switched off. A court-appointed expert witness testified that, given the woman’s grave medical condition, it was possible for brain death to have occurred within that interval. The court agreed and concluded that “the link between the removal of the life-support machine and the woman’s death has not been proved beyond a reasonable doubt.”⁷

Unlike the reasonable-patient standard discussed in the last section, proof beyond a reasonable doubt is a procedural standard that typically applies to criminal cases. This latter standard is generally used to set the level of persuasion the judge or jury must have—as trier of fact—before a defendant can be found guilty of a crime. A reasonable doubt is, in this respect, a real doubt based on reason and common sense and arrived at once all the evidence (or lack thereof) produced in a case has been carefully and impartially considered. And proof beyond such a doubt is, accordingly, proof so persuasive that you would unhesitatingly rely and act on it yourself in going about your own most important affairs. Still, it does not mean *absolute* certainty.

The Forzatti case is about euthanasia and, as such, presents a bio-variant on the standard at issue (meaning it presents a variation owed to its involving biolaw); which is to say that the doubt in question concerned not the defendant’s act (which was unequivocal and raised *no* doubts) but whether it occurred in a moment the death was already occurred (and, thus, this act was cause of death). And, as it turned out, reasonableness (in the form of an assessment of reasonable doubt) worked in this case as a limitation on the state’s power to mete out punishment.

⁷ Milan Court of Appeal, 24 April 2002.

5 Caselaw (3): Reasonableness v. Rights

Reasonableness was an explicit subject of discussion in an assisted-suicide case that the European Court of Human Rights heard in 2002: the case, *Pretty*, could appropriately be subtitled “when reasonableness was used against reason and law.”⁸

Mrs. Diane Pretty was a terminally ill woman from the United Kingdom affected by motor neuron disease, a degenerative condition affecting the muscles. Being paralyzed from the neck down, she wanted to take her own life with her husband’s help so that she might die with dignity at home and at a time of her own choosing. But Section 2(1) of the Suicide Act of 1961 makes it a criminal offence for a person to aid, abet, counsel, or procure the suicide of another. Section 2(4) of the same act says that no proceedings for this offence shall be instituted except by or with the consent of the Director of Public Prosecutions (DPP). A commitment was therefore requested on the part of the DPP, namely, that he not give his consent to Mr. Pretty’s prosecution if Mr. Pretty should help his wife commit suicide; but the DPP said he could not do so. Mrs. Pretty thus contended that Section 2(1) of the act violated the European Convention on Human Rights (ECHR), under Articles 2 (on the right to life), 3 (prohibiting inhuman or degrading treatment or punishment), 8 (on the right to respect for private life), 9 (on the freedom of conscience), and/or 14 (prohibiting discrimination). The Queen’s Bench Divisional Court found that no violation of the ECHR had been committed by the United Kingdom. Mrs. Pretty thus brought the case to the European Court of Human Rights, which upheld the British opinion with a ruling of 29 April 2002 holding that there was no UK violation of ECHR Articles 2, 3, 8, 9, or 14.

Here is the crucial point where reasonableness plays a role. It was Mrs. Pretty’s contention that she “was prevented from exercising a right enjoyed by others who could end their lives without assistance because they were not prevented by any disability from doing so.” The source of this discrimination was the government’s blanket ban on all assisted suicide, and the ban could not in this case be justified, since the applicant could not be made to fall within the class of vulnerable people the law was designed to protect. The court observed that you have discrimination under the ECHR when people in very similar conditions are subject to disparate treatment or when people in vastly different conditions are subject to similar treatment. But the court also found that “there is objective and reasonable justification for not distinguishing in law between those who are and those who are not physically capable of committing suicide.”

The reason for this view (i.e., no reasonable justification for the distinction at issue) is revealed in another part of the opinion, where it is observed that the borderline between the two classes will often be a very fine one, and to seek to build into the law an exemption for those judged to be incapable of committing suicide would seriously undermine the protection of life which the 1961 act was intended to safeguard, for it would greatly increase the risk of abuse.

⁸ *Pretty v. United Kingdom* (Application No. 234/02). See Santosuosso (2002) and Pavone (2002).

The Court thus seems to use *reasonable* as a synonym for *suitable* or *adequate*, understood in this case as what is needed if we are to prevent the risk of abuse. There is nothing in the opinion to suggest that the court is concerned about the consequent violation of the patient's right to self-determination. It is worth noting that the Italian Supreme Court has taken the opposite position in a case, which, although different under some respects (the case being about the powers of an incompetent person's *guardian*) focused exactly on the same point: the legal effects on self-determination of being the person able or unable to act physically or mentally. The court found that

The principles of informed consent and equal rights among individuals, whatever their condition (competence or incompetence), require that a duality of subjects be preserved in medical decision-making. Thus, the physician must provide information about diagnosis and therapy, so that the (incompetent) patient, acting through his/her guardian, can accept or refuse the proposed treatments.⁹

In *Pretty*, in conclusion, reasonableness is a way of saying that we as a society must be cautious in recognizing full rights for people at the end of life, since these people's rights carry less weight than certain traditional moral values with which they come into conflict, and in the end it is better, all things considered, to sacrifice the former (the rights) to the latter (the values). But, in doing so, the judges run counter to the basic assumption behind all court decisions in many countries, beginning with *Quinlan* (US 1976), as well as to legislation on advance directives and living wills: the mere fact of a patient being incompetent or unable is not a good reason to curtail this person's rights and liberties.

6 Caselaw (4): Reasonable Reasoning and Common Sense

The case discussed in the last section, *Pretty*, aptly exemplifies as well a further aspect of reasonableness in biolaw, an aspect that might be called the *undeclared use* of reasonableness, where *reasonableness* takes on the meaning of "moderation in reasoning."

The question here is whether, to what extent, and in what cases reasonableness can be brought to bear on legal reasoning (rather than on behaviour), and what the boundary is, if any, with common sense and the use of common sense in law.

In *Pretty*, the European Court of Human Rights takes up the right to life arguing that Article 2 of the ECHR "could not, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor could it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life."¹⁰

⁹ *Suprema Corte di Cassazione*, n. 21748, 16 October 2007. It is the Englaro case that the decision is on.

¹⁰ Article 2 of the ECHR: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

The right to life has a very long story in Europe and European countries. It has proceeded along two parallel courses since it was enshrined in Article 2 of the ECHR. On the one hand, this article has been interpreted from the outset, since 1950, in a very specific and literal sense as referring to the death penalty exclusively; and more recently, in 2000, this original meaning of the right to life as encapsulated in the ECHR has been taken up in the Charter of Fundamental Rights of the European Union. But throughout this time, over the years, a more inclusive meaning has taken root, with the right to life shifting from a strict construction (as a right that one can be deprived of only under due process for a crime subject to the death penalty) to a broader construction under which this right comes into play in any situation where life is at stake, even in an essential biological sense (as when refusing life-saving treatment, or asserting the right to life for surplus embryos and fetuses, and so on). In this broader sense, the right to life is considered a basic constitutional right, even when not expressly named in a bill of rights, owing to its intrinsic nature as an enabling condition, on the assumption that you have to be alive in order to enjoy your rights and liberties.

Hence the question: What was the European Court referring to when it found that the right to life “could not, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die”?

The judges seem to be making an appeal to reasonableness (though without using the word itself) by inviting the parties concerned, as well as jurists and the layperson at large, to exercise a measure of restraint and not get carried away with legal interpretation.

However, it was quite a different and more specific claim that Mrs. Pretty submitted to the court: she argued that Article 2 of the ECHR protects not life itself but the *right* to life, since the whole point of the article is to protect individuals from *third* parties (from the state and its officials) rather than from *themselves* (or their guardians). In fact, the article recognizes that it is for the *individual* to choose whether or not to live, and so what is being protected here is the individual’s right to self-determination in matters of life and death. Someone may thus refuse life-saving or life-prolonging medical treatment and may lawfully choose to commit suicide: it is that right of the individual that the article protects, recognizing that while most people want to live, some want to die, and the article protects both rights. The right to die does not lie in antithesis to the right to life but rather functions as its corollary, and the state has a positive obligation to protect both.

Although all this is a questionable matter and it is possible to disagree with such a thesis, the Court’s decision did not express a different opinion but simply missed the point. The remark that Mrs. Pretty was claiming a right diametrically opposite to the right to life suggests that the court confused two meanings of *life*, collapsing the idea of life as a *right* to life into that of life as *biological* life. It is only in this latter biological sense that life stands opposite to death; and so, if on the opposite side of biological life we find death, on the opposite side of the *right* to life we find not death but a *duty* to life. As any legal dictionary will clarify, a right *entitles* you to something, whether to concepts like justice and due process, or to ownership of property or some interest in property, real or personal.

Hence the right to life is, firstly, a right to have full protection against assaults on our life (including unintended assaults) from third parties, even from public authorities, as can clearly be appreciated by reference to the death penalty, which lies at the historical root of the right to life. A question may arise as to whether a person endowed with the right to life can disavow this right, but it cannot be denied that someone may act—or even *not* act—by virtue of that right. The line of reasoning the European Court seems adopt gives rise to the paradox of a right that morphs into a duty.

There is something flawed in this new wave of thought investing the right to life: initially introduced as a safeguard against the death penalty, the right is now being used as a wildcard applicable as well to whatever case might involve an end-of-life or a beginning-of-life issue. It seems to me that we should question the wisdom of this reasoning. In fact, I submit that if we dig deep enough, we will find that the wildcard so conveniently applied all-around works more as an excuse to give up reasoning altogether than as a form of moderation in reasoning.

If something is to be reasonable, it must at least be explained in a form that we can understand and make sense of. In *Pretty*, the European Court simply did not explain anything.

7 Reasonable Man, Woman . . . and Nature

The hypothetical reasonable person the law refers to is not the average person, but the personification of a community ideal of reasonable behaviour. Legal definitions of reasonable person imply a “social” understanding of what a person is in his natural terms or a “natural” definition of what a person is. That much can clearly be appreciated by looking at the historical evolution of the reasonable man. Indeed, the “reasonable man” standard, first applied to negligence cases in England in the mid-nineteenth century and then in the United States, became a gender-neutral “reasonable *person*” standard by the beginning of the twentieth century, and is now mostly used as inclusive of all persons, men and women alike.

Moreover, the law does not take into account minor, individual differences of character or ability in establishing a standard against which to evaluate conduct, but exceptions do exist: children are held to the standard of a reasonable child of the same age; and a person’s particular talent or training is also considered (see Rothstein 1999).

In recent decades, a reasonable-woman standard has come into use in the United States in sexual-harassment cases to determine whether such harassment has in fact been engaged in. The first time *reasonable* was used in law in conjunction with *woman* was in 1928, but only to report, in a legal commentary, that an exhaustive survey of common-law cases had turned up “no single mention of a reasonable woman.” The two words are then used together in a 1984 *Harvard Law Review* comment suggesting a new standard of review (the reasonable-woman standard) as appropriate for sexual-harassment cases: this new standard, described as objective, calls on us to consider the perspective of a reasonable victim

or plaintiff rather than the subjective perspective of this or that individual (see Ranney 1997).

The “reasonable woman” standard has received a great deal of attention since its use in the 1991 majority opinion in *Ellison v. Brady*. The court held in *Ellison* (drawing on the dissent to the 1986 case *Rabidue v. Osceola Refining Co.*) that the reasonable-woman standard was more appropriate than the “reasonable person” standard derived from tort law (itself a replacement of the traditional “reasonable man” standard) in determining whether behaviour directed toward women creates a hostile working environment and thereby constitutes harassment. Courts that use the reasonable-woman standard recognize a difference between men and women when it comes to the effect of unwanted sexual advances. And, considering that women have historically been more vulnerable to rape and sex-related violence than men, these courts take the view that the proper perspective for evaluating a sexual-harassment claim is that of the reasonable woman (see Goldberg 1995; Heller 1998; Perry et al. 2004).

What is important here, where we are concerned, is not the contentious issue itself of what the most appropriate standard is for what it means to be a reasonable child, man, woman, or person: it is rather that when we invoke such a child, man, woman, or person, we do so relying on some background assumptions and ideas that lie in concealment until a discussion brings them to light. Some of these assumptions and ideas are based on biological characteristics and accordingly pertain to the biological entity that rights and liberties belong to. The question, however, is not *what* but *who* this biological entity is. And so, it is not by a natural nexus that a human being (an individual) comes to be a holder of rights and liberties: such an ascription of rights and liberties does not inhere in humans owing to their natural characteristics, of course, but rather depends on historical context—it is the outcome of a historical process.

The question of who the holders of rights and liberties are is, needless to say, a fundamental one, so it is not surprising to see it turn up regularly on the constitutional docket. To be sure, after the demise of patriarchal legal systems and the gradual recognition of individual rights—such as racial, sexual, religious, and anti-discrimination rights, along with so many others—we might have thought we had settled once and for all the vexed question of *who* the (biological) entity is that these rights and liberties belong to. But in recent decades the question has come back with renewed intensity owing to the impact the life sciences and the biotechnologies are having on our societies. Even as the same concept of a person (an individual) continues to be a subject of debate and discussion, new groups, species, and entities have appeared on the horizon that are now filtering into society. They therefore need to be explored and understood.

Furthermore, the engineering of creatures that are part-human, part-nonhuman makes it necessary to redefine the distinctive properties of humanity as well as to rethink our relation to nonhuman animals. In-vitro fertilization has inspired many opportunities for the use of gametes, fertilized eggs, embryos, and the like, and the production of human/nonhuman hybrids is but one among these many opportunities. Another such opportunity or possibility is, notably, the *cloning* of human

beings—which goes to show just how broad and multifaceted this whole issue is. To be sure, we do not yet have the science to create such *new entities* (hybrids, clones, and the like), but it is likely that if we persist we will sooner or later overcome the technological obstacles we now face, and then we will have gotten to the point where we *can* create these new entities. In fact, it seems that somewhere down the line we will be able to introduce into the human body such nonbiological material as *cyborgs* and other forms of artificial intelligence, and this will pose an even greater challenge for the concept of a human individual such as we presently understand it. Even as we speak, for the first time ever the issue of the freedoms and the right to life of the great apes is being considered by a legislature: this is happening in Spain, whose parliamentary environmental committee has approved resolutions urging Spain to comply with the Great Apes Project, framed by scientists and philosophers who say the great apes, our closest genetic relatives, should on that account be accorded rights hitherto reserved to humans.

In short, the question is: To what extent are changes in the human (and possibly even the nonhuman) biological entity affecting our idea of reasonableness in what concerns the rights traditionally recognized for such entities?

8 Conclusion

That reasonableness owes no special debt to reason should not be taken to mean that it is impossible to find some threads of consistency in the use of reasonableness.

A sampling of the varied use of reasonableness was taken with the different legal cases previously considered: reasonableness as way of changing things without really changing them, in the reasonable-person standard for informed consent; as a limitation on the state's power to punish, in the Forzatti case; as a way of justifying sacrificing the rights of dying people for the sake of traditional moral values, in *Pretty*; and as a way of "rewriting" the right to life without explaining how that comes about, in *Pretty* again.

It is hard to say how consistent the use of reasonableness in biolaw can be made. In fact, it may well be that we will never be able to avoid undeclared uses of *reasonableness* or declared ones where the word finds an ostensible use that is simply stated without any comment or clarification. If we compare, on one side, the need for a rational approach to new challenges that biological sciences bring to rights and liberties and if we consider, at the same time, how ambiguous our use of reasonableness is in biolaw, then we must, as I see it, necessarily come to the conclusion that we should altogether refrain from using reasonableness in biolaw. And when someone speaks of reasonableness we should ask them, "Could you please try and use a different word?" Or we should ask them, "What do you mean by reasonableness?"

In this way we could avoid some harmful uses of reasonableness, such as its use as a wildcard against research in biology and law, or a way of saying, "Let's stop being rational."

My conclusion is that we have to be reasonably unreasonable if we are to make progress in the life sciences and in working out the related question of fundamental rights.

References

- Casonato, C. 2006. *Introduzione al biodiritto*. Padua: Cedam.
- Coke, E. 1985. *Commentary Upon Littleton*. 18th ed. Ed. C. Butler. Delran, NJ: Gryphon. (1st ed. 1628.)
- Dolgin, J., and L.L. Shepherd. 2005. *Bioethics and the Law*. New York, N.Y.: Aspen.
- Faden, R., and T.L. Beauchamp. 1986. *A History and Theory of Informed Consent*. Oxford: Oxford University Press.
- Giraudoux, J. 1967. *La Guerre de Troie n'aura pas lieu*. Paris: Grasset.
- Goldberg, D.B. 1995. The Road to Equality: The Application of the Reasonable Woman Standard in Sexual Harassment Cases. *Cardozo Women's Law Journal* 3: 1–17.
- Gross, T., and B. Blasius. 2007. Adaptive Coevolutionary Networks: A Review. *Interface. Journal of the Royal Society*. <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=2405905>.
- Haack, S. 2005. On Legal Pragmatism: Where Does “The Path of the Law” Lead Us? *American Journal of Jurisprudence* 50: 71–105.
- Heller, K.J. 1998. Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases. *American Journal of Criminal Law* 26: 1–120.
- Holmes, O.W. 1948. *The Common Law*. Boston: Little, Brown and Company. (1st ed. 1881.)
- Pavone, I.R. 2002. Nota alla decisione della Corte europea dei Diritti Umani del 29 aprile 2002 sul caso Pretty v. United Kingdom. *Affari Sociali Internazionali* 4: 37–49.
- Perry, E.L., C.T. Kulik, and A.C. Bourhis. 2004. The Reasonable Woman Standard: Effects on Sexual Harassment Court Decisions: Psychology, Law and the Workplace. *Law and Human Behavior* 1: 9–27.
- Ranney, F.J. 1997. What's a Reasonable Woman to Do? The Judicial Rhetoric of Sexual Harassment. *National Women's Studies Association Journal* 2: 1–22.
- Rawls, J. 1971. *A Theory of Justice*. Cambridge, Mass.: Harvard University Press.
- Richardson, H.S., ed. 2005. John Rawls. In *The Internet Encyclopedia of Philosophy*. Ed. J. Fieser and B. Dowden. Georgetown University. <http://www.iep.utm.edu/r/rawls.htm>.
- Rothstein, M.A. 1999. The Impact of Behavioral Genetics on the Law and the Courts. *Judicature. Genes, and Justice. The Growing Impact of the New Genetics on the Courts* 3: 116–23.
- Santosuosso, A. 2002. Un commento sul caso Pretty. *Bioetica* 10: 368–72.
- Schneider, C.E., and M. Garrison, eds. 2003. *The Law of Bioethics: Individual Autonomy and Social Regulation*. St. Paul, Minn.: West.
- Shakespeare, W. 1967. *King John*. Ed. E.A.J. Honigmann. London: Methuen.
- Waldrop, M.M. 1992. *Complexity: The Emerging Science at the Edge of Order and Chaos*. New York, N.Y.: Simon & Schuster.
- Wierzbicka, A. 2006. *English: Meaning and Culture*. Oxford: Oxford University Press.

Reasonableness and Biolaw

Stephanie Hennette-Vachez

1 Introduction

There can undoubtedly be a procedural approach to reasonableness. Alexy argues that conditions such as taking “all relevant factors” into account or “putting all relevant factors together in a correct way” (see Alexy 2009) are necessary for reasonableness to be pursued—and *a fortiori* achieved. In the particular field of biolaw, Faralli argues somehow similarly that reasonableness can only be reached when norms proceed from a “shared method of discussion” (rather than from an “antecedent doctrine”) and if they are based on the assumption that dilemmas faced by biolaw can not be expressed nor analyzed in terms of truth and/or falseness but only pretend to be “adequately argued and justified” (see Faralli 2009). At any rate, a non-procedural (eg., substantial) approach of reasonableness may well be said to be quite unlikely in early 21st century European academic settings, for natural law theories articulated around substantial standards of validity are readily said to be out of—scientific—fashion. Indeed, it would have been surprising to hear speakers and the *Reasonableness and the Law* conference argue that the concept of reasonableness was a promising ground for validating certain conducts and norms as “reasonable,” and invalidating others as “unreasonable.” However, the frontier between a procedural and a substantial approach of reasonableness is not easy to draw. Consequently, and despite the above recalled procedural approach to reasonableness, the concept sets the legal theorist on a slippery slope towards axiological assessments of legal cases—a reason for which it will be argued it is best relinquished.

Indeed, reasonableness rings a little bit like a variety of concepts that regularly attract legal theorists’ attention because of their everlasting hope that the satisfying answer to the question of how hard cases really are determined will eventually be found. For legal theory has never accepted Jerome Frank’s breakfast theory; in fact,

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it has mostly deemed it inadmissible.¹ Instead, it has relentlessly devoted time and efforts at looking for concepts that would convey less arbitrariness but still be able to account for the fact that in many cases, since there is no “one good legal answer” to a given situation, something else and more than positive law does play a part in the manufacture of legal norms. Common sense, *ordre public*, justice, fairness, rationality, human dignity . . . all these concepts have been or still are regularly called upon in positive law and theoretical inquiries in the name of their ability to bring together the description of what lawmaking is and that of what it ought to be. They succeed in fulfilling that mission because they formally are presented as “legal” categories (hence they avert the spectrum of arbitrariness) and substantially have no precise or definite definition (hence they can accommodate many different or even contradictory interpretations).

Fairly enough, reasonableness—unlike “common sense” (see de Sousa Santos 1995) or, “human dignity” (see Feldman 1999)—is not a purely substantial concept; hence the idea that it has to do with methods of discussion where all viewpoints are considered and balanced in the hope that something like an overlapping consensus is reached. Thanks to this procedural dimension of reasonableness, the concept is deemed susceptible of being objectively discussed. It may therefore be argued that it is less of a disguise for a particular judge’s personal preferences (or breakfast menu) than other solely substantial ones may be. Indeed (the argument unfolds), whereas it is possible that no agreement would ever be reached on the substantial assessment that a particular behavior is or is not contrary to human dignity,² there would be a guarantee of possible common and objective grounds for discussion as to whether the decision has been reasonably reached. However, it is suggested here that Reasonableness is but another variation on a same theme of axiological modes of legal reasoning, for despite a readily procedural presentation, it always and inextricably conveys much substance. For indeed, whether one will deem the recourse to human dignity in legal reasoning in a particular case “reasonable” or not strongly reflects one’s personal understanding of the principle. This is why it is considered here that the border between procedural and substantial aspects of reasonableness is not easily drawn and thus that legal usage of the concept conveys the risk of shifting from legal analysis to axiological prescription.

¹ It would be interesting to investigate the link between the intensity of such breakfast (or raw personal preferences) theories’ rejection within specific legal communities and the status therein of legal sociology. I would not be surprised for a correlation to appear, for the sociological approach’s premise is so similar to that of breakfast-like theories (eg., the notion that elements exterior to law may shed an interesting light on legal processes) that it would usefully account for legal communities’ often limited interest in types of investigation that threaten the very idea of the autonomy of law.

² Multiple examples can be referred to here, for the human dignity principle has been used by: the South African Constitutional Court to condemn prostitution (CCT31/01, 9 October 2002, *Jordan v. the State*); the German Federal Administrative Court to uphold the probation of a particular class of Peep shows (*BVerwGE* (1981) 64, 274); the French Council of State to uphold city ordinances prohibiting dwarf-throwing games to be organized in nightclubs . . . (C.E., Ass., 27 October 1995, *Commune de Morsang sur Orge*, rec., 372).

There is much to expect from the immediate “testing” of the theoretical construction of a concept in a particular field of law; and biolaw appears to be a particularly relevant field for putting theoretical approaches of “reasonableness” to the test, if only because it is one in which the idea of reasonableness has historically played a strong role. However, it is a “test-field” from which the idea of the concept’s relevance to legal theory returns weakened; and there are, at least, three reasons to that. First, it all seems that the idea of reasonableness as a central concept in the process of elaborating norms in the field of biomedical issues disappeared with the shift from bioethics to biolaw; in other words, bioethics/biolaw specialists have a relatively strong case for arguing that reasonableness is a somewhat outdated concept. Second, it can be claimed that the use of reasonableness as an assessment device of legal regulation in the field of biomedical issues is difficult to justify in from a perspective of legal theory, for it can very easily be but the clumsy mask of political critique. Finally, and on a more general standpoint, it is arguable that interest paid to reasonableness by legal theory is only a (supplementary) confirmation of the contemporary pervasiveness of ethical considerations and principles in the field.

2 Reasonableness as an Outdated Concept: The Perspective of a Biolaw Specialist

What is striking in definitions of reasonableness such as the ones recalled above—and what is best seen from the point of view of biolaw—is that they rely on the kind of argumentations that used to be prominent some twenty or even thirty years ago in the then—emerging field of bioethics. It shares many a resemblance with central concepts of the time, such as that of “secular moral reasoning” developed by Engelhardt as a means of overcoming the “moral fragmentation that characterizes postmodernity” (see Engelhardt 1986, 421) and identifying “foundational” consensual values (*ibid.*, Chapter 2), or that of “middle-level principles” that Beauchamp and Childress had put forth.³ It also corresponds to the manner in which these theoretical views initially influenced the actual and institutional practice of bioethics. As an illustration, one only needs to look back at the creation and generalization of Ethics Committees that initiated in the early 1980s. Those committees were indeed presented as means of securing a deliberative, consensual and pluralistic model of rule-making (see Moreno 1994, 1995). Additionally, their composition and working methods generally strongly reflected “reasonableness” understood as a “shared method of discussion” in which the highest requirement is that all positions are “adequately argued and justified,” so that the final outcome (the committee’s opinion) is

³ See Beauchamp and Childress (1979). They argued that such principles could be used and generate common grounds between people and groups from different moral backgrounds, such as deontologists and consequentialists. They identified principles such as those of autonomy, beneficence, non maleficence and justice to be such middle-level principles.

in a position to pretend to authoritativeness (see Bayertz 1994). One could also observe that such concepts (secular morality, middle-level principles . . .), and such practices (the institutionalization of ethics) were typical of times during which both the capacity and the legitimacy of *legal* regulation in the field of biomedical questions were under question—if not denied. The French example is very telling in that respect. The *Comité Consultatif National d’Ethique* was created in 1983. Typically during the early 1980s (see Flis-Trèves et al. 1991), there was a strong and quite dominant notion that law was an inadequate tool for regulating biomedicine because it was both too general to satisfactorily apply to cases that were ever particular and specific and too slow in its elaboration to ever catch up with science’s pace.⁴ In this context, it is hard not to see the institutionalization of ethics as an attempt to find and develop an alternative source of normativity.

However, things have changed and the 1990s could be said to have favored a shift from the “bioethics” paradigm to the “biolaw”. It is indeed a decade during which there was a growing sense that the consensus strategy typical of the first “ethical” phase had failed and that it was therefore necessary to acknowledge its chimerical dimension and return to majoritarian law-making processes. Core common principles had not emerged (and they were not going to); nor had regulating become an easier task (and it would not any time soon). Consensus no longer appeared to be the method nor the purpose; mere compromise was left (see Franklin 1995). This accounts for the global movement of legislative action in the field of biomedical issues⁵ that gradually took over “soft” ethical regulation.

The British example nicely illustrates that the *bioethical* approach had not watered down the depth or strength of axiological controversies. The emblematic 1984 Warnock report (see Department of Health 1984; Jasanoff 2005, 149) did not avert (it may even have stimulated) forceful opposition to its key propositions, such as that of legalizing research on human embryos up to the 14th day. Hence the tight votes that followed all legislative initiatives on the topic up to the 1990 Human Fertilization and Embryology Act of 1990 (see Mulkey 1997). To be sure, what occurred at the international scale is somewhat different, if only because of the inapplicability of the majoritarian rule. Similar acknowledgements that consensus was out of reach have characterized the recent years nonetheless. First, the hopes generated by the international method of identifying the minimal basis of common values have been somewhat overshadowed by the empirical finding of the relative pointlessness of the whole undertaking. The Oviedo Convention of 1997 has

⁴ Emblematically in that respect, see the very official and institutionally prominent 1985 conference that brought together scientists, politicians, lawyers, moral philosophers, etc. See Nyssen, ed. (1985).

⁵ For a few yardsticks: Spain enacted a law on medically assisted reproduction as early as 1988 (ley 35 del 1988). The famous British Human Fertilization and Embryology Act was passed in 1990. France voted its first Bioethics Law in 1994 and recently adopted a new one (2004). Now, most countries have legislative regulations in the field of biomedicine: Germany, the Netherlands, Italy, Switzerland, Portugal . . .

accordingly been criticized by specialists of the field and neglected by many States⁶ precisely because of its incapacity of saying anything normative⁷—the emblem of the vanity of consensus being its article 18 which instead of embodying a position on whether embryonic research should or not be made legal, limits itself to saying that be it the case, such research is to be authorized only under precise conditions. More dramatically still, the United Nations failed altogether to bring the international community to a ban on cloning. Thus the ambitious worldwide resolution on reproductive cloning eventually led to a much lower profile non-binding *declaration* calling all States to adopt “all measures necessary to prohibit all forms of human cloning inasmuch as they are incompatible with human dignity.”⁸ On a more conceptual standpoint, it is worth underlying that recent scholarship acknowledges this necessary departure from the mirage according to which the fact of taking all views into account would enable the elaboration of sound solutions. Engelhardt’s latest volume’s title is telling: *Global Bioethics: the Collapse of Consensus*⁹; and legal scholarship acknowledges the difficulty, at times impossibility, of regulatory consensus (see Brownsword 2005). Many publications draw the same statement albeit they may assess it differently (see Pellegrino 2000; Trotter 2006): biomedical issues are an area of deep moral disagreement that cannot be solved through sound methods of argumentation.

As the very notion of consensus is progressively pushed out of the picture, new understandings of the stakes of biomedical debates and the possible means of dealing with them emerge. The idea that procedures and methods were appropriate means of neutralizing the violence of moral controversy and eventually overcoming it is weaker today than it once was. Consequently, whereas the biomedical debate in the 1980s was mostly articulated around the aim of finding the proper regulatory *method* (a debate in which reasonableness as defined above did have a say), it mostly

⁶ Countries such as France, Italy, Poland (1999), the Netherlands or Sweden have signed the 1997 Convention but still not ratified it. Others, such as the United Kingdom, Ireland, Germany or Belgium have not even signed it!

⁷ In this respect, the UNESCO Declarations (from the 1997 one on the Human Genome to the 2005 one on Bioethics and Human Rights) can also be read as so minimal that they actually constrain none of their signatories: see Girard (2006). Similarly the much praised Article 3 of the European Charter of Fundamental Rights can be viewed as achieving only minimal results, if only because of the manner in which it repeatedly refers (and thus yields to) national law; see Henette-Vauchez (2005).

⁸ Note that this formula remains ambiguous enough for the adoption of this watered down declaration to have been divisive still, for there were 84 votes in favor, but also 34 against and 37 abstentions. This is to be explained by the fact that the countries who opposed the idea of a global ban on all sorts of cloning (reproductive and therapeutic) argued that the final declaration’s wording had not lifted the ambiguity and could still be interpreted as encompassing therapeutic cloning.

⁹ See Engelhardt (2006). For a representative excerpt of the book’s main idea, see: “Some levels of disagreement run so deep and so wide as to render allegations of a shared morality [...] meaningless [...] [some discussions] imply not only surface standard disagreement, but deep disagreement over fundamental principles as well. They cannot be regarded as variations of a single universal standard of patient autonomy where disagreement or difference is merely a matter of degree. Instead, their disagreement shows substantial incommensurable difference” (Tao, 2006, 155).

is in the 2000s about discussing the *substance* of regulation (thus the concept of reasonableness' relevance is much more dubious). In other words, the highly political dimension of choices in the field of biomedicine is more generally acknowledged today than it was before. Choices have to be made and they may be informed by prior ethical pluralistic discussion but they ultimately resort to law—not ethics. In that respect, biolaw increasingly appears to be nothing more than the endorsement of given options: biolegal norms are embedded in political assumptions. This evolution of the biomedical debate and the relatively new strength of the “biopolitical” paradigm actually reveal interesting features of biolaw (see Bishop and Jotterand 2006) Notably, they support the view that there are no *good—legal—answers* to the questions in presence (should embryos be created for research purposes? should physician assisted suicide be tolerated? should patents be deliverable over living material? . . .). In other words, biolaw substantially really is the result of political conventions and agreements—compromises (see Hennette-Vachez 2009). For that reason, and because increasingly biolaw is mostly legislative law, the interrogation relative to the relevance of “reasonableness” in biolaw ultimately has to do with the very conception one has of the political legitimacy of parliamentary lawmaking.

3 Reasonableness and Parliamentary Lawmaking, or the Hesitant Frontier Between Legal Theory and Political Critique

It is argued here that the concept of reasonableness is a tricky tool for legal theory for it (imperceptibly?) leads to substantially evaluative stances¹⁰ and is therefore of very limited utility. In a manner very typical of the contemporary Italian biomedical debate, Faralli has argued that the Italian statute 40/2004 (*Norme in materia di procreazione medicalmente assistita*) is to be criticized as the result of the triumph of a “conservative antecedent doctrine.” In other words, according to Faralli’s above-recalled definition of reasonableness, the Italian law is to be considered “unreasonable.” There are several reasons for which one can find such assessments of parliamentary law-making puzzling; however, they all derive from the general consideration that such usages of the concept of reasonableness actually constitute attempts at demeaning norms for political (axiological) purposes.

The claim that a parliamentary law (here the assisted reproduction law), in a democratic political regime (here Italy), is “unreasonable” necessarily implies one of the following:

- either there is a causal relationship between the method (parliamentary lawmaking) and the outcome (the law), in which case the outcome’s unreasonableness necessarily results from the method’s unreasonableness

¹⁰ It is hypothesized here that such substantial evaluative stances are per se incompatible with a posture of legal theory, and therefore that law is not to be assessed in terms of its substantial conformity to pre-existing heteronomous principles.

- either there is no causal relationship between method and outcome, and the former’s reasonableness serves as no guarantee of the latter’s reasonableness.

In this latter case (no causal relationship between the implementation of a reasonable—parliamentary—method and the achievement of a reasonable result), the whole point of reasoning in terms of reasonableness from the point of view of legal theory is somewhat minored altogether, unless we think procedures and methods have an interest *in themselves*. At any rate, such perspective would be at odds with some of the most critical trends of 20th century political and legal philosophy, among which the most prominent ones led by Rawls and Habermas, who are precisely based on the premise that there is something like a causal relationship between procedures and outcomes.¹¹ In the former case, even greater difficulties emerge for indeed, one might wonder: where does it take us (legal theorists) to describe parliamentary law-making as “unreasonable”? What is it in parliamentary confrontation of opinions that draws it away from a reasonable method of constructing biolaw? And—paramount to all—: by what should it be replaced?

It is not suggested here that all the authors and legal scholars who have opposed the Italian *legge* 40/2004 for being “unreasonable” have implied either one of these two quickly sketched premises (that there is, or that there is not, a causal relationship between the reasonableness of a method of lawmaking and its actual outcome)—although some might well have. Rather, I believe the concept of reasonableness has often be used in a much lighter fashion; more accurately, it has been used in a political (as opposed to legal) sense, as a means of opposing on political (axiological) grounds a law whose—democratic—legitimacy was out of the question. As a matter of fact, these are not uncommon mores in the world of biolaw. The Italian law is criticized as unreasonable by progressive actors of the public debate on bioethics that have the impression it is too restrictive. The EU decision to fund research on human embryos is criticized by conservative groups that accuse the EU research policy of being too utilitarian. The French law on bioethics is said to be unreasonable both by catholic groups because it allows research on human embryos, and by important parts of the scientific community because it only does so reluctantly and restrictively. All these groups who criticize biolaw have the impression that either their views were not taken into account or that they were not put together in a correct way—thus, that the biolaws they criticize are “unreasonable.” Social actors may well say so much; by doing so they only exercise their freedom of opinion and aim at exerting political pressure in the law-making process. Whether it is justified for legal theory (and legal theorists) to engage in a similar assessment of politically legitimate law-making in terms of reasonableness is much more dubious, for the challenge of objectivity here seems insuperable. In that perspective, it is contended here that the role of the legal theorist in the field of biolaw is easier justified

¹¹ More accurately, it should be specified here that Habermas’s ideal procedure of discussion is constructed as (and justified by) enabling true democratic agreement. However his discourse theory has been criticized by many aspects. For a recent and stimulating critique from the point of view of Austinian pragmatism, refer to Cayla (2007).

when restricted to “clarifying points of contention and agreement,” hopefully with the effect of later “facilitating the processes of political negotiation” (see Trotter 2006, 247).

4 Reasonableness, Law and Ethics

Maybe the contemporary interest legal theory is paying to concepts such as “reasonableness” is only an additional sign of how penetrated by ethical conceptions contemporary legal theory is. Because there is another possible theoretical explanation for evaluative usages of the concept of reasonableness that has not been accounted for hereabove. It may well be, indeed, that those who so refer to the concept do pre-suppose that there is a causal relationship between methods and outcomes but deny however that parliamentary law-making is a reasonable method and recommend that other ones are more satisfactory. Such a posture would somehow resemble a Habermasian perspective in which language (and no longer the State) is the ultimate foundation of democratic norms. In which case, what conceptions of reasonableness that have to do with the idea that “good” outcomes are associated with “good” methods eventually convey is the idea that a reasonable body of norms no longer is essentially associated with political or institutional concepts such as validity, sovereignty and ultimately legitimacy. Instead, it is notions like deliberation, acceptability, participation, etc. that are to be taken into account. These underpinnings are worth reflecting upon.

At any rate, it is quite undisputed that many notions associated to the concepts of political legitimacy and sovereignty have been seriously challenged in contemporary legal thought. Constitutional courts¹² seem to have taken over legislators as the ultimate source of law—all the easier that they have been constructed, over the 20th century, as essentially concerned with fundamental rights, the indisputably legitimate mission *par excellence*. Law is now quite commonly accepted as a potentially State-independent device (see Cohen-Tanugi 1987; Weiler and Wind 2003); post-modernity seems to really mean association of private actors (versus unilateralism) as well as trust in soft law and incitement (versus binding rules)—“old” law is said to be challenged by “new” modes of governance (see Bùrca and Scott 2006; Trubek and Trubek 2006) Institutions-wise, this means that in various regions of the world, governments no longer are considered to be the only relevant source of power, for most of them are integrated in multilevel systems of governance (see Bernard 2002). Hence sovereignty either no longer is thought to lie in the people’s representatives or it is no longer thought to necessarily be absolute and ultimate (see Walker 2006). Simultaneously, contemporary legal philosophy (see Cayla 1996,

¹² Actually, this also applies to constitutional courts in a loose sense, i.e., one that would include courts that are not technically constitutional but are said to exert constitutional functions, such as obviously the European Court of Justice (see among many examples of the constitutionalization literature applied to the ECJ in Stone Sweet 2004) but also, more recently, to the European Court of Human Rights (see, for example, Greer 2005).

2007) has rejuvenated the idea of the possibility of unveiling something like a universal rationality, mostly throughout a revisitation of procedures as a potentially valid means to valid ends. Communicational Ethics in Habermas' fashion but also Rawls' principle of justice are typical of this theoretical stance. Such premises, for they have been prominent in 20th century political theory, have given rise to much theoretical debate, and some of their criticisms are of unquestionable value (see for example Rosenberg 1998). Here is not the locus to engage upon that path however; for what needs to be presented in the remaining paragraphs are the various forms such ethical conceptions of law have taken in the particular field of biolaw.

Let us first underlie how strong the case is for such pervasiveness to be particularly conspicuous in the field of biolaw. It has been convincingly argued that from a historical perspective, the struggles relative to the exact determination of the borders of legal categories such as "person," "alive" or "dead" (eg., in contemporary vocabulary, biopolitical issues) have been propitious grounds for the affirmation of natural law logics (see Thomas 1995, 2002). Medieval re-readings of Roman law have purported to oppose a number of legal fictions in particular those who contradicted biological life and genealogical orders.¹³ Instead, they sought to impose an anthropological understanding of the legal category of "persons" throughout the historically disputable idea that it was meant to apply to all living persons. Contemporary legal debates and especially those who have arisen with respect to biomedical issues seem to confirm this historically inspired analysis for indeed, there are strong links between those issues and the reappearance of axiologically-inspired theories and principles of law (Thomas 2002, 130): "Contemporary law's postulate that the body is inherent to the person traces back to medieval juridical speculations that denatured the originally purely functional sense of the person in Roman law on the basis of theological premises."¹⁴ This is paradigmatically illustrated by the recent fate of the human dignity principle (HDP). Not only has Western legal orders' recent infatuation with the HDP strongly coincided with their facing regulatory challenges in the field of biomedicine (see Beyleveld and Brownsword 2001), the particular field has also strongly echoed a very particular understanding of the principle by valuing "dignity as constraint" way over "dignity as empowerment" (ibid.). Thus the HDP may have been called a "two-edged sword" (see Feldman 1999, 685), it mostly seems to have served the interests of the "dignitarian alliance" (see Brownsword 2003, 2008) in the field of biolaw, as it has been mostly promoted as the vector of duty-led approaches (over rights-conferring ones) and neo-Kantian normative obligations (see Hennette-Vauchez 2008). It is contended that the concept of reasonableness is susceptible of playing similar a role.

¹³ The classical example being the legal fiction allowing the unborn son to inherit from the deceased father. For other examples, see Thomas (2002, 137).

¹⁴ "L'inhérence du corps à la personne, qui est un postulat du droit contemporain, plonge ses racines, en réalité, dans les spéculations juridiques médiévales qui, à partir de prémisses théologiques, dénaturèrent le sens purement fonctionnel de la personne en droit romain".

References

- Alexy, R. 2009. *The Reasonableness of Law*, this volume.
- Bayertz, K. 1994. *The Concept of Moral Consensus, The Case of technological interventions in human reproduction*. Dordrecht: Kluwer.
- Beauchamp, T.L., and J.F. Childress. 1979. *Principles of Biomedical Ethics*. New York, N.Y.: Oxford University Press.
- Bernard, N. 2002. *Multilevel Governance in the EU*. Dordrecht: Kluwer.
- Beyleveld, D., and R. Brownsword. 2001. *Human Dignity in Bioethics and Biolaw*. Oxford: Oxford University Press.
- Bishop, P., and F. Jotterand. 2006. Bioethics as Biopolitics. *The Journal of Medicine and Philosophy* 31: 205–12.
- Brownsword, R. 2003. Bioethics Today, Bioethics Tomorrow: Stem Cell Research and the “Dignitarian Alliance”. *University of Notre Dame Journal of Law, Ethics and Public Policy* 71: 15–51.
- Brownsword, R. 2005. Stem Cells and Cloning: Where the Regulatory Consensus Fails. *New England Law Review* 39: 535–71.
- Brownsword, R. 2008. *Rights, Regulation and the Technological Revolution*. Oxford: Oxford University Press.
- Cayla, O. 1996. Droit. In *Dictionnaire d’Ethique et de Philosophie Morale*. Ed. M. Canto-Sperber. Paris: Presses Universitaires de France.
- Cayla, O. 2007. L’angélisme d’une théorie pure (du droit) chez Habermas. *Revue du droit public* 6: 1541–68.
- Cohen-Tanugi, L. 1987. *Le droit sans l’Etat. Sur la démocratie en France et en Amérique*. Paris: Presses universitaires de France.
- de Búrca, G., and J. Scott, eds. 2006. *Law and New Governance in the EU and the US*. Oxford: Hart.
- de Sousa Santos, B. 1995. *Towards a New Common Sense. Law, Science and Politics in the Paradigmatic Transition*. New York, N.Y.: Routledge.
- Department of Health and Social Security. 1984. *Report of the Committee of Inquiry into Human Fertilization and Embryology*.
- Engelhardt, H.T. 1986. *The Foundations of Bioethics*. New York, N.Y.: Oxford University Press.
- Engelhardt, H.T. ed. 2006. *Global Bioethics: the Collapse of Consensus*, Salem: M&M Scrivener.
- Faralli, C. 2009. Reasonableness, Bioethics, and Biolaw, this volume.
- Feldman, D. 1999. Human Dignity as a Legal Value (Part I). *Public Law*: 682–702.
- Feldman, D. 2000. Human Dignity as a Legal Value (Part II). *Public Law*: 61–76.
- Flis Trèves, M., D. Mehl, and E. Pisier. 1991. Contre l’acharnement législatif. *Pouvoirs* 56: 121.
- Franklin, B. 1995. The Value of Consensus. In *Committee on the Social and Ethical Impacts of Development in Biomedicine. Society’s Choices: Social and Ethical Decision Making in Biomedicine*. Ed. R.E. Bulger and E.M. Bobby. Washington: National Academy Press, 1995.
- Girard, C. 2006. Le droit international de la bioéthique. L’universalisation à visage humain? In *Bioéthique, Biodroit, Biopolitique, Réflexions à l’occasion de la loi du 6 août 2004*. Ed. S. Hennette-Vauchez, 51–69. Paris: LGDJ.
- Greer, S. 2005. *The European Convention of Human Rights. Achievements, Problems and Prospects*. Cambridge: Cambridge University Press.
- Hennette-Vauchez, S. 2005. Article II–63. In *Traité établissant une Constitution pour l’Europe. Partie II: La Charte des droits fondamentaux*. Ed. L. Burgorgue-Larsen, A. Levade and F. Picod, 52–63. Brussels: Bruylant.
- Hennette-Vauchez, S. 2008. A Human Dignitas? The Contemporary Principle of Human Dignity As a Mere Reappraisal of an Ancient Legal Concept. In *EUI LAW Working Papers Series*. European University Institute. http://cadmus.eui.eu/dspace/bitstream/1814/9009/1/LAW_2008_18.pdf.

- Hennette-Vauchez, S. 2009. Words Count. How interest in stem cells made the embryo available: a look at the French law of bioethics. *Medical Law Review*. Already available in the *EUI LAW Working Papers Series*. European University Institute. http://cadmus.eui.eu/dspace/bitstream/1814/9048/1/LAW_2008_19.pdf.
- Jasanoff, S. 2005. *Designs on Nature. Science and Democracy in Europe and the United States*. Princeton, NJ: Princeton University Press.
- Moreno, J. 1994. Consensus by Committee: Philosophical and Social Aspects. In *The Concept of Moral Consensus. The Case of technological interventions in human reproduction*. Ed. K. Bayertz. Dordrecht: Kluwer.
- Moreno, J. 1995. *Deciding Together. Bioethics and Moral Consensus*. New York, N.Y.: Oxford University Press.
- Mulkay, M. 1997. *The Embryo Research Debate. Science and the Politics of Reproduction*. Cambridge: Cambridge University Press.
- Nyssen, H., ed. 1985. *Génétiq ue, Procréation et Droit*. Paris: Actes Sud.
- Pellegrino, E. 2000. Bioethics at the Century's Turn: Can Normative Ethics Be Retrieved? *The Journal of Medicine and Philosophy* 25: 655–75.
- Rosenberg, M. 1998. Overcoming Interpretation through Dialogue. A Critique of Habermas's Proceduralist Conception of Justice. In *Just Interpretations. Law Between Ethics and Politics*, 114–49. Berkeley Calif.: University of California Press.
- Tao, J. 2006. A Confucian Approach to a “Shared Family Decision Model” in Health Care: Reflections on Moral Pluralism. In *Global Bioethics: the Collapse of Consensus*. Ed. H.T. Engelhardt. Salem: M&M Scrivener.
- Stone Sweet, A. 2004. *The Judicial Construction of Europe*. New York, N.Y.: Oxford University Press.
- Thomas, Y. 1995. Fictio Legis. L'empire de la fiction romaine et ses limites médiévales. *Droits. Revue française de théorie juridique* 21: 17–63.
- Thomas, Y. 2002. Le sujet concret et sa personne. In *Du droit de ne pas naître. A propos de l'affaire Perruche*. Ed. O. Cayla and Y. Thomas, 91–170. Paris: Gallimard.
- Trotter, G. 2006. Bioethics and Deliberative Democracy: Five Warnings from Hobbes. *The Journal of Medicine and Philosophy* 31: 235–50.
- Trubek, D., and L. Trubek. 2006. New Governance and Legal Regulation: Complementarity, Rivalry and Transformation. *Columbia Journal of European Law* 13: 539.
- Walker, N., ed. 2006. *Relocating Sovereignty*. Dartmouth: Ashgate.
- Weiler, J.H., and M. Wind, ed. 2003. *European Constitutionalism Beyond the State*. Cambridge: University Press.

Reasonableness in Biolaw: The Criminal Law Perspective

Stefano Canestrari and Francesca Faenza

1 Reasonableness and Legislative Discretion in Framing Criminal Law in Matters of Bioethics: Limits and Peculiarities

There is an extra layer of justification to deal with in continental criminal law when choosing the principle of reasonableness as a guide by which to explore biolaw. Indeed, as concerns Italy in particular, the tradition is for the Constitutional Court to exercise much self-restraint in its use of the test of reasonableness in matters of criminal law, enveloping this test in a cascade of accompanying cautions and caveats. Such caution is owed to the constitutional principle expressed in the formula *nullum crimen sine lege* (Article 25, second paragraph, of the Italian Constitution), whereby the power to establish criminal penalties vests exclusively in Parliament. According to this principle, criminal offences can be defined and regulated only by statutory laws created by Parliament. The constitutional foundation of Parliament's monopoly on criminal law makes it all the more peremptory for the Constitutional Court not to challenge in any way the discretionary evaluations carried out by Parliament when criminal laws are in question (Insolera 2006, 326ff.; Manes 2005, 218ff.; Palazzo 1998, 371ff.). However, the trend in the Constitutional Court's case law is showing a growing use of reasonableness in testing the legitimacy of criminal laws: the evolution of reasonableness as way by which to counterbalance the discretionary power of Parliament has contributed to widening the margins within which the Constitutional Court can review legislature's choices in the area of criminal law.¹

In this context, bioethics offers an interesting perspective precisely on account of the wide discretion available to lawmaker in framing criminal statutory provisions on bioethics: the large role that value judgments play in biolaw offers a vantage point from which to observe both the limits and the potential of the reasonableness test in constitutional adjudication.

Then, too, it is worth underscoring the significance of discussing reasonableness in relation to biolaw—especially in relation to the *criminal* regulation of

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¹ Italian Constitutional Court, decision 409/1989.

bioethical subject matter—in that reasonableness is a “context-sensitive” notion (MacCormick 2003, 529), or a “notion à contenu variable” (Perelman and Vender Elst 1984), for it gets specified in different ways depending on context. As far as criminal subject matter is concerned, reasonableness inclines to combine with the different constitutional principles that underpin criminal law. This can be considered the distinguishing feature of the idea of reasonableness in criminal law: on the model of reasonableness used in criminal law, reasonableness gets shaped in different ways depending on the constitutional principles of criminal law it combines with, and which in turn help to shape the dialectic between criminal law and the Constitution (Manes 2007, 751). In what follows, we will illustrate the different manifestations of criminal reasonableness by drawing on what is already a rich store of statutory and case law on bioethics. Our particular focus will be on the biolegal issues involving the beginning and end of human life.

2 Different Criteria on Which Reasonableness in Criminal Law Is Based When Regulating Bioethical Subject Matter

Reasonableness comes to bear on different questions in criminal law. For example: What guidelines should the lawmaker use in framing criminal laws? Which limits does the Constitutional Court have in evaluating the reasonableness of criminal provisions? How to weigh the good or interest being protected by criminal law? Is the punishment established by statutes commensurate with such an interest? And how to go about setting out the kinds of behaviour that count as crimes? In each of these areas there is need to work out standards or criteria to which to anchor the judgment of reasonableness. Three such standards are worth mentioning in this regard. First, the reasonable-person standard, used sometimes with respect to the physician (“professional standard”) and sometimes with respect to the patient (in which case we have the “reasonable-patient standard,” or *verständiger Patient*, in German) (Dolgin and Shepher 2005, 59). In the second place, the empirical-statistical criterion traceable to the rule of *id quod plerumque accidit* (“that which generally happens”).² Finally, the best-practice standards established by the *leges artis* specific to a trade or profession depending on the case at hand.

The first of these criteria is mainly used in English-speaking areas in rendering judgments in civil malpractice or medical liability cases, but it may also be applied in criminal law as a basis on which to assess what would count as a “reasonable member of the medical profession,” in which use the standard can contribute to blocking out the idea of a model professional, here a physician having the best skills and knowledge available to date. It can be observed, with regard to the two other criteria just mentioned, that they are subject to an inescapable margin of uncertainty

² Constitutional Court, decision 333/1991 (also see Constitutional Court decisions 1/1971, 139/1982, 126/1983, and 71/1978).

which often appears accentuated when exploring the new, uncharted territory one finds in working through the issues of bioethics.

Take, for example, the crimes of cloning or producing hybrids or chimeras:³ the rule of *id quod plerumque accidit* seems to offer little guidance in these cases, considering that there is nothing in the way of precedent from which to draw maxims based on experience. A more solid standard in bioethics is therefore the third one mentioned: the *leges artis* standard of best medical practice. This seems borne out by the case law of the Italian Constitutional Court, which has found that “legislation establishing whether a given therapy is appropriate cannot simply be based on the discretion of the lawmakers themselves but should instead provide that policies be worked out which take into account the latest scientific knowledge and experimental evidence [. . .], and such knowledge and evidence should in any event be reflected in the legislation in question.”⁴ It is the Constitutional Court’s view, then, that the discretionary evaluations carried out by the lawmaker find a limit in reasonableness understood as a law’s agreement with the best or most reliable science and experience to date. As we will see, it is this notion of reasonableness—based on the standard of the best available or latest science and technology—that comes to bear on the question (yet to be decided) of the constitutionality of the statutory provisions on medically assisted procreation making it criminal in Italy to produce surplus embryos and to cryopreserve them (the provisions at issue being found in Article 14, paragraphs 2 and 3, of Law No. 40/2004).

It can in any event be observed that mere conformity to the best-practice and most reliable science and experience standards do not suffice to guarantee that the criminalizing provision or law will be reasonable: these standards need to be supplemented with further criteria that concur in substantiating a judgment of reasonableness in matters of criminal law. Four criteria that become relevant in this respect are those of reasonableness as proportionality, as adequacy of the means of protection in relation to its ends, as constitutionality of the interests protected by criminal law, and as system-wide coherence.

3 Reasonableness as Proportionality of the Punishment’s Severity, or *Quantum*: The Punishments Euthanasia Is Subject to Under Italian Law

One of the main uses of reasonableness in criminal law consists in determining whether a punishment is proportional to, or commensurate with, the interest being protected. The judgment of reasonableness as proportionality has traditionally been made by comparing the different punishments established for different violations or sets of facts. It would be unreasonable, in this sense, to establish punishments of

³ These new offences were introduced in Italy with Law n. 40/2004 on medically assisted procreation, under Article 13, paragraph 3, letters (c) and (d).

⁴ Constitutional Court, decision 282/2002.

equal severity for acts or facts of different gravity, just as, conversely, it would be unreasonable if homogeneous facts were differentially treated. The proportionality test so understood is based on a triadic scheme whereby reasonableness is assessed by reference to a *tertium comparationis*. This scheme tends to be put aside now in favour of other models of judgment not based on a comparison against a *tertium comparationis* (Luther 1997, 349; Insolera 2006, 321ff.; Manes 2007, 746). But it should be noticed that whatever method is chosen, it is a particularly delicate task to assess whether a punishment (or its severity) is reasonable: “Translating quality into quantity” (or applying a measure to any choice to act in one way or another) “is the one function that more than any other pertains to legislative discretion” (Palazzo 1998, 374; Pagliaro 1997, 774ff.). As the Italian Constitutional Court has stated, “it is part of the legislator’s discretionary power to statutorily set the degree of punishment [. . .]; nor can this Court pass judgment on legislative policy;”⁵ except in precisely those cases where the law is unreasonable.

Reasonableness as proportionality can be used in bioethics as a model by which to assess the criminal regulation applicable to mercy killings under Italian law. It should be observed here, by way of a preamble, that the Italian legal system does not have any regulation specific to euthanasia. Euthanasia consequently falls under the general legal forms applicable to offences against life, and this results in punishments so harsh they fail to pass the test of reasonableness as proportionality. Let us consider cases of euthanasia in which a person takes the life of another at that other person’s clear and express request. These cases appear at first sight to be classifiable as unlawful killing of a consenting party (“omicidio del consenziente,” Article 579 of the Italian Criminal Code). Under this provision, anyone who causes a consenting person’s death is punishable by imprisonment of from six to fifteen years. While consent does not make the act legal, it does mitigate the gravity of the act and therefore translates to a lesser punishment (Canestrari 2006, 129ff.). However, it is only rarely that euthanasia by consent should in practice be brought under the purview of Article 579 of the Italian Criminal Code. Indeed, Article 579 provides, under its third paragraph, that the provisions in articles regarding murder be applied when the act is done to someone who is mentally incompetent or has any kind of mental incapacity from whatever cause, including abuse of substance, whether it be alcohol or a narcotic. Now, it is precisely this state of mental incapacity that often describes patients physically and psychologically exhausted by an illness or by a debilitating medical treatment or use of pain killers. Mercy killings will therefore tend to more easily be classifiable as murder, and the punishment will accordingly be harsher.

The punishment does not in any way seem reduced in severity by Article 62(1) or 62 *bis* of the Italian Criminal Code, respectively providing for cases in which “the act was motivated by highly compelling moral or social values” or in which

⁵ Constitutional Court, decision 109/1968. In this decision the Court has found that the power of the Constitutional Court to review the laws cannot be expanded to include a judgment as to “the congruence between a crime and its punishment;” unless “the two are so disproportionate that there is no conceivable way to justify the punishment.”

“attenuanti generiche” (other kinds of extenuating circumstances) apply. Indeed, on the one hand, the Court of Cassation has ruled that no compelling moral or social values apply to mercy killings, the reason being that mercy killing does not have on its side “society’s unconditional approval” that the rule in question requires. On the other hand, the extenuating circumstances made may wind up being outweighed by the aggravating circumstances that often apply in cases involving euthanasia, examples being premeditation, killing by use of poisons, and a relation of kinship with the victim. It needs to be stressed here that such cases of aggravated murder may be punished with life imprisonment—and such an outcome seems to contradict the standard of reasonableness as proportionality. The punishment, in other words, seems disproportionate to the act’s import all things considered, in that no allowance is made for the motive of compassion or for the patient’s extreme suffering, both of which are central to mercy killing and distinguish it from murder at large. So, if this criminal framework appears unreasonable, this is because the same punishment applies equally to situations marked by different objective and subjective features, and it is difficult to find a *ratio parificandi* on which basis such different situations may be equated.

It seems that a more reasonable—because more proportional—framework can be found in this sense in Spain’s *Código Penal* of 1995, which provides a much more lenient punishment for cases of active and direct euthanasia by consent. The Spanish law sets forth a specific, more lenient provision for cases involving “active causation and cooperation by way of necessary acts aimed at bringing about another person’s death, but only if this person (the victim) has expressly made an earnest and unequivocal request and is affected by a serious terminal condition or by a permanent condition causing nearly unbearable suffering (Article 143, paragraph 4, of the *Código Penal*) (Tordini Cagli 2008, 64ff.). In this way, the punishment that may be dispensed will be more proportional to the crime, for it will take into account the features specific to euthanasia.

Finally, a few comments should be made on the role the previously mentioned “social value” criterion provided in Article 62(1) of the Italian Criminal Code can play in judging the reasonableness of a criminal provision. We saw that the social-value criterion carries little weight in cases of mercy killing; Joel Feinberg’s offence principle, by contrast, uses it as a criterion by which to assess “the reasonableness of conduct that happens to cause offence to others” (Feinberg 1985, 44): social value figures among the so-called mediating maxims that, for Feinberg, govern “the application of the offence principle to legislative or judicial deliberation.” This is to say that social value does not just express an appeal to fairness or clemency but operates as a specific standard of reasonableness, and so as a standard that can come into play in the legal balancing between the “seriousness” of offensive conduct and its “reasonableness.” Certainly, the theoretical differences between offence and harm are such that the criteria applicable to offence cannot immediately be carried over to harm. Still, social value seems to make a significant contribution as a criterion by which to judge the reasonableness of conduct, even in cases of euthanasia (or mercy killing), beyond the strict allowances made by Article 62(1) of the Italian Criminal Code.

4 The Reasonableness of Criminal Laws and Assisted Suicide: The Prohibition Against Discriminating Between Equals (*Ratione Subiecti*) and the Means-to-Ends Judgment of Adequacy with Respect to the Aims of Protection

In *Pretty v. The United Kingdom*, a case brought before the European Court of Human Rights (ECHR) in Strasbourg, the UK criminal law on assisted suicide was assessed using reasonableness as the basic guide.⁶ Reasonableness was framed by the court in this context as a twofold concept, understood on the one hand on the model of reasonableness as equality, and on the other hand on the model of reasonableness as adequacy of means to the ends of protection.

With the Suicide Act of 1961, attempted suicide was made criminally irrelevant in the United Kingdom, but not so *assisted* suicide: Section 2(1) of the act provides that “a person who aids, abets, counsels or procures the suicide of another, or attempts by another to commit suicide, shall be liable of conviction on indictment to imprisonment for a term not exceeding fourteen years.” The appellant claimed that this rule is discriminatory because it sets up a disparity between persons, favouring the able-bodied (who are capable of taking their own lives and are free to do so) over those who are *not* able-bodied, who can only do so with the help of a third person. The UK law thus violates the prohibition against differential treatment set forth in Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The ECHR rejected this argument, finding that there is a reasonable justification on which basis not to distinguish between “those who are and those who are not physically capable of committing suicide.” The reasonableness test thus wound up in this case favouring the UK law: the court found that “cogent reasons” existed—like the need to protect human life and to prevent potential abuse—such that the provision at issue in the Suicide Act cannot be constructed as violating Article 14 of the European Convention on Human Rights. The court upheld the general principle that there is a single exception to the prohibition against differential treatment. This is the exception of a reasonable justification for such treatment: “For the purposes of Article 14 a difference in treatment between persons in analogous or relevantly similar positions is discriminatory if it has no objective and reasonable justification” (§ 87).

This pronouncement clearly has its basis in the familiar model of reasonableness as equality. But reasonableness is further specified by the ECHR in application to criminal law in the sense of requiring a “reasonable relationship of proportionality between the means employed and the aim sought to be realized.” On this interpretation, then, the reasonableness test is used not to assess the *aims* of protection (that which a legislature seeks to protect in framing criminal laws) but rather the *means* of protection as they relate to those aims: in this specification, we have a test by which to assess whether the means are adequate to their end, or whether “the crime and the

⁶ *Pretty v. The United Kingdom*, European Court of Human Rights, Application n. 2346/2002.

corresponding punishment are suited to achieving an aim assumed to be legitimate” (Palazzo 1998, 381–82). The suitability of means with respect to the aims of protection is judged on the basis of well-established criteria worked out by the constitutional courts of Europe in cases of involving criminal law. Thus, for example, the Federal Constitutional Court of Germany (or *Bundesverfassungsgericht*) has settled on the view of means-to-ends adequacy as a three-pronged requisite that breaks down into the constituent criteria of suitability (*Geeignetheit*), necessity (*Erforderlichkeit*), and appropriate or reasonable fairness (*Angemessenheit*) (Luther 1997, 345; Manes 2005, 283). It can be observed in these cases that the reasonableness test takes the form of a judgment whose object has to do with rationality with respect to the aims (or *Zweckrationalität*) involved in working toward such an end—and yet such means-to-ends rationality still remains inherently political.

5 Reasonableness and Alternative Models by Which to Regulate Euthanasia: The Procedural Justification, or *Prozedurale Rechtfertigungen*

The procedural-justification model has been used in different areas of the criminal law applicable to bioethics: examples are its use in connection with induced abortion and euthanasia, and physician-assisted suicide in particular. A well-known procedural-regulation model for physician assisted suicide is that offered by the Dutch law (2002), which provides that a physician will not be held criminally liable for a euthanasia or assisted suicide carried out in compliance with the procedure set forth in the law. On the procedural approach, the legislators abstain from any direct evaluation of the interests at play—and so do not set forth beforehand, and once and for all, which of these interests should prevail—but rather confine themselves to stating the conditions, methods, and procedures defining the boundaries within which a person may freely choose and self-determine a course of action. We thus have a combination of substantive and procedural rules: compliance with the procedure legitimates the act by providing a basis on which to rule out the act’s illegality or its punishability; conversely, a failure to comply with the procedure will entail criminal liability (Donini 2004, 27ff.; Eser 2000, 43ff.; Magro 2001, 253ff.).

Procedural justification offers an alternative to the regulative model based on balancing and ranking by law the conflicting interests at play: on the procedural model, responsibility for deciding on a prevailing interest rests with the concerned persons themselves, and no liability arises so long as the established procedure is followed. This procedural approach is conceived as a way to deal with the issues of sociocultural pluralism forming the background to legal systems in the West, where legislatures, especially as concerns bioethical issues, have little chance of invoking a standard of reasonableness based on a wide consensus on the part of the citizenry.

The role of reasonableness on the procedural model is that of a guideline useful in working out the legal procedure following which an otherwise prohibited behaviour will not be subject to punishment. Certain necessary guarantees need to

be provided in end-of-life cases, requiring that the option for euthanasia be framed as an exceptional one of last resort (*extrema ratio*): “Self-determination through others must in any event be reasonable,” and there are two necessary conditions subject to which such arrangements (euthanasia) can be deemed reasonable; that is, the terminal process must be irreversible (“point of no return”) and the person in question must be bound to a near death (Cornacchia 2003, 405). It is these criteria that the Dutch law seems to look to in providing that a physician will not be liable to punishment so long as, among other conditions, both the physician and the patient reach “the conviction that there is no other reasonable solution for the situation.” This requisite—that there be no other reasonable alternative available—connects with the conditions of necessity, suitability, and proportion that, as we saw, figure in German constitutional case law as sub-criteria for a judgment of reasonableness. The requirement to exhaust all reasonable alternatives goes along in this sense with the need for protection that must accompany any act of self-determination resolving itself into death.

The peculiarity of the Dutch model lies in the emphasis it lays on the doctor-patient relationship as the place within which to work out a reasonable assessment of the interests involved: it is within the context of this relationship that a request for assistance in suicide must be pondered and carried through, all the while satisfying the conditions and guarantees established by law. In the Dutch framework, then, the balancing between the right to life and the freedom of self-determination in health matters is entrusted to the pondered assessment of the patient in consultation with his or her doctor. There is a point that needs to be stressed here, which is that the reasonableness at issue on the procedural approach to medically assisted suicide is that of the law (or the legislator) and not that of the patient’s decision. In fact, this decision is not even amenable to a judgment of reasonableness: “Once these largely procedural tests have been satisfied, the content of the patient’s decision is not open to any scrutiny at all.” (Jackson 2004, 439). So there is no room, on this approach, for any argument claiming that a request to die is inherently unreasonable.

6 Act Versus Omission in the Reconstruction of Euthanasia: A Reasonable Distinction?

Whether the distinction between active and omissive conduct makes good sense as a heuristic or classificatory device is something that can be assessed in light of reasonableness. The distinction between active and passive euthanasia (between mercy killing and letting die) becomes crucial in determining criminal liability if it is on this distinction that we base the distinction between legitimate and criminally illegitimate conduct (Ashworth 2006, 283ff.; Tassinari 2001, 147ff.). The oversimplification involved in this reconstruction comes through clearly in those cases where a refusal of lifesaving treatment requires withdrawing life support, and the patient requests the physician to do so. These cases show that while the physician’s behaviour is substantially omissive in meaning—in the sense that it consists in

no longer providing life-sustaining care: omitting to provide care—it is by contrast active from the practical standpoint of what it materially involves doing. Hence, a strict dichotomy between active (illicit) and passive (licit) euthanasia can entail for the physician liability for murder of the consent-giver (Article 579 of the Italian Criminal Code).

What makes this reconstruction look not too persuasive—not too reasonable—is its making the ascription of criminal liability dependent on a criterion (act *v.* omission) almost entirely reduced to a merely causal, naturalistic understanding of what the conduct in question consists in. As is known, certain corrective doctrines have been worked out to deal with the problems deriving from this strict dichotomy between act and omission, examples being the German doctrine of *Unterlassung durch Tun* (theorizing the idea of an “omission by positive act”)⁷ and the doctrine that suicide and euthanasia are functionally identical on the normative plane (Cornacchia 2002, 405ff.). But these doctrines seem unable to adequately cover all cases where the withdrawing of lifesaving treatment requires a certain *facere* (or positive act) on the physician’s part.

There is for these cases an alternative scheme that seems more appropriate on a theoretical plane and more consistent with the principle of reasonableness: it involves looking at the normative elements that frame the category of offences committed by way of an omission in which the omission consists in a failure to perform a duty to act imposed by the criminal law on specified classes of persons. When all the conditions are satisfied, an informed and competent patient’s rejection of life support will release the medical personnel from a legal obligation to provide care. The physician’s conduct can be deemed noncriminal owing to its being consistent with his or her professional duties, in accordance with an interpretive model that, with all due adjustments, can also be used to legitimize so-called indirect euthanasia.

This interpretation has recently been used in one of the most debated rulings on bioethics issued in Italy: the holding was that no criminal liability attaches to a physician for withdrawing life-sustaining treatment upon request by a competent patient.⁸ Set forth in the Italian Constitution (under Article 32, second paragraph) is a constitutional right to an informed refusal of treatment, including lifesaving treatment, and it was ruled on this ground that the act of withholding treatment may not be deemed illegal so long as this is done in fulfillment of a duty.

In conclusion, where the case at hand is one in which a physician withholds lifesaving treatment upon request by a competent patient, the distinction between act and omission may be deemed reasonable if understood in a strictly naturalistic way. But not so if the distinction so understood is used as a criterion by which to distinguish criminal (legitimate) from noncriminal (illegitimate) behaviour, under the equation whereby omission is legitimate whereas positive act is not.

⁷ There is a strand of German legal literature that uses this doctrine to rule out that someone can be punished for withholding life support if this is done acting on a valid request of the patient: Roxin (1987, 348ff.); Schneider (1997, 31ff., 174ff.)

⁸ *Tribunale di Roma*, ruling issued 17 October 2007.

6.1 Reasonableness as a Criterion on Which Basis to Judge the Constitutionality of Criminalizing Physician-Assisted Suicide: The Experience of the U.S. Supreme Court

There is a further way in which reasonableness comes into play in working out the relation between euthanasia and the right to withhold life-sustaining treatment. The U.S. Supreme Court has used reasonableness as a criterion by which to assess the soundness of the distinction between killing and letting die.

In *Vacco v. Quill*,⁹ the issue before the court was whether a New York statute criminalizing physician-assisted suicide violated the Equal Protection Clause of the Fourteenth Amendment: while medically assisted suicide is a crime under New York state law, the patient, on the other hand, is recognized as having the right to refuse treatment, including lifesaving treatment. The respondents argued that the statute was unconstitutional on grounds of its violating the principle of reasonableness: “it is hardly unreasonable or irrational for the State to recognize a difference between allowing nature to take its course, even in the most severe situations, and intentionally using an artificial death-producing device.” The New York penal statute would thus institute a differential treatment “not rationally related to any legitimate state interest.” Indeed, under the ban on assisted suicide, “mentally competent, terminally ill patients” who are kept alive by life-support systems can use “consent to treatment provisions” to request withdrawal of lifesaving treatment, but terminal patients who do *not* depend on a life-support system cannot turn to a physician for help in hastening their death. And since, on the respondents’ argument, a refusal of lifesaving care is “essentially the same thing” as physician-assisted suicide, the differential treatment between terminal patients according as they depend or not depend on a life-support system is unreasonable.

The Supreme Court, however, rejected the view that a refusal of lifesaving medical treatment can be equated with suicide and therefore held that the New York statute does not violate the Equal Protection Clause. The reasonableness of this statute is based on a number of criteria converging on the criterion of its being adequate to the purposes of protection. For one thing, the court held that the distinction between *letting* a patient die and *making* that patient die is an “important, logical, rational” distinction, as well as a “widely recognized and endorsed” one in the medical profession and in the legal tradition; for another thing, this distinction is in agreement with the “fundamental legal principles of causation and intent”; and finally, there exist “valid and important public interests that easily satisfy the constitutional requirement that a legislative classification bear a rational relation to some legitimate end.”¹⁰ In analogy to *Pretty v. The United Kingdom*, reasonableness is essentially being conceived here according to the traditional doctrine prohibiting arbitrary decisions (*Willkürverbot*): the principle of equality established

⁹ U.S. Supreme Court, *Vacco, Attorney general of New York, et al., v. Quill et al.*, 521 U.S. 793 (1997).

¹⁰ U.S. Supreme Court, *Washington v. Glucksberg*, 521 U.S. 702 (1997).

under the Equal Protection Clause can be deemed to have been violated only if no reasonable (*vernünftig*) ground for differential or nondifferential treatment is found (Luther 1997, 344).

7 Ways in Which the Provisions in Law No. 40/2004 Regulating Medically Assisted Procreation Might Be Judged Unconstitutional in Light of the Standard of Reasonableness

With Law No. 40/2004 the legislature introduced for the first time in Italy a comprehensive scheme under which to regulate medically assisted procreation. Under a motion filed by the *Tribunale Amministrativo Regionale* of Lazio, paragraphs 2 and 3 of Article 14 of Law No. 40/2004 are currently being reviewed to determine their compatibility with two articles of the Italian Constitution: Article 3—where the issue is the reasonableness of the challenged provisions in relation to the constitutional prohibition against discrimination—and Article 32, where the issue is whether the provisions effect an adequate balance between a woman’s health and the need to protect the embryo.

This pending judgment of constitutionality provides an opportunity to make a few considerations bearing on the questions here discussed, since the Constitutional Court is being asked to assess the reasonableness of a criminal provision having strong bioethical implications. The prohibitions set forth in Article 14(2)(3) make violators criminally liable to imprisonment as well as to pecuniary penalties and to up to one year’s suspension from the health-care profession. Article 14(2) provides that—“in view of the advance of science and technology” and the periodic updating of guidelines—embryos may not be created in any number greater than that strictly necessary to a single and simultaneous implantation, and in any event may not be created in any number greater than three. And Article 14(3) provides that embryos may be cryopreserved only in those cases in which—owing to unforeseen, documented, and serious causes beyond human control which affect the woman’s health—intrauterine transfer proves impossible; and such a transfer will in any event have to be effected “as soon as possible.”

Regardless of what the referring court may observe in regard to the issues brought before it, the provisions under review conflict in more than one respect with the principle of reasonableness. In fact, there are at least four ways in which the provisions in question may prove inadequate when considered in light of this principle.

7.1 A First Sense in Which the Provisions Under Review May Be Deemed Unreasonable: The Drafting Method Used by Lawmaker

One feature of Article 14(2) which raises doubts as to its reasonableness is the drafting method used by the lawmaker in setting it down. In this case, testing the reasonableness of the rule entails making a series of considerations beyond that

which consists in comparing the rule with another one providing a *tertium comparationis*: such further considerations will therefore have to be concerned with the inherent reasonableness of the rule itself.

Having said this, let us return to Article 14(2). By rigidly fixing in advance a maximum number of producible embryos, the provision at issue defeats the purpose of its own appeal to “the advance of science and technology.” Here the rationale is supposed to be that of making the provision itself open-ended or responsive to the constant evolution under way in medicine and science. Statutorily establishing a set limit of three embryos winds up instead ossifying the provision, thereby making it unreceptive to the rapid changes that are taking place in this field of research. As much as one might argue here that this is not such a crippling feature of the provision, since the entire law is subject periodic updating under certain guidelines devised specifically for it, this cannot be held up as a solution, because the guidelines in question can only *supplement* or *specify* the law but not modify the substance of it. Article 14(2) thus seems to fail of reasonableness by virtue of its not being suited to receiving the feedback from science which the provision itself claims to take into account, and which appears indispensable in light of the fast-changing nature of assisted reproductive technology and, of course, its close dependence on scientific innovation. One can appreciate, in short, a certain contradiction between the provision’s declared legislative purpose and the encapsulatory form chosen for the provision itself.

7.2 A Second Sense in Which the Provisions at Issue May Be Deemed Unreasonable: Their Cap on the Number of Embryos That May Be Created and Their Prohibition Against Cryopreservation—an Unreasonable Balancing of Conflicting Interests?

The interests falling within the scope of a criminal statute must be balanced in such a way that the limitation imposed on the disfavoured interest respects the standard of proportionality and preserves the core of that interest or right. Reasonableness in the balancing of rights or interests by law thus lies in the “prohibition against imposing unilateral or otherwise excessive demands” (Luther 1997, 358; also see Palazzo 1998, 381; Manes 2007, 768ff.).

So, where the challenged provisions are concerned, we must ask whether the sacrifice imposed on the health of the mother-to-be might be justified—or adequately made up for—in view of the need to protect a contrary interest regarded as more urgent or significant. The interest that prevails on the mother-to-be’s right to health is, in the provisions under consideration, the embryo’s life. The primacy accorded to the embryo’s interest upturns the precedent set by the Italian Constitutional Court with decision No. 27/1975 on abortion. The balancing test is worked out in this ruling by favouring “not only the mother’s right to life but also her right to health” with respect to the need to “protect the embryo.” This view defended by the court

is grounded in the “nonequivalence” between the two spheres of interest at issue, in that “the right not only to life but also to health of someone who already is a person cannot be equated with the right of someone who is not yet a person, namely, the embryo.” (Dolcini 2004, 459). So, while on the one hand, the extension to the unborn child of the inalienable human rights set forth under Article 2 of the Italian Constitution justifies providing the embryo with criminal protection, the same extension cannot, on the other hand, be taken to mean that the law may accord to the embryo a “total and absolute primacy.”

In the Constitutional Court’s 1975 ruling, reasonableness in balancing is gauged by the relation of direct proportionality between someone’s ascribed status as a person and the degree of protection afforded by criminal remedies. But the assumptions on which Italian lawmaker framed the 2004 law effect a complete about-face with respect to that gauge. Viewed in this light, then, the 2004 law on medically assisted procreation fails to comply with the model of reasonableness forming the basis of a well-established precedent set by the Constitutional Court, and forming as well as the basis of the legislative scheme by which abortion is currently regulated.

7.3 The Legal Limitations on Reproductive Technology and the Unreasonable Requirement to Sacrifice the Woman’s Health

It has been discussed so far how the prohibitions introduced with Article 14(2)(3) of Law No. 40/2004 are in important ways ineffectual, even self-defeating. In addition to that, there is also their being *criminal* prohibitions, and it is striking to think that the procedures so criminalized had hitherto been legal and admissible—in fact they were fully recognized as good medical practices which even helped to form the best-science standard developed at assisted-reproductive-technology centres internationally. In contrast to what had been the case before the law went into effect, the prohibition against producing embryos in any number greater than that necessary to a single and simultaneous implantation, coupled with the prohibition against cryopreservation, makes it so that if an embryo fails to adhere to the uterus, the woman has to undergo a new ovarian-stimulation procedure, thereby exposing herself to the risk of conditions associated with fertility hormone injections (conditions such as ovarian hyperstimulation syndrome and neoplasm). This risk, therefore, cannot be characterized as inherent in the use of reproductive technology but is rather a direct consequence of the legislatively established rules at issue.

In short, the 2004 law sets up a demanding procedure—and one that is not risk-free, either—even as alternative solutions are available which carry a lesser risk and employ, to use the language of the law, under Article 4, paragraph 2, a “physically and psychologically less invasive technique.” The policy decided by the legislature in framing this law thus seems difficult to bring in line with the “lesser invasiveness” principle which the law itself invokes, and in a broader sense the policy seems to be at odds with the principle requiring precaution and adequacy of means. It seems evident, in light of these considerations, that a judgment assessing the constitutionality of the provision in question as to the alleged infringement of the right to health

(set forth under Article 32 of the Italian Constitution) proves to be deeply tied to a reasonableness test. Indeed, under the previously discussed constitutional precedent,¹¹ no legislation regulating therapy can be based on legislative discretion alone but must instead take into account the soundest medical and scientific knowledge available. And it was argued that this is not what the challenged 2004 law does, since its sacrificing of the mother's right to health is not based on constraints inherent in medical protocol but derives directly from legislative choice, thereby indicating that the law does not hold up under a strict test of reasonableness.

7.4 The Law on Medically Assisted Procreation and the Parameter of Systemic Reasonableness

If we shift focus now from an analysis of the single provisions contained in Law No. 40/2004 to an overall assessment of this law, we will see that reasonableness is still useful as a tool by which to judge its external coherence, meaning its coherence with the rest of the legal system, to see whether it supports the system's intrasystemic coherence. One cause for concern in this connection is that this law (No. 40/2004) unreasonably affords for the embryo greater protection than that which the Italian law on abortion (No. 194/1978) affords for the foetus (Canestrari 2004, 417; Riscicato 2005, 679ff.; Romano 2007, 512–13). In other words, the entry into force of the 2004 law made it so that the Italian legal system now affords—under its criminal law—greater protection for the very first stages of embryo development than it does for the (more advanced) fetal stage: an embryo is much more closely protected when still *outside* a mother's womb than it will be once it has been implanted.

This uneasy relation between the two laws in question (the one on medically assisted procreation and the other on abortion) thus introduces an element of intrasystemic unreasonableness as concerns the criminal protection of prenatal life: it would be reasonable to expect such protection to intensify in proportion as prenatal life develops, yet the legal system does exactly the opposite, by making the relation *inversely* proportional instead. The resulting criminal regulation thus sets up between the embryo and the foetus a differential treatment that does not seem fully in keeping with the principle of reasonableness understood as intrasystemic coherence of the legal system. There are further examples that can be adduced in this regard. Among the most significant of them is the criminal prohibition against preimplantation genetic diagnosis (embryo screening) involving a procedure that is more than merely observational, a prohibition set forth under the original framework of Law No. 40/2004 with its accompanying guidelines (Ministerial Decree of 21 July 2004): it seems that this prohibition is rendered all but meaningless by the possibility for the mother to undergo prenatal diagnosis (by amniocentesis or by chorionic villus sampling) and to decide, on the basis of the test results, whether to proceed to an abortion.

¹¹ Constitutional Court, decision 282/2002.

8 Conclusions

The considerations thus far made evince, even in their succinct form, not just the multiform nature of principle of reasonableness but also its growing use in working through bioethical issues falling within the scope of criminal law. This can be appreciated with respect to the activity of both the courts and the lawmaker. Where the courts are concerned, we can see the standard being used in deciding hard cases relating to bioethics, as in a recent controversial ruling rendered by the Italian Court of Cassation on the issue of whether lifesaving treatment may be withheld from a patient in a permanent vegetative state: here the court explicitly invoked the “conciliatory logic of reasonableness, which makes it necessary to take into account the concrete circumstances of the case at hand.”¹²

Where legislative decision-making is concerned, on the other hand, reasonableness can serve as a criterion by which to assess whether it is advisable to make use of criminal punishments. From this standpoint, reasonableness can play an important role that comes into focus once we consider the delicate nature of bioethical issues, which bear a strong connection to the whole question of the basic rights and of human dignity. From the specific perspective of the criminal law regulating bioethical subject matter, the most relevant role we see for reasonableness—among its multiple roles—consists in making sure that the constitutional principles of criminal law are respected. The ethically sensitive and contentious nature of bioethical issues is such as to call for a mild rather than a severe regulatory scheme, all the more so if a choice is made to bring such issues under the scope of criminal law, and in these cases reasonableness must accordingly act as a bulwark against criminal laws which fail to satisfy the requisites of adequacy, proportion, and necessity or which otherwise entail an unjustified—unreasonable—limitation on some of the interests at stake.

As we have seen, the fact that criminal punishments affect the fundamental rights requires the reasonableness test in the criminal area to be especially rigorous, based on a model of strict scrutiny in assessing the reasonableness of a criminal law and not on the looser assessment of whether the law in question embodies a minimum of rationality (Manes 2007, 742). For these reasons, and keeping to the specificity of criminal law, we should note that reasonableness makes more sense as a device by which to limit the overprotection (*Übermaßverbot*) of interests than as a device by which to ground a prohibition against an under-protection (*Untermaßverbot*) of interests, as can instead be seen in the way the German Constitutional Court has framed (in its own case law) the issue of abortion (Luther 1997, 345; Manes 2007, 762).

In conclusion, there emerges with respect to bioethical issues a need to embrace a notion of reasonableness in criminal law anchored to the basic guarantees that such law is supposed to ensure. In other words, because the constitutional principles governing criminal law are the very benchmark by which to determine the

¹² *Corte di Cassazione, sez. I civ.*, decision 21748/2007.

legitimacy of legislative enactments, the operation of these principles cannot be undercut by reference to reasonableness. In fact, as we discussed, the dependency works in the opposite direction, for it is the standard of reasonableness that must be modelled on the constitutional principles of criminal law, and not vice versa. This holds all the more for ethically pregnant areas of legislation such as bioethics, where the basic guarantees underpinning criminal law must stand firm and cannot be renounced—beyond all reasonable doubt.

References

- Ashworth, A. 2006. *Principles of Criminal Law*. Oxford: Oxford University Press.
- Canestrari, S. 2000. Verso una disciplina penale delle tecniche di procreazione medicalmente assistita? Alla ricerca del bene giuridico tra valori ideali e opzioni ideologiche. *L'indice penale* 3: 1091–115.
- Canestrari, S. 2004. Commento alla l. 19 febbraio 2004, n. 40. *Diritto penale e processo* 4: 416–22.
- Canestrari, S. 2006. Le diverse tipologie di eutanasia. In *I reati contro la vita e l'incolumità individuale*. Ed. S. Canestrari, 117–43. Turin: Utet.
- Cornacchia, L. 2002. Euthanasia: il diritto penale di fronte alle scelte di fine vita. *Teoria del diritto e dello Stato* 3: 374–416.
- Cornacchia, L. 2003. Il dibattito giuridico-penale e l'eutanasia. In *Elementi di etica pratica*. Ed. G. Zanetti, 195–208. Rome: Carocci.
- Dolcini, E. 2004. Embrione, pre-embrione, ootide: nodi interpretativi nella disciplina della procreazione medicalmente assistita. *Rivista italiana di diritto e procedura penale* 2: 440–523.
- Dolgin, J.L., L.L. Shepher. 2005. *Bioethics and the Law*. New York: Aspen.
- Donini, M. 2004. *Il volto attuale dell'illecito penale: la democrazia penale tra differenziazione e sussidiarietà*. Milan: Giuffrè.
- Eser, A. 2000. Sanktionierung und Rechtfertigung durch Verfahren. In *Winfried Hassemer zum sechzigsten Geburtstag*. Ed. P.A. Albrecht, 43–49. Baden-Baden: Nomos.
- Feinberg, J. 1985. *The Moral Limits of the Criminal Law. Offence to Others*. Oxford: Oxford University Press.
- Insolera, G. 2006. Principio di eguaglianza e controllo di ragionevolezza sulle norme penali. In *Introduzione al sistema penale*. Ed. G. Insolera, N. Mazzacava and M. Pavarini, 313–47. Turin: Giappichelli.
- Jackson, E. 2004. Whose Death is it Anyway?: Euthanasia and the Medical Profession. *Current Legal Problems* 57: 415–42.
- Luther, J. 1997. Voce: Ragionevolezza (delle leggi). In *Digesto Discipline Pubblicistiche*, vol. 12, 341–62. Turin: Utet.
- MacCormick, N. 2003. Reasonableness and Objectivity. In *Law and Legal Interpretation*. Ed. N. MacCormick and F. Atria, 527–55. Burlington: Ashgate.
- Magro, M.B. 2001. *Eutanasia e diritto penale*. Turin: Giappichelli.
- Manes, V. 2005. *Il principio di offensività nel diritto penale: canone di politica criminale, criterio ermeneutico, parametro di ragionevolezza*. Turin: Giappichelli.
- Manes, V. 2007. Attualità e prospettive del giudizio di ragionevolezza in materia penale. *Rivista italiana di diritto e procedura penale* 2–3: 739–89.
- Pagliaro, A. 1997. Sproporzione “irragionevole” dei livelli sanzionatori o sproporzione “irrazionale”? *Giurisprudenza Costituzionale* 1: 774–78.
- Palazzo, F. 1998. Offensività e ragionevolezza nel controllo di costituzionalità sul contenuto delle leggi penali. *Rivista italiana di diritto e procedura penale* 1: 350–84.
- Perelman, C., and R. Vender Elst 1984. *Les notions à contenu variable en droit*. Bruxelles: Emile Bruylant.

- Risicato, L. 2005. Lo statuto punitivo della procreazione tra limiti perduranti ed esigenze di riforma. *Rivista italiana di diritto e procedura penale* 48: 674–93.
- Romano, M. 2007. Principio di laicità dello Stato, religioni, norme penali. *Rivista italiana di diritto e procedura penale* 50: 493–514.
- Roxin, C. 1987. Die Sterbehilfe im Spannungsfeld von Suizidteilnahme, erlaubtem Behandlungsabbruch und Tötung auf Verlangen. *Neue Zeitschrift für Strafrecht* 1: 345–50.
- Schneider, C. 1997. *Tun und Unterlassen beim Abbruch lebenserhaltender medizinischer Behandlung*. Berlin: Duncker & Humboldt.
- Tassinari, D. 2001. Profili penalistici dell'eutanasia nei paesi di Common law. In *Nuove esigenze di tutela nell'ambito dei reati contro la persona*. Ed. S. Canestrari and G. Fornasari, 147–85. Bologna: Clueb.
- Tordini Cagli, S. 2008. *Principio di autodeterminazione e consenso dell'avente diritto*. Bologna: Bononia University Press.

Part IId
Reasonableness in EU and International
Law

The Principle of Reasonableness in European Union Law

Adelina Adinolfi

1 The Multiple Facets and Roles of Reasonableness in EU Law

The concept of reasonableness seems to play a number of different roles in the EU legal system, and it takes meanings and purposes that may considerably vary according to the contexts in which it is invoked. Thus, one cannot find a single, comprehensive paradigm within which the concept may be construed; rather, it is necessary to identify different features that may be framed within a general understanding of reasonableness. In addition, it is somewhat difficult to track down an explicit reference to reasonableness in the caselaw of the European Court of Justice (hereinafter, “the Court” or “the Court of Justice”), because (as will be discussed in Section 2) this concept overlaps on occasions with other principles, whilst on other occasions it appears to be deeply hidden in the Court’s legal reasoning.

Even the nature of reasonableness is not univocal in EU law: it may be used to construe Community law and fill its gaps—and in this role it takes on the guise of an interpretative rule—but it may also be a criterion by which to assess the lawfulness of EC legislation and of the conduct of the EU’s political institutions. Reasonableness can thus be said to have the Janus-faced nature of an interpretative criterion and of a general principle of law that legislation should respect. In any event, the boundary between these two natures appears rather vague: suffice it to recall that the Court relies on general principles of law not only as substantive rules but also as interpretative criteria.¹

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¹ The Court tries to interpret EC legislation in conformity with the general principles of law, and only where this proves to be impossible it declares an act unlawful. See, for instance, Case C-540/03, 30 June 2006, *European Parliament v. Council*, ECR: I-5769ff., where the Court found that the Directive on family reunions “leaves the Member States a margin of appreciation [...] sufficiently wide to enable them to apply the Directive’s rules in a manner consistent with the requirements flowing from the protection of fundamental rights” (par. 105). See also Case 5/88, 13 July 1989, *Wachauf*, ECR: 2609ff.

Reasonableness is also to some extent relevant in the sharing of powers between the Community and its Member States. The Court applies a standard of reasonableness in assessing whether any derogation from market freedoms that Member States apply is justified. According to the Court's jurisprudence, Member States should produce a "reasonable justification" when they have recourse to a derogation on such grounds as public security or public health, or when they invoke "mandatory requirements" to justify national provisions that might be regarded as measures having an effect equivalent to quantitative restrictions.²

Finally, one cannot neglect to consider the influence that EC legislative techniques may have on how the Court uses the concept of reasonableness. When legislation refers to a "reasonable solution" to attain a certain policy objective (on which see Section 4.2), this implies a significant discretion in the judicial control, and it requires a sort of "reasonableness test" to assess the compliance of Member States with their EC obligations under the legislation in question.

In this context, the paper aims at exploring the impact that the recourse to the concept of reasonableness has in the exercise of discretionary powers by the European Court of Justice.

2 The Disguised Role of Reasonableness in the Caselaw of the European Court of Justice

Although it cannot be denied that reasonableness often guides the Court's legal reasoning, the concept is rarely mentioned in its judgments. This might be explained with the proposition that the concept is often absorbed—and sometimes concealed—into different interpretative criteria (such as the principle of proportionality or the Court's teleological method) sharing many features with the concept of reasonableness.

Such "disguised" recourse to reasonableness mainly appears from the Court's rulings aimed at finding a "reasonable solution" whenever the meaning of EC legislation is unclear on a textual interpretation. One holding, among others, that can illustrate this pattern is that in *Givane*: the Court was asked to clarify the meaning of Article 3(2) of Regulation No. 1251/70 by establishing whether or not a two-year period giving rise to a right of residence for a migrant worker's family member had to immediately precede the worker's death. The Court began with the assumption that the wording of the provision is of little help because it can support opposite conclusions, and it thus found that "it is necessary to place that expression in its context and to interpret it in relation to the spirit and purpose of the provision in question."³ The Court thus held that a "reasonable solution"⁴ consists in finding that the two-year period does have to immediately precede the death: this was based

² The Court first adopted a definition of "measures having an equivalent effect to quantitative restrictions" in Case 8/74, 11 July 1974, *Dassonville*, ECR: 837ff. See also Case 104/75, 20 May 1976, *de Peijper*, ECR: 613ff. See Oliver (2003).

³ Case C-257/00, 9 January 2003, *Givane*, ECR: 345ff.

⁴ *Ibid.*

on the argument that the provision in question implies the need for “a significant connection between the host Member State and the worker concerned,”⁵ and that such a connection “could not be ensured if the right of residence in the territory of a Member State [...] were to be acquired as soon as a worker had resided for at least two years in that State at some stage of his life, even in the distant past” (ibid.).⁶

At first sight, this reasoning could easily be understood in the framework of the Court’s teleological method; it may be argued, however, that in fact the Court first sought to find the most appropriate solution from the standpoint of legal reasoning, and then ascribed such a solution to the EC legislator, thereby construing the latter’s will as being aimed at establishing a reasonable solution. In carrying out this interpretative operation, the Court took into account the actual outcome of different possible constructions, assessing the reasonableness of possible solutions in light of their application.

A similar pragmatic approach is followed by the Court with respect to the influence of the general principles of EC law. The Court, in its rulings, seems first to identify a reasonable solution, and then to consider whether this solution is required by a general principle of EC law, such as the principle of legal certainty, which plays a crucial role in Court’s caselaw; in other words, a general principle of Community law is said to require that a reasonable solution be chosen among different possible interpretations of the same provision.

One may wonder why the Court often prefers to disguise the role of reasonableness by referring to different principles or criteria. A tentative answer is that if the Court frequently referred to reasonableness as the sole foundation of the interpretative solutions it upholds, this could be viewed as an excessively wide or even an arbitrary exercise of its discretionary powers. Indeed, referring to the mere reasonableness of a certain interpretation seems to imply stronger discretionary powers than relying on principles or on interpretative criteria having a specific content: thus, if the Court, having identified a “reasonable solution” to an interpretative problem, ascribes this solution to the legislator’s will, or holds that the solution is mandated under a general principle of law, this reasoning seems to imply that the Court is exercising less discretionary power than if it based its rulings on the general (and often questionable) consideration of reasonableness.

3 A Tentative Paradigm of Analysis: Different Regulatory Levels in the Application of Reasonableness

An analysis of the Court’s caselaw in search of a concept of reasonableness reveals what appears to be, at first sight, a rough distinction between “substantive reasonableness” and “procedural reasonableness.”⁷ The first kind of reasonableness

⁵ Ibid.

⁶ The Court considers that the opposite solution “could create uncertainty as to the legal position of workers and members of their family, whereas that regulation must enable their rights to be clarified and established with certainty” (ibid.).

⁷ A similar distinction has been suggested, in the area of international economic law, in Ortino (2005).

refers to principles bearing on the merits of a decision adopted by public authorities (whether European or national), an example being a decision on the scope of EC provisions allowing derogation from the free movement of goods or services. The second kind of reasonableness implies that EC judicial or administrative proceedings should comply with some guarantees aimed at ensuring fairness, and the same applies to national judicial or administrative proceedings where EU legislation is in question.

The Court resorts to the concept in its substantive form as an interpretative criterion or as a general principle of Community law. Thus, reasonableness may be invoked in order to interpret EC legislation or to assess its validity, or to ascertain whether national legislation is in compliance with a given EC obligation.⁸

In its procedural dimension, the principle makes it possible to assess whether national or European judicial or administrative proceedings are fair—that is, whether they comply with basic principles of protection, such as effective judicial protection of rights conferred on citizens by EC law—or else whether proceedings do not exceed a reasonable duration.

Relying, as a general framework, on these two different kinds of reasonableness, one may further argue that reasonableness, as construed by the Court of Justice, comes into play at three regulatory levels.

On the first level, reasonableness comes to bear on the EU's internal organization: it plays a role in regulating the exercise of the different powers the Treaty confers on the EU's political institutions. In the "checks and balances" approach adopted by the Court, reasonableness plays a crucial role in defining the boundaries between the competences of political institutions. On this level, reasonableness may take shape as the principle of "loyal cooperation" or as that of the "rule of law" or of democracy, principles that have to be respected by each European institution in its conduct (Jacqué 2004; Schwarze 2006).

On the second regulatory level, the principle plays a role in the relation between the European Union and its Member States. Here reasonableness serves the different function of supplementing the criteria that regulate the sharing of competences between the EU and its Member States. In particular, the principle is mainly used to construe the Treaty's provisions or secondary legislation allowing Member States to derogate from obligations under EC law.

The third level relates to the protection of citizens' rights. In order to ensure such protection, the Court has derived general principles that are rooted, *inter alia*, in the concept of reasonableness enshrined in the Member States' legal tradition. On this level, reasonableness is mainly used as a mean by which to protect individual rights from an arbitrary exercise of the powers the Treaty confers on European institutions.

Of course, there is no clear-cut separation between the different regulatory levels just considered. One may object, among other things, that when a Community act is declared void because it contravenes the principle of reasonableness, this may have an impact both on the sharing of competences between EC institutions and Member States and on the protection of citizens whose interests may have been prejudiced

⁸ As mentioned in the main text, this occurs when the Court monitors the Member States' application of Treaty provisions permitting derogation from market freedoms.

by the same act. Furthermore, one might observe that the interpretation of EC law clearly has an influence on the Member States' powers. The recourse to reasonableness as an interpretative criterion of EC law may sometimes lead to the adoption of a certain construction of a provision to avoid imposing an "unreasonable burden" on Member States. For instance, the Court recognises that it may be legitimate for a Member State to grant a benefit only to citizens of other Member States who have demonstrated a certain degree of integration in the State where they have their residence; such a construction is aimed at ensuring that a grant of assistance "does not become an *unreasonable burden* which could have consequences for the overall level of assistance which may be granted by that State."⁹ So there appears to be a close interrelation among the different regulatory levels on which reasonableness is applied.

However, for the purposes of this study, a systematic interpretative statement may be useful irrespective of the possible interaction between different levels of analysis; ascertaining the role that reasonableness plays on different levels—pertaining to the EU's internal organisation, to the relation between the EU and its Member States, and to the protection of individual rights—would in any event help to explain the multiple functions the concept serves in the EU system.

Therefore, following the pattern above, I shall review the Court's approach on each of the three levels identified, considering substantial and procedural reasonableness respectively. This will arguably make it possible to describe the different roles and meanings that reasonableness may take on in the EU legal system; this will help not only to assess the concept's actual significance in such a system, but also to highlight, on a more general view, some elements making for a better understanding of the concept. The analysis will also provide a basis on which to discuss, in the final part of the paper, the consequences of a reasonableness principle with respect to the functioning and lawfulness of the EU legal system, and to explore as well the impact of "EC reasonableness" on the Member States' national systems.

4 The "Substantive" Notion of Reasonableness

4.1 The Significance of Reasonableness in the Functioning of the EU Organization: Reasonableness as a Limitation on the Action of EU Political Institutions

Considering the significance of reasonableness with respect to the EU's internal organization, it should be ascertained how this concept may limit the legislative powers conferred on political institutions.

⁹ Case C-11/06 and 12/06, 23 October 2007, *Morgan*, ECR: 9161ff., par. 42 (italics added). See also Case C-209/03, 15 March 2005, *Bidar*, ECR I-2119ff., where the Court finds that "in the case of assistance covering the maintenance costs of students, it is [. . .] legitimate for a Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State" (par. 57). See Borgmann-Prebil (2008).

There is no doubt that reasonableness plays a decisive role in defining the principles regulating the exercise of Community competences. It is well known that, although the principle of subsidiarity is aimed at regulating the exercise of the concurrent competences conferred on the Community, it nevertheless implies wide discretionary power for the Community's political institutions. Hence the role of reasonableness is crucial in assessing the conformity of a legislative action with the principle of subsidiarity, insofar as it must be verified, under the "subsidiarity test," whether any EC legislation proposed or adopted in a sphere of concurrent competences is really "necessary." Thus, one may suggest that the principle limits the powers of political institutions, since these are allowed to legislate only if an action is deemed *reasonably* needed (Bast and von Bogdandy 2002; Weatherill 2004; Tridimas 2005).

The role of reasonableness is even more evident when it comes to assessing an action's conformity with the principle of proportionality (de Búrca 1994; Ellis 1999). The legislator has to choose the least restrictive means, making sure that the proposed measure does not limit rights or interests any more than is necessary to attain the measure's purpose. Here the principle of reasonableness serves to actually mediate between different (and sometimes conflicting) interests in view of the burden a measure may impose to achieve its goals.

The principle of reasonableness may further limit the powers of political institutions by virtue of its serving as a criterion for the validity of EC legislation. The Court has sometimes directly been asked by national courts in preliminary proceedings to assess the validity of a Community act in light of the principle of reasonableness. Thus, for example, the Court was requested by a national court to assess whether the Commission had violated the principle of reasonableness in considering a Member State's national territory as a whole for the purpose of qualifying an area as a wine-growing region, thus disregarding that a national territory "is made up of areas which obviously differ widely both from a geographical and from an oenological point of view."¹⁰ The Court found that "in an entity composed of Member States, such as the European Community, it is clearly reasonable to take the territory of those Member States as a point of reference for administrative purposes," and so Commission's choice seems to be "*prima facie* a reasonable solution," which could therefore be questioned only on the basis of "serious arguments based on specific circumstances" (par. 73). This was a case, then, where the principle of reasonableness was relied on in assessing whether a discretionary power has lawfully been exercised.

One may gather from this approach that when the use of a discretionary power seems *prima facie* reasonable, strong arguments are needed to challenge a European institution's policy. A policy's reasonableness seems to imply that the discretionary power was correctly used, unless it is shown that particular circumstances would

¹⁰ Case C-375/96, 29 October 1998, *Zaninotto*, ECR: I-6629ff. See also Case C-155/99, 19 October 2000, *Busolin*, ECR: I-9037ff.: the national court asked whether a regulation was "invalid for infringement of the principle of reasonableness, manifest error and inconsistency in relation to the object pursued, in the light of the system of calculation used by the Commission" (par. 7).

have required a different outcome. In a word, if a legislative act is judged by the Court to be at first sight reasonable, the standard is thereby considerably raised against which it can be shown that the act is unlawful.

This hypothesis is borne out by the caselaw relative to the Community's non-contractual liability for legislative acts. Liability in such cases extends to legislative action if there is a "sufficiently flagrant violation of a superior rule of law for the protection of the individual."¹¹ This entails that, in legislative areas involving policymaking discretion, EC liability arises "only in exceptional cases, namely where the institution concerned manifestly and gravely disregarded the limits on the exercise of its powers."¹² Thus, an act's unlawfulness does not in itself suffice to hold the Community liable, since a Community institution's action must be arbitrary in light of the general principles of EC law.¹³ Therefore, where conduct is considered reasonable, it is hard to show that an act is unlawful, and, even if the act *is* shown to be unlawful, it is still difficult to establish that the Community is liable for the damages the act has resulted in.

4.2 The Significance of EC "Reasonableness" with Respect to Member States: Sharing of Competences Between the Community and Its Member States, and Fair Application of EC Law in National Legal Systems

In regard to the role of reasonableness in respect of the conduct of Member States, one may first of all observe that reliance on reasonableness is very extensive in the caselaw aimed at monitoring the Member States' exercise of their power to derogate from Treaty obligations.¹⁴ Thus, on the second level in previously outlined scheme,

¹¹ Case 5/71, 2 December 1971, *Schoppenstedt*, ECR: 975ff.: "Where legislative action involving measures of economic policy is concerned, the Community does not incur non-contractual liability for damage suffered by individuals as a consequence of that action, by virtue of the provisions contained in article 215, second paragraph, of the Treaty, unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred" (par. 11).

¹² Joined Cases 64, 113/76 et al., 4 October 1979, *Dumortier Frères*, ECR: 3091ff., par. 4. Cf. Grossrieder-Tissot (2001).

¹³ Joined Cases 194–206/83, 25 April 1985, *Asteris*, ECR: 2815ff.

¹⁴ Derogation clauses are established by Treaty provisions, and sometimes by legislation. Under certain EC acts, a Member State may refuse to import goods from other Member States if it deems that the product does not meet certain requirements. Thus, for example, Directive 2007/46 provides that a Member State must permit within its territory the sale of a vehicle manufactured according to another Member State's technical requirements, but not so if the former Member State "has reasonable grounds to believe that the technical provisions according to which the vehicle was approved are not equivalent to its own" (Article 23(7)). The same Directive allows a Member State to exempt a particular vehicle from compliance with one or more of the provisions of the Directive itself, provided it imposes alternative requirements; however, an exemption from such provisions is only available "where a Member State has reasonable grounds" for granting the exemption (Article 24(1)).

the principle of reasonableness seems essential as a means with which to specify the scope of the duties the Treaty imposes on Member States.

When employed for this purpose, the principle of reasonableness assumes the form of a means-ends test by which the Court assesses whether there is a “reasonable relationship” between a national measure and its asserted purpose. For example, it may be necessary to examine whether a national measure restricting the free movement of goods is justified by a legitimate aim. Under the scheme usually followed in monitoring the permissibility of a national derogation from a fundamental freedom, the Court considers first whether the aim the measure is alleged to pursue is reasonable.¹⁵ In the Court’s caselaw, many policy aims have been so justified, examples being consumer protection, health protection, and environmental protection.

Where the Court answers in the affirmative—that is, where the national measure at issue is deemed to be justified by a legitimate aim—it further assesses whether the measure is proportional to its aim. Thus, the Court has held in many cases that “if a Member State has at its disposal less restrictive means of attaining the same goals, it is under an obligation to make use of them.”¹⁶ In other words, the Court generally considers whether the interest in question can be protected in a different way, with a lesser impact on a fundamental freedom established in the Treaty.¹⁷ Although the second step in the Court’s analysis surely falls within the purview of the principle of proportionality, it is clear that the national measure must in the Court’s view be “reasonable” in both respects, meaning that the aim pursued and the means chosen to protect that aim must both be reasonable.¹⁸ When assessing the validity of a national measure in light of the said scheme, the Court enjoys a very wide discretionary power, since it decides which aims may reasonably justify a limitation on market freedoms, and to what extent a derogation is permitted.

Although the “rule of reason” was developed with respect to the free movement of goods, the Court of Justice applies the same rule in the context of other market freedoms, such as the freedom to provide services.¹⁹ The Court thus assesses whether any restriction on a fundamental freedom may be justified by imperative reasons of public interest.

The Court has occasionally reasoned along the same lines in regard to competition law, finding that a public interest justifies a derogation to Article 81.²⁰ This

¹⁵ In making such an assessment, however, the Court does not invoke reasonableness but instead uses words such as *suitable* or *appropriate*.

¹⁶ Case 90/86, 14 July 1988, *Zoni* ECR: 4285ff. See Gormley (2005).

¹⁷ The Court does not always use the test in the same way. See de Bùrca (1994).

¹⁸ See Case C-265/88, 12 December 1989, *Messner*, ECR: I-4209ff.: the Court found that an obligation imposed on EC nationals to make a declaration of residence within three days of entering into a State’s territory is in breach of EC obligations “when the time allowed for making the declaration of arrival by foreigners is not reasonable” (par. 9).

¹⁹ Case C-384/93, 10 May 1995, *Alpine Investment* ECR: I-1141ff.: “Maintaining the good reputation of the national financial sector may therefore constitute an imperative reason of public interest capable of justifying restrictions on the freedom to provide financial services” (par. 44).

²⁰ As in Case C-309/99, 19 February 2002, *Wouters*, ECR: I-1577ff., and Case C-67/96, 21 September 1999, *Albany*, ECR: I-5751ff.

approach clearly extends the Court's judicial discretion in defining the scope of the rule of reason and hence that of competition law. The rule of reason also plays a role in connection with Article 81(3), under which the effects that counteract competition must be balanced against those that promote it; however, the Court's discretion in this context is limited, since the assessment is to be made within the Treaty framework. The Court has held up in this respect a flexible application of the Treaty provisions by establishing that "competition cannot be enforced without account being taken of the economic and legislative context and the effects of the alleged infringements."²¹ However, such a flexible approach cannot mean that judicial application of the rule of reason may affect the requirement to comply with EC obligations. As the Court clarified, "even if the rule of reason did have a place in the context of Article 85(1)—now Article 81(1)—of the Treaty, in no event may it exclude application of that provision in the case of a restrictive arrangement involving producers accounting for almost all the Community market and concerning price targets, production limits and sharing out of the market."

Furthermore, reasonableness may also have a crucial role in assessing whether a national measure may be justified on the basis of the precautionary principle; this is well illustrated by the *Monsanto* case,²² where the Court had to consider the unpredictable effects on human health which may be produced by the insertion of foreign genes in foods. According to the Court, the precautionary principle means that "where there is uncertainty as to the existence or extent of risks to human health, protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent" (par. 111). Protective measures thus presuppose that risk assessment provides scientific evidence which "makes it possible reasonably to conclude on the basis of the most reliable scientific evidence available and the most recent results of international research that the implementation of those measures is necessary in order to avoid novel foods which pose potential risks to human health being offered on the market" (par. 113). One may argue that, in this case, the principle of reasonableness takes the form of an assessment of how probable a risk is, and thus plays a pivotal role in clarifying the scope of the Member States' power to limit the free movement of goods by asserting a reasonable probability of a health hazard on the basis of scientific evidence.

If the Court makes wide use of the principle of reasonableness—under the previously described scheme—in assessing whether a Member State has correctly used its power to derogate from EC law, the principle has at times been accorded some relevance in the more general context of verifying compliance with Treaty

²¹ Case C-235/92, 8 July 1999, *Montecatini v. Commission* ECR: I-4539, par. 130. See also Case C-552/03 P, 28 September 2006, *Unilever Bestfoods*, ECR I-9091ff., par. 13; Case T-112/99, 18 September 2001, *Métropole télévision*, ECR: II-2459ff.; Case T-328/03, 2 May 2006, *O2*, ECR: II-1231ff. See on the rule of reason in competition law: Odudu (2002), Manzini (2002), Wesseling (2005), Marquis (2007), and Rossi and Curzon (2008).

²² Case 236/01, 9 September 2003, ECR: I-8105ff.

obligations.²³ To bring just one example, the Court considered whether a charge levied under a national system was reasonable, so as to ascertain whether the charge had to be deemed a tax or a service fee (it would have been prohibited by the Treaty in the former case and permitted in the latter). For a charge to be considered a service fee it should be “established reasonably by reference to the cost of the service in respect of which the charges are levied.”²⁴ In this case, then, a reasonableness criterion was used to assess the amount of a charge imposed by a Member State, this to define the nature of the charge (as a tax or a service fee) and to correspondingly apply EC law.

Some cases where the “test of reasonableness” is applied can also be found with respect to national provisions concerning conflicts of laws, that is, where the applicable law needs to be identified in the absence of a solution established by EC legislation. For instance, in clarifying which social-security legislation applies to a worker who is self-employed in two or more Member States and resides in one of them, the Court has found that “the attachment of a worker to the legislation of the State where he resides, in a case where he pursues one or more self-employed activities in two or more Member States, is by no means unreasonable.”²⁵ A similar approach has subsequently been upheld with respect to employees,²⁶ as well as in

²³ Recall that Member States should enjoy a reasonable time limit within which to comply with EC obligations. See Case 1/00, 13 December 2001, *Commission v. France*, ECR: I-9989ff. Furthermore, reasonableness serves as a criterion by which to assess the compliance of national legislation with EC obligations. See, for example, the Opinion of Advocate General Tizzano in Case C-145/04, 6 April 2006, *Spain v. United Kingdom*, ECR: I-7917: a Member State’s power to define its own electorate for European elections “may be exercised only exceptionally and within limits and under conditions that are compatible with Community law. That implies that it is necessary in each case to ensure compliance with the general principles of the legal order—such as, in particular, in this case the principles of reasonableness, proportionality and non-discrimination—as well as, of course, any specific and relevant Community provisions” (par. 103). The Advocate General also found that it seems “consonant with those principles to exclude the possibility of extending voting rights to persons who have no actual link with the Community” (par. 104). In addition, the principle of reasonableness has some relevance for the purpose of fixing an amount for fines under Article 228, in the event of a Member State’s repeated infringements of EC obligations (see Case C-387/97, 4 July, *Commission v. Greece*, ECR: I-5047), especially in assessing the seriousness of the violation.

²⁴ Case C-206/99, 21 June 2001, *Sonae* ECR: I-4679ff. The Court found that “the distinction drawn between taxes prohibited by Article 10 of the Directive and duties paid by way of fees or dues implies that the latter comprise only remuneration the amount of which is calculated on the basis of the cost of the service rendered. The existence of a maximum which those charges cannot exceed is not sufficient to make them duties paid by way of fees or dues if that maximum is not established reasonably by reference to the cost of the service” (par. 43). See also Case C-134/99, 26 September 2000, *IGI*, ECR: I-77717 and joined Cases C-71/91 and C-178/91 20 April 1993, *Ponente Carni and Cispadana Costruzioni*, ECR: I-1915ff.

²⁵ Case C-242/99, 20 October 2000, *Vogler*, ECR: I-9083 (par. 27).

²⁶ Case C-249/04, 26 May 2005, *Allard*, ECR: I-4535: “It should first be recalled that the Court has already ruled, first, that, in regard to social security, the purpose of the principle of application of the legislation of a single Member State is to avoid the complications which might ensue from the simultaneous application of a number of national legislative systems and, second, that the attachment of a worker to the legislation of the State where he resides, in a case where he pursues

the area of tax law.²⁷ In such cases, the principle of reasonableness arguably plays a role as an integrative source to be employed in areas where EC Treaty applies but EC legislation does not provide any clear solution.

This technique may be used not only when legislation is unclear but also when EC provisions, generally contained in Directives, deliberately reserve significant discretion for Member States. For instance, a discretionary power is obviously conferred on Member States by EC legislation containing “as far as possible” clauses, which are sometimes included in binding acts. Examples include Directives on environmental protection, such as Directive 2006/123,²⁸ under which Member States must limit, “as far as possible, any environmentally significant detrimental changes in groundwater quality.” Another example is provided by Directive 2000/78, establishing a general framework for equal treatment in employment. The Directive establishes, with a view to promoting equal treatment for disabled persons, that “reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer” (Article 5).²⁹

Such “as far as possible” clauses are arguably aimed at introducing some flexibility in binding acts by giving to Member States the opportunity to prove that a certain restriction or a certain measure was “reasonably possible.” These clauses are mainly employed where Treaty provisions make it possible to advance certain interests, such as environmental protection, by way of “mainstreaming,” that is, by integrating such interests into the whole of the Community’s legislative activity, and by giving them priority over other interests. With this technique, Community

one or more self-employed activities in two or more Member States, is by no means unreasonable” (par. 28). See also Case C-242/99, *Vogler*, pars. 26–27.

²⁷ The Court relied on the principle of reasonableness, finding that the solution established by some agreements between Member States in allocating fiscal jurisdiction was not unreasonable. See Case 336/96, 12 May 1998, *Gilly*, ECR: I-2793ff.: “Nor, in the allocation of fiscal jurisdiction, is it unreasonable for the Member States to base their agreements on international practice and the model convention drawn up by the OECD, Article 19(1)(a) of the 1994 version of which in particular provides for recourse to the paying State principle” (par. 31).

²⁸ Directive 2006/118/EC, OJ L 376, 19ff. See, for example, Case 1/00, 13 December 2001, *Commission v. France*, ECR: I-9989ff.: “Since the French Republic had to have a reasonable period for implementing Decisions 98/256 as amended and 1999/514 [...] it must be held that the infringement consisting of a failure to implement those decisions is proved only from expiry of the period allowed for complying with the reasoned opinion” (par. 136).

²⁹ Similar clauses are sometimes included in Directives concerning safety at work. Furthermore, the Court excluded that a national provision requiring workers’ protection as far as reasonably possible constitutes a violation of Directive 89/391. In Case C-127/05, 14 June 2007, *Commission v. United Kingdom* ECR: I-4619, the Court acknowledged a “margin of manoeuvre available to the Member States in transposing those provisions into national law. On the other hand, it cannot be inferred from that provision, on the basis of an interpretation *a contrario*, that the Community legislature intended to impose upon Member States a duty to prescribe a no-fault liability regime for employers.” Therefore, “that duty does not imply that the employer is required to ensure a zero-risk working environment” (par. 53).

legislation in effect shifts to Member States the task of balancing interests, or of weighing the goals of the legislation against the obligation to achieve these goals. When it comes to determining the Member States' compliance with EC law, the Court considers these clauses in light of the principle of reasonableness, which plays a crucial role in determining whether or not a certain action is permissible.³⁰

4.3 The Impact of "EC Reasonableness" on the Activity of National Administrative and Judicial Authorities

Insofar as the principle of reasonableness is considered a general principle of Community law, it should be respected by national administrative and judicial bodies when applying both EU legislation as such and national provisions aimed at implementing Community acts.³¹

This means that the Court may ascertain whether the principle of reasonableness has been respected both in domestic legislation and in the conduct of national administrative authorities whenever they apply EU law. This is clarified by a ruling in which the Court expressly stated that Member States have to rely on reasonableness when monitoring the allocation of Community funds. In particular, a Member State must "satisfy itself, first, that the expenditure incurred by the recipient of the aid is reasonable and, second, that that person has displayed sound financial management."³² A further example concerns the implementation of EC law: the Court has clarified that, where a Member State decides to anticipate or bring forward a Directive's implementation, the time limits should be consistent with reasonableness.³³

The need for Member States to respect the principle of reasonableness in implementing EC law is sometimes expressly stated by legislation. Certain Directives

³⁰ For instance, in Case C-2/97, 17 December 1998, *Società italiana petroli v. Borsana*, ECR: I-8597ff., the Court assessed whether it was technically possible to replace a carcinogen with a less-dangerous substance (see paras. 55–56).

³¹ The Court has declared that national authorities should comply with EC principles of law when applying national measures that implement or apply EC law; see e.g., Case 316/86, 26 April 1988, *Krucken*, ECR: 2213ff., par. 22; Case 5/88, *Wachauf*, ECR: 2609ff.; Case C-144/04, 22 November 2005, *Mangold*, ECR: I-9981ff., par. 78; Case C-260/89, 18 June 1991, *ERT*, ECR: I-2925ff.; Joined Cases C-2/92, 23 March 1994, *Bostock*, ECR: I-955ff., par. 16; Case C-107/97, 18 May 2000, *Rombi and Arkopharma*, ECR: I-3367ff., par. 65.

³² Case 413/98, 25 January 2001, *DAFSE v. Frota Azul-Transportes e Turismo*, ECR: I-673ff. The Court found that a Member State undertaking a certification of accounts "cannot confine itself to carrying out a mere technical check [...] but must, to the contrary [...], satisfy itself as to the reasonableness of the costs charged within a complex structure" (par. 27), since "if the certification carried out by the Member State concerned amounted to no more than a technical check, the Commission would then be obliged to carry out systematic monitoring" (par. 28).

³³ The Court found that "there is nothing to prevent the Member States from anticipating implementation of the obligations laid down in the Directive for existing work equipment" (par. 47); however, "when taking all appropriate measures to ensure fulfilment of the obligations arising under a directive, pursuant to Article 5 of the Treaty, the Member States are required to comply with the general principles of Community law" (par. 48).

do not simply fix a term for their implementation but leave some discretion to Member States in ensuring that a reasonable period is given to the interested parties compelled to apply the Directive. Thus, Directive 2006/118, on the protection of groundwater from pollution and deterioration,³⁴ requires that “a reasonable period should be allowed to elapse before an active substance is included in Annex I in order to permit Member States and the interested parties to prepare themselves to meet the new requirements which will result from the inclusion.”³⁵ Such techniques are clearly aimed at extending the Member States’ discretion, leaving it to them to assess their own particular national situation.

The principle of reasonableness as defined by the Court may even bear to some extent on the conduct of the Member States’ national courts: the caselaw of the Court of Justice has sometimes required national courts to use reasonableness in defining the effect of certain EC obligations.³⁶ A particular scenario concerns the definition of the duty of national courts of last resort to refer preliminary questions: in the well-known *Cilfit* case, the Court acknowledged a limitation on the obligation to refer preliminary questions on the basis of the *acte clair* doctrine, where “the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.”³⁷ However, the assessment of reasonableness is significantly restricted by the Court in order to avoid the risk of non-uniform application of EC law.

The principle of reasonableness should further be considered by national courts when deciding whether to order interim measures. Here the principle of reasonableness is aimed at giving national courts some discretionary powers, but that discretion is strictly limited on the basis of certain criteria that these courts have to consider in their assessment. This is unequivocally clear in the Court’s caselaw, as in the above-mentioned *Cilfit* case (where the Court, in leaving some discretion to national courts, laid down strict criteria for assessing the lack of a reasonable doubt), or in the *Atlanta* case, where the Court, although it acknowledged the power of national courts to grant interim measures when they have serious doubts as to the

³⁴ *OJ L 372*, 27 December 2006, 19ff.

³⁵ Similarly, Directive 2007/46, establishing a framework for the approval of vehicles, establishes the general technical requirements for approval of all new vehicles with a view to facilitating their circulation within the Community. Article 31, par. 4, provides that for “any entry or group of entries in Annex XIII a reasonable transitional period shall be fixed to allow the manufacturer of the part or equipment to apply for and obtain an authorization.”

³⁶ Since reasonableness may give rise to non-uniform assessments, a national court raised the preliminary question whether the relevant Member State’s certification of the accuracy of accounts relative to payments (a certification required by an EC regulation) implies a merely technical control or makes it necessary to also assess the reasonableness of the expenditure. The Court of Justice found that the risk of non-uniformity is averted by virtue of the fact that “the final decision concerning the grant of Community assistance lies exclusively with the Commission” (par. 31): Case C-413/98, 25 January 2001, *DAFSE*, *ECR*: I-673ff.

³⁷ Case 283/81, 6 October 1982, *Cilfit* *ECR*: 3415ff. See also Case C-495/03, 15 September 2005, *Intermodal Transports BV*, *ECR*: I-8151ff., where the Court confirmed that the national court has “sole responsibility for determining whether the correct application of Community law is so obvious as to leave no scope for any reasonable doubt” (par. 37).

lawfulness of a Community act, imposed conditions requiring a hard balancing of interests.³⁸

A further general effect on national courts is that they should rely on the principle of reasonableness as defined by the Court whenever they interpret EU legislation. In fact, the Court clarified in *Cilfit* that EC provisions should be construed according to peculiar interpretative criteria. Thus, even the principle of reasonableness, considering it is used by the Court of Justice as an interpretative criterion, must be taken into account by national courts where it seems relevant in interpreting EU provisions that have to be applied in national proceedings.

Although national authorities should conform to the principle of reasonableness when applying EC law, the Court seems reluctant to accept that national legislation relying on the same principle may be regarded as a correct implementation of EC obligations. This is clearly demonstrated by an infringement proceeding in which the Court considered whether a provision of the Dutch Civil Code was suitable for implementing the Directive on unfair terms in consumer contracts.³⁹ According to the provision in question, any rule concerning contracts is inapplicable if it does not comply with the standards of reasonableness and fairness appropriate to the circumstances of the case. The Court did not uphold the Dutch government's argument that the national legislation at issue could be interpreted in such a way as to ensure compliance with the Directive. The reluctance of the Court in this respect was certainly owed to the need to ensure that the proper implementation of Directives at the national level fully meets the requirement of legal certainty.⁴⁰ Even though domestic legislation based on reasonableness might actually satisfy EC obligations, it makes monitoring too difficult, as it requires a careful assessment of the national practice in question. Furthermore, such legislation would also limit the effectiveness of protection afforded to citizens by EC law because it may raise doubts about the actual content and scope of such protection.

4.4 The Significance of Reasonableness in the Protection of Individual Rights

As to the role of reasonableness in protecting individual rights—that is, the third level in the scheme suggested above—the most important dimension is arguably that concerning the application of the principle of non-discrimination. According to the Court's definition, this principle requires that “comparable situations must not be treated differently and that different situations must not be treated in the same way.”

³⁸ Case C-465/93, 9 November 1995, *Atlanta*, ECR: I-3761ff. See Bebr (1996).

³⁹ Case C-144/99, 10 May 2001, *Commission v. Netherlands*, ECR: I-3541ff.

⁴⁰ “[...] even where the settled case law of a Member State interprets the provisions of national law in a manner deemed to satisfy the requirements of a Directive, that cannot achieve the clarity and precision needed to meet the requirement of legal certainty. That, moreover, is particularly true in the field of consumer protection” (*ibid.*, par. 21).

However, such treatment may be justified “if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the objective being legitimately pursued.”⁴¹ Thus, one may argue that the Court relies on reasonableness in assessing whether a difference in treatment is justified. When assessing whether a discrimination can be justified, the Court balances the different values and interests at stake; reasonableness is thus likely to play a role in this process even when it is not explicitly mentioned in the ruling.

The principle of equity may also fall within the framework of a general criterion of reasonableness. In *Walt Wilhelm*,⁴² the Court implicitly relied on equitable principles, affirming that “if the possibility of two procedures being conducted separately were to lead to the imposition of consecutive sanctions, a general requirement of natural justice demands that any previous punitive decision must be taken into account in determining any sanction which is to be imposed.” This shows that the Court is even inclined to discern and apply general principles of natural justice as sources of Community law.

However, while reasonableness in the previously considered judgments is arguably aimed at *safeguarding* individual rights, the same principle has in other circumstances led the Court to instead *restrict* certain rights. This can be appreciated in the Court’s judgments limiting the temporal effect of an interpretation EC law or of a finding of invalidity of EC law: the Court seeks to find a reasonable compromise among the different interests at stake, and it justifies such a solution on the basis of the principle of legal certainty.⁴³ This balancing test has sometimes jeopardized the right of private persons to have unlawful charges or taxes reimbursed, the point of the balancing being to avoid economic imbalances that work to the detriment of private enterprises or of Member States. It is clear from the Court’s reasoning in such cases that reasonableness serves to determine a balance point between conflicting interests; indeed, economic considerations play a decisive role in the Court’s rulings limiting temporal effects.

Furthermore, the Court has sometimes attached importance to the principle of unjust enrichment, finding that national provisions “which prevent the reimbursement of taxes, charges, and duties levied in breach of Community law cannot be regarded as contrary to Community law where it is established that the person required to pay such charges has actually passed them on to other persons.” It may thus be inferred from this reasoning that individual rights established under EC law should be protected unless there is evidence that such protection would conflict with reasonableness, which in this case takes on the guise of a general principle of equity.

⁴¹ Case C-148/02, 2 October 2003, *Garcia Avello*, ECR: I-11613ff., par. 31. See also Case C-354/95, 17 July 1997, *National Farmers’ Union*, ECR: I-4559ff.; Case C-184/99, 20 September 2001, *Grzelczyk*, ECR: I-6193.

⁴² Case 14/68, 13 February 1969, *Walt Wilhelm*, ECR: 1ff. See Lauwaars (1969) and Walz (1996).

⁴³ See, for example, Case 24/86, 2 February 1988, *Blaizot*, ECR: 379ff., and Case C-72/03, 9 September 2004, *Carbonati Apuani*, ECR: I-8027ff.

5 The “Procedural” Notion of Reasonableness

5.1 Reasonableness with Respect to EC Judicial and Administrative Proceedings

Moving to the procedural facet of the principle of reasonableness, no doubt the most important role that plays lies in its use in determining what constitutes fair duration in a judicial or administrative EC proceedings. Reasonableness is used in this role to assess compliance with the general principle of Community law—a principle inspired by Article 6(1) of the European Convention on Human Rights (ECHR)—under which everyone is entitled to a fair hearing.⁴⁴ Under the Court’s caselaw, whether an EC court proceeding is reasonable in its duration is something that needs to be assessed in light of the circumstances of each case, which means taking into account how important the case is for the person concerned, how complex it is, and how the applicant and the competent authorities conduct themselves.⁴⁵ In applying these criteria, the Court has been led to find that the same length of time was reasonable in one case and unreasonable in another, as can clearly be illustrated by looking at the *Sumitomo* and *Baust* cases in comparison: in *Sumitomo*,⁴⁶ the Court found that a judicial proceeding lasting more than four years was justified in light

⁴⁴ See Case C-270/99 P, 27 November 2001, ECR: I-9197ff.: “As regards the application of the general principle of Community law that everyone is entitled to legal process within a reasonable period [. . .], it is clear from the case-law of both the Court of Justice and the European Court of Human Rights that the reasonableness of the length of proceedings is to be determined in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities” (par. 24). See also Case C-185/95 P, 17 December 1998, *Baustahlgewebe v. Commission* ECR: I-8417ff.; Case C-194/99, 2 October 2003, *Thyssen Stahl v. Commission*, ECR: I-10821ff. On the proceedings conducted by the Commission in the context of state aid, see Case T-95/96, 15 September 1998, *Gestevisión Telecinco v. Commission*, ECR: II-3407ff., where a proceeding of forty-seven months was found to exceed the limits of reasonableness. In Case T-395/04, 10 May 2006, *AirOne v. Commission*, ECR: II-1343ff., a period lasting nearly six months was found not to exceed a reasonable time frame, while in Case T-167/04, 11 July 2007, *Asklepios Kliniken v. Commission* ECR: II-2379 ff., the length of the proceedings was considered reasonable in view of the complexity of the case.

⁴⁵ See Case C-185/95 P, 17 December 1995, ECR: I-8417, par. 26ff. In Case 199/99, 2 October 2003, *Corus Ltd.*, ECR: I-11177ff., where the Court found that the duration of proceedings lasting five years was “justified in the light of the particular complexity of the case” (par. 56). The elements taken into consideration were the number of undertakings that brought actions for annulment, the variety of claims regarding access to documents relating to the administrative procedure, the size of the file (which contained 11,000 documents), and language constraints imposed by the Court’s rules of procedure. See also Case C-238/99 P, 15 October 2002, *Limburgse Vinyl*, ECR: I-8375ff.

⁴⁶ Case C-403/04, 25 January 2007, ECR: I-729ff. The Court found that “the general principle of Community law that everyone is entitled to a fair hearing, which is inspired by Article 6(1) of the ECHR, and in particular the right to legal process within a reasonable period, is applicable in the context of proceedings brought against a Commission decision imposing fines on an undertaking for infringement of competition law” (par. 115). See also Case C-199/99, P *Corus v. UK*.

of the case's complexity, while in *Baust*,⁴⁷ a proceeding lasting about the same time was considered overlong. This clearly shows how an assessment of reasonableness depends on the specific circumstances of each case, thereby leaving the Court a wide margin of discretion.

In determining whether the time taken to handle a case is justified, the Court has taken into account such factors as the high number of actions for annulment brought against a given act and the size of the documents to be examined, and even the fact that the claims are submitted in any number of different languages.⁴⁸ It is in light of all these factors that the Court ascertains whether or not the duration of a proceeding can be considered reasonable. By applying a standard of reasonableness, and taking into account all the circumstances of the case, the Court can consider whether or not a long duration is justified. If the Court concludes that the duration is in fact unreasonable, it applies a further test, assessing whether such excessive duration has influenced the outcome of the relative judicial proceeding.⁴⁹ This implies a further discretionary analysis by the Court aimed at assessing whether the duration so determined to be excessive has prejudiced the interests of the parties to the proceeding.

The Court applies a similar test to EC administrative proceedings, assessing, for instance, whether the Commission takes an unreasonable time to investigate alleged violations of competition law⁵⁰ or to conduct disciplinary proceedings.⁵¹

⁴⁷ In Case C-185/95, 17 December 1998, *Baustahlgewebe v. Commission*, ECR: I-8417ff., the Court concluded that the relevant circumstances could not justify the length of the proceedings: "The circumstances of this case are not such as to indicate that constraints of that kind can provide justification for the time which the proceedings took before the Court of First Instance" (par. 44). According to the Court, "it must be held, notwithstanding the relative complexity of the case, that the proceedings before the Court of First Instance did not satisfy the requirements concerning completion within a reasonable time" (ibid.).

⁴⁸ See, for example, Case C-185/95 P, 17 December 1998, *Baustahlgewebe v. Commission*: "The appellant's application was one of 11, submitted in three different languages, which were formally joined for the purposes of the oral procedure" (par. 35). In Joined Cases C-403/04 and C-405/04, 25 January 2007, *Sumitomo*, ECR: I-729ff., the Court emphasised that "seven undertakings brought actions for annulment of the same decision, in three languages of the case."

⁴⁹ "However, in the absence of any indication that the length of the proceedings affected their outcome in any way, that plea cannot result in the contested judgment being set aside in its entirety": Case C-185/95, *Baustahlgewebe v. Commission* (par. 49).

⁵⁰ In Case C-113/04 P, 21 September 2006, *Technische Unie*, ECR: 8831ff., the Court found that "compliance with the reasonable-time requirement in the conduct of administrative procedures relating to competition policy constitutes a general principle of Community law whose observance the Community judicature ensures" (par. 40). In Case C-194/99, *Thyssen Stahl v. Commission*, the Court began its analysis on the assumption that observance of the rights of defence is a fundamental principle of Community law which must be complied with even in administrative proceedings (par. 30). See also Case 238/99, 15 October 2002, *Limburgse Vinyl Maatschappij and Others v. Commission*, ECR: I-8375, pars. 167 to 171, and Case C-282/95 P, 18 March 1997, *Guérin automobiles v. Commission*, ECR: I-1503, pars. 36–37.

⁵¹ See Case C-270/99 P, 27 November 2001, *Z v. European Parliament*, ECR: I-9197ff., pars. 23–25. The Court found that "as regards the argument based on Article 6(1) of the Convention, and without there being any need to determine whether that provision is applicable to the disciplinary proceedings provided for in the Staff Regulations, it should be recalled that Article 6(1) provides that in the determination of his civil rights or obligations or of any criminal charge against him,

The Court has relied on a general principle of law under which administrative proceedings should satisfy a reasonable-time requirement. Not unlike what the court does in assessing whether judicial proceedings are unreasonably long, so in this case, where an administrative proceeding is at issue, the Court exercises its power to assess whether a proceeding's duration had an impact on its outcome, and so on the administrative decision itself.⁵² The Court thus determines whether a proceeding's excessive length affected a party's rights of defence.⁵³

A peculiar problem comes up when the need arises to break down administrative proceedings into stages and to ascertain whether each such stage has been conducted in compliance with the principle of reasonable duration. The Court has found that an "administrative procedure may involve an examination in successive stages and one has to consider whether the duration of each stage was excessive." It thus quashed a judgment of the Court of First Instance that, in assessing an administrative proceeding's compliance with reasonable length, only considered the second stage of the proceedings.⁵⁴ The Court of Justice did so on the ground that "excessive duration of the first phase of the administrative procedure may have an effect on the future ability of the undertakings to defend themselves" (par. 54). Administrative proceedings, then, must be considered in all their stages in determining whether one of these stages has been so long as to run afoul of a general principle of law.

5.2 Reasonableness with Respect to National Judicial and Administrative Proceedings

The Court also relies on the principle of reasonableness in monitoring the national procedural laws of Member States so as to assess whether such laws are adequate to ensure the protection of rights conferred by EC law. This use can be found quite often in the Court's caselaw, the reason being that national procedural laws are not harmonized, and so the Court requires that such laws comply with the principles

everyone is entitled to a fair and public hearing within a reasonable time, by an independent and impartial tribunal established by law. As its wording clearly shows, Article 6(1) of the Convention does not lay down precise time-limits and does not provide that the time-limits laid down in a legislative measure, such as those laid down in Article 7 of Annex IX to the Staff Regulations, are necessarily to be regarded as mandatory" (par. 23).

⁵² In Case 194/99, 2 October 2003, *Thyssen Stahl v. Commission*, the Court found that the rights of defence are infringed whenever an administrative procedure could have had a different outcome as a result of an error committed by the administrative body (here, the Commission). Thus, "one should show that it would have been better able to ensure its defence had there been no error."

⁵³ See, for example, Case C-270/99 P, 27 November 2001, *Z v. European Parliament*, par. 43.

⁵⁴ Case 113/04, 21 September 2006, *Technische Unive BV*, paras. 40–59. In applying the reasonable-time principle, the Court of First Instance had drawn a distinction between the investigation stage and the remainder of the administrative procedure (par. 42). The Court of Justice found that the Court of First Instance had "failed to consider whether the excessive duration, imputable to the Commission, of the entire administrative procedure [...] might affect the ability of the FEG and TU to defend themselves in the future" (par. 56).

of equivalence and effectiveness. On this approach, the national procedures available under which to obtain judicial protection of rights conferred by EC provisions must “be no less favourable than those governing similar domestic claims nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law.”⁵⁵ The Court relies on these principles to assess whether a national procedure, such as a law fixing a limitation period, should be considered reasonable.⁵⁶ Reasonableness acts in this role to provide the Court with the discretion to ascertain whether a national law can adequately ensure the protection of rights conferred on citizens under EC legislation or under the Treaty.

The principle is further used to assess the conditions giving rise to responsibility for Member States due to a violation of EU law. In this role, reasonableness serves to raise the threshold for finding a violation of Community obligations giving rise to liability, and it also serves to assess whether an infringement of EU law is serious enough to produce certain consequences.⁵⁷

6 Concluding Remarks

The above survey of EC caselaw and legislation points up the difficulty involved in finding a comprehensive interpretative scheme under which to work out the meaning of reasonableness in EU law. It seems, on the one hand, that if a sharp distinction is drawn between different methods of interpretation, in an effort to single out an autonomous role for the principle of reasonableness, the results produced will be scant. And yet the foregoing survey of caselaw suggests that the Court’s entire legal reasoning is strongly influenced by a principle of reasonableness, even though the Court may wind up justifying on the basis of different principles or criteria what it decides on as a reasonable solution. It may thus be suggested, from a pragmatic point of view, that the Court once that it has settled on a solution it deems reasonable, ascribes such a solution to the EC legislator, or else rules that the solution is required under a general principle of law.

Reasonableness in EU law is a manifold principle playing different roles, and in playing these roles it changes its meaning and content, like a chameleon. As an interpretative principle of EC law, it works under the shadow of other principles,

⁵⁵ Case C-188/95, 2 December 1997, *Fantask*, ECR: I-6703ff. See Biondi (2005).

⁵⁶ Case C-188/95, *Fantask*: “The five-year limitation period under Danish law must be considered to be reasonable [...]. Furthermore, it is apparent that that period applies without distinction to actions based on Community law and those based on national law” (par. 49). See also Case C-90/94, 17 July 1997, *Haahr Petroleum v. benrå Havn and Others*, ECR: I-4085ff., par. 49; Case C-255/00, 24 September 2002, *Grundig*, ECR: I-8003ff.; and Joined Cases C-216/99 and C-222/99, 10 September 2002, *Prisco*, ECR: I-6761ff.

⁵⁷ As stated in Joined Cases C-46/93 and C-48/93, 5 March 1996, *Brasserie du Pêcheur and Factortame*, ECR: I-1029ff., “Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties” (par. 51).

while as a parameter of legitimacy, it may reinforce a presumption of lawfulness of EC legislation or it may constitute a criterion for review the validity of such legislation. In the monitoring of national law, the principle is expressed through a “rule of reason” that plays a crucial role in assessing whether Member States fulfil their EC obligations.

This lack of a rigorous construction in the Court’s caselaw may seem surprising if compared with any domestic legal system or if considered from a legal-theoretical perspective. However, one should take into account the peculiar features of EU law: the EC Treaty is incomplete,⁵⁸ and the very technique used to confer legislative powers on the institutions implies the existence of significant gaps (see, among others, Bast and von Bogdandy 2002, and Michel 2003). For the Court, this implies a political role stronger than that played by national courts in European countries. Suffice it to recall here that the Court establishes the higher principles of EC law and their relative priority, striking a balance among different interests and values. Reasonableness thus seems likely to play a greater role in the absence of a written constitution; and it may be argued that if working out a ranking of values and rights in written constitutions is a difficult task,⁵⁹ this seems to become even more difficult when it is up to the courts to establish the higher principles of a legal system.⁶⁰

In this context, the recourse to reasonableness in the Court’s caselaw gives expression in the EU legal system to two different needs: the need for flexibility in applying EC law, and the need for filling gaps in the legal system. The foregoing survey of caselaw shows that the Court relies on reasonableness in assessing whether EC political institutions and Member States alike are fulfilling their Treaty obligations. Thus, the Court applies a principle of reasonableness in assessing whether European institutions are acting lawfully, as well as in assessing whether Member States are acting in compliance with their EC Treaty obligations: when the conduct of EC institutions is at issue, reasonableness is often disguised by the Court under other principles and criteria, presumably to avoid criticism for exercising a too wide judicial power; when it comes to assessing whether national legislation complies with EC law, the principle’s role becomes more evident, since the Court seems to have no hesitation in resorting to it in ascertaining whether a national measure constitutes a reasonable derogation from EC obligations or in verifying whether

⁵⁸ This is a feature shared by all international treaties: see Petersman in this volume, who observes that “all international treaties remain incomplete and build on general principles of law.” (p. 430).

⁵⁹ See Morrone in this volume for a discussion of this point where the Italian Constitution is concerned.

⁶⁰ The call for a codification of fundamental rights—such as is envisaged by the Constitutional Treaty, and also by the Treaty of Lisbon, albeit through a different technique—clearly aims at limiting judicial discretion, and this would seem to restrict the significance of the general criterion of reasonableness. But this effect may only be *apparent*, since codified general principles do not necessarily translate to a limitation on judicial activism: in fact a codification of this sort may make for a greater role of the Court in balancing the different values and interests explicitly so stated in a treaty, and such balancing is something the Court would have to do relying as well on reasonableness.

national legislation respects the principle in implementing or applying Community legislation.

Finally, there is the question of the balancing of interests, which appears to be an even more sensitive question in the EU system than in the single national legal systems, and this makes for a greater role of reasonableness in the EU system: when recourse is had to reasonableness in settling a dispute, the outcome may invest not only the interests of different actors in the market and in society (e.g., an interest in environmental protection as against one in competitive industry), but also the relation between Member States, since different States may have an interest in balancing conflicting values in different ways, especially for economic reasons.⁶¹ Reasonableness thus plays a prominent role whenever a balancing approach is required and a cost-benefit analysis needs to be made: this might consist in balancing the need for environmental protection against the need to develop industry, or in balancing the free movement of goods against consumer protection, or the grant of an interim relief against the Community's interest in the application of EC legislation. In these cases, recourse to reasonableness clearly provides the Court with a criterion exceeding a strict legal perspective, and it involves a broad assessment of interests of the different actors.

References

- Bast, J., and A. von Bogdandy. 2002. The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform. *Common Market Law Review* 2: 227–68.
- Bebr, G. 1996. Case C-465 and 466/93, Atlanta Fruchthandelsgesellschaft and Others v. Bundesamt für Ernährung und Forstwirtschaft, Judgments of the Court of Justice of 9 November 1995, not yet reported. *Common Market Law Review* 33: 795–809.
- Biondi, A. 2005. The Rule of Reason and National Procedural Limitations: Is it Really Reasonable? In *Rule of Reason: Rethinking another Classic of European Legal Doctrine*. Ed. A. Schrauwen, 129–41. Groningen: Europa Law.
- Borgmann-Prebil, Y. 2008. The Rule of Reason in European Citizenship. *European Law Journal* 3: 328–50.
- De Búrca, G. 1994. The Principle of Proportionality and its Application in EC Law. *Yearbook of European Law* 13: 105–50.
- Ellis, E., ed. 1999. *The Principle of Proportionality*. Oxford: Hart.
- Gormley, L.W. 2005. Genesis of the Rule of Reason in the Free Movement of Goods. In *Rule of Reason: Rethinking another Classic of European Legal Doctrine*. Ed. A. Schrauwen, 19–33. Groningen: Europa Law.
- Grossrieder-Tissot, S. 2001. La responsabilité de la Communauté européenne du fait de l'activité normative de la Commission. *Revue trimestrielle de droit européen* 1: 91–121.
- Jacqué, J.-P. 2004. The Principle of Institutional Balance. *Common Market Law Review* 2: 383–91.
- Lauwaars, R.H. 1969. Walt Wilhelm and Others v. Bundeskartellamt. Case 14/68. Decision of February 13, 1969. Preliminary Ruling at the Request of the Kartellsenat of the Berlin Kammergericht. *Common Market Law Review* 5: 488–90.
- Manzini, P. 2002. The European Rule of Reason—Crossing the Sea of Doubt. *European Competition Law Review* 8: 392–99.

⁶¹ One area where this happens is in the growth and use of genetically modified crops.

- Marquis, M. 2007. O2 (Germany) v. Commission and the Exotic Mysteries of Article 81(1). *European Law Review* 6: 29–47.
- Michel, V. 2003. Le défi de la répartition de compétences. *Cahiers de Droit Européen* 1: 17–86.
- Odudu, O. 2002. A New Economic Approach to Article 81(1)? *European Law Review* 1: 100–05.
- Oliver, P. 2003. *Free Movement of Goods in the EC*. London: Sweet & Maxwell.
- Ortino, F. 2005. From “Non-discrimination” to “Reasonableness”: A Paradigm Shift in International Economic Law? *Jean Monnet Working Papers* 1: 1–59.
- Rossi, L.S., and S.J. Curzon. 2008. “Rule of Reason” for the EU Internal Market? *Studi sull'integrazione europea* 3: 295–310.
- Schwarze, J. 2006. *European Administrative Law*. London: Sweet & Maxwell.
- Tridimas, T. 2005. The Rule of Reason and its Relation to Proportionality and Subsidiarity. In *Rule of Reason: Rethinking another Classic of European Legal Doctrine*. Ed. A. Schrauwen, 109–28. Groningen: Europa Law.
- Walz, R. 1996. Rethinking Walt Wilhelm, or the Supremacy of Community Competition Law over National Law. *European Law Review* 22: 449–64.
- Weatherill, S. 2004. Competence Creep and Competence Control. *Yearbook of European Law* 23: 1–55.
- Wesseling, R. 2005. The Rule of Reason and Competition Law: Various Rules, Various Reasons. In *Rule of Reason: Rethinking another Classic of European Legal Doctrine*. Ed. A. Schrauwen, 57–76. Groningen: Europa Law.

An Evolving “Rule of Reason” in the European Market

Lucia Serena Rossi and Stephen J. Curzon

From a general point of view, it can be argued that legal reasoning encompasses the concept of reasonableness, since the establishment of a set of rules necessarily entails that a margin of flexibility be allowed. Such a margin may take one of several forms, ranging from exceptions and derogations to exemptions. Either way, the legislator, the executive, or the judiciary will have to make a determination by comparing and weighing different competing values.

As far as competition law is concerned, the so-called “rule of reason,” a concept of elasticity making it possible to establish exceptions to a rigid rule, was developed in U.S. antitrust law long before the creation of the European Union.

The aim of this paper is to determine whether this concept can play a role in the EU internal market, and to this end we will consider if, and how, it has been applied in that context. In responding to this legal conundrum, we will carry out a comparative analysis of two distinct areas of application, namely, the market rules dealing with competition and those on the free movement of goods, persons, services, and capital.

As a starting point, however, a few introductory remarks will be made on the rule of reason in its American and European settings. In fact, considering that this rule was initially conceived under U.S. antitrust law, it is appropriate to discuss the U.S. system, drawing the necessary analogies with the European system and highlighting the inevitable differences.

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Although research for this article was conducted jointly, and the conclusions reflect both authors' viewpoint, sections 1 and 4 are to be generally attributed to Lucia Serena Rossi and 2 and 3 to Stephen James Curzon.

1 Comparing the American and the European Antitrust Systems

1.1 The American System

It is the well-known Sherman Antitrust Act (Sherman Act, July 2, 1890, Chap. 647, 26 Stat. 209, 15 U.S.C. § 1–7) that prohibits anti-competitive agreements in the U.S. Section 1 states that “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”

Notwithstanding this general prohibition, the Sherman Antitrust Act does not provide for any sort of derogation and seems to disregard the fact that in certain circumstances an agreement between undertakings may increase market efficiency, entail benefits for consumers, or pursue other legitimate objectives. Considering the inherent necessity that all legal systems maintain a degree of flexibility, it was not long before a question arose as to whether the interdiction at issue was to be considered absolute (*per se* rule) or whether it could be subject to derogation.

It was the U.S. Supreme Court’s judgment in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), that first attempted to define, and limit, the scope of the Sherman Antitrust Act by holding that only combinations and contracts unreasonably restraining trade were subject to actions under antitrust laws. Nevertheless, it is clear from that decision that U.S. courts remained competent to determine that certain restraints are unreasonable simply by virtue of their “nature and character,” without having to evaluate their effects. It follows that, although the case provides a statement of principle from which one may infer the existence of a test of reasonableness, the large powers retained by the courts seemed to ensure the continued relevance of the *per se* rule.

Over the past four decades, however, the United States Supreme Court has narrowed the category of restraints deemed unlawful *per se*, thereby subjecting a greater number of restraints to a fact-based rule-of-reason analysis (e.g., *Continental TV v. GTE Sylvania*, 433 U.S. 36 [1977]). Such case-law explicitly implements the statement of principle made in *Standard Oil*, simultaneously confirming that the rule of reason should focus on economic, and not social, consequences of a restraint (see *National Society of Professional Engineers v. United States*, 435 U.S. 679 [1978]).¹

The system described envisages the possibility of invoking exceptions to the general rule prohibiting “any restraint of trade.” In fact, in interpreting the 1890 Sherman Antitrust Act, U.S. courts have given birth to an authentic reasonableness test under which they are entitled to employ an effects analysis, balancing the pro- and anti-competitive effects of an agreement. Contracts, combinations, and conspiracies will not be declared illegal if the positive effects on competition in a given market outweigh the negative ones. It follows that the application of such a test is to be understood as a sort of *ex-post* exception allowing a measure, otherwise in violation of the U.S. antitrust rules, to fall outside their scope.

¹ It must be noted that the U.S. Supreme Court still maintains the application of a *per se* rule in areas such as resale price maintenance and tying contracts.

Three points are particularly noteworthy against this background. Firstly, the “justification” provided by the rule of reason is exclusively based on a finding of positive *economic* effects. It is apparent that pursuing legitimate non-economic objectives will not suffice to guarantee compliance with antitrust laws. Secondly, the application of the stated doctrine is internal to antitrust reasoning. In fact, due to the absence of specific justificatory provisions in the Sherman Act, it has fallen to the U.S. Supreme Court to interpret the Act as containing an intrinsic limit, namely, the rule of reason, thus guaranteeing the necessary flexibility of the law. Finally, for the purposes of the present paper, one must not overlook the fact that in *Parker v. Brown*, 317 U.S. 341 (1943) the U.S. Supreme Court recognized the so-called “state action doctrine,” limiting the extent to which state measures are reviewed in light of antitrust rules. Subsequent case-law clarifies that measures will be excluded from the scope of the Sherman Act where they amount to the exercise of a state’s sovereign powers (i.e., a state measure) *and* if their implementation is supervised by the same state (see Delacourt and Zywicki 2005, 1075).

1.2 The EU System

The EU antitrust system is more complex than that applicable in the U.S. by reason of the Sherman Act. Articles 81 and 82 of the Treaty establishing the European Community (hereinafter the ECT), as given effect to by subsequent implementing regulations (adopted on the basis of Article 83 ECT), envisage a transfer of competences to the European Commission for such matters.

Moreover, with the entry into force of Council Regulation (EC) no. 1/2003 of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, the old and cumbersome system established by Council Regulation No. 17 of 21 February 1962 (Official Journal 13, page 204) has been reformed. In particular, the so-called modernisation regulation has removed the need for authorisation and notification of agreements to the Commission and has rendered Article 81(3) directly applicable by national judges and administrative authorities (see footnote 2 below).

Keeping the aforesaid developments in mind, it must be noted that the EC antitrust system revolves around Article 81 of the ECT. It is to this article that we shall turn our attention in an attempt to determine whether the rule of reason can play a role in the EU.

Article 81 ECT, as defined and implemented by several EC regulations, involves a three-pronged analysis. First of all, Subsection 1 requires the determination of whether an agreement is anti-competitive. In this sense it prohibits

all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market (Article 81[1] ECT).

Secondly, by virtue of Article 81(2), all agreements that fall within the prohibition set by Article 81 subsection 1, are to be considered null and void, and have no

effect between contracting parties (see Case C-22/71, *Béguelin Import Co.*, in ECR 1971 page 949, paragraph 29, and Case C-319/82, *Société de Vente de Ciments et Bétons de l'Est SA v. Kerpen & Kerpen*, in ECR 1983 page 04173, paragraph 11). Finally, Article 81(3) endows undertakings with the possibility of obtaining an individual exemption if an agreement helps to improve the production or distribution of goods or to promote technical or economic progress (efficiency gain), if it ensures a fair share of the resulting benefit for consumers (fair share for consumers), and if it does not impose unnecessary restrictions or if it aims to eliminate competition for a substantial part of the products concerned (indispensability).²

It must be pointed out that the interests protected by Article 81(3) ECT are of an economic nature. Moreover, the system of exemptions it creates does not exactly involve a balancing of interests but, on the contrary, seems to be a mere sequence of filters guiding the implementing authority towards a decision (see Nicolaidis 2005, 123). Agreements that fulfil all the conditions set will be deemed legitimate regardless of their anti-competitive nature and/or effects.

It follows that Article 81(3) ECT must be distinguished from the “American” rule of reason, insofar as it allows derogations from the general rule rather than an evaluation of the rule’s applicability. Furthermore, until recently article 81(3) involved an *ex ante* balancing of the interests at stake rather than an *ex post* analysis of an agreement’s effects on market efficiency. With the entry into force of Regulation 1/2003 and a legal-exception system, however, it is clear that analysis under Article 81(3) ECT is also carried out *ex post*.

In light of the above, it has been questioned whether the “American” rule of reason can be transposed to Article 81 ECT. Such reasoning would mean that Article 81(1) be interpreted as not embracing those agreements which satisfy an effects analysis, i.e., where the pro-competitive effects outweigh the anti-competitive ones. In order to answer such a question an analysis of the system of exceptions developed by the European Court of Justice (hereinafter the ECJ) for the rules on free movement, which constitute the core of the internal market, appears necessary. It should be noted that in this context it is to Member States, and not to undertakings, that the ECT prohibitions are directed.

2 Free Movement in the EC: Mandatory Requirements, Proportionality, and the “European” Rule of Reason

It is generally acknowledged that the ECJ has adopted a genus of rule of reason in its case-law concerning the European internal market. This approach is especially

² Whilst the first two subsections of Article 81 ECT are of mixed competence and fall to be applied by the EC Commission and national judges alike—application of the third subsection was until recently a prerogative of the former. It is to this division of competences that we shall return to in our conclusions to this paper in an attempt to determine whether the rule of reason can play a role in EC competition law following the entry into force of Reg. 1/2003.

apparent in the framework of norms governing the free movement of goods, where the Treaty structure is particularly suitable for such a development.

In fact, whilst Article 28 ECT prohibits Member States from introducing quantitative restrictions on imports or “measures having equivalent effect,” Article 30 ECT provides a list of interests that may be invoked to justify national measures otherwise subject to the prohibition.³ In light of the exhaustive character of the latter Article, and the fact that decades of case-law emphasize the need to interpret it restrictively (see, e.g., Case C-177/83, *Kohll v. Ringelhan & Rennett SA*, in ECR 1984 page 03651, paragraph 19), it is not surprising that the ECJ has developed an “innovative” rule of reason allowing measures which pursue legitimate interests not expressly provided for in the Treaty (such as environmental and consumer protection) to escape the prohibition in Article 28. This reasoning originated in the seminal *Cassis de Dijon* judgment (Case C-120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, in ECR 1979 page 00649), in which the so-called “mandatory requirements” were created.

Without being drawn into debates not consonant to the present paper, it is sufficient to recall that, in *Dassonville*, the European Court of Justice, in exercising the powers of interpretation granted to it under Article 220 ECT, broadly construed the notion of “measures having equivalent effect.”⁴ Subsequently, in *Cassis de Dijon*, the Court attempted to limit this interpretation by drawing what seemed to be, and was later confirmed as, a distinction between distinctly and indistinctly applicable measures.⁵ Whilst the former automatically entail a measure having equivalent effect, and as such contravene Article 28 ECT, the latter are not to be so considered insofar as they pursue “mandatory requirements.” It follows that whilst distinctly applicable measures can only be justified by an explicit derogation provided by the Treaty itself, indistinctly applicable measures may also benefit from an added category of “justifications” which allows them to fall *outside* the scope of Article 28 ECT.⁶

³ Under Article 30 ECT, “The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”

⁴ See Case C-8/70, *Procureur du Roi contro Benoît e Gustave Dassonville*, in ECR 1974 page 00837, paragraph 5: “All trading rules enacted by member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions.”

⁵ *Distinctly* applicable measures are loosely associated with discriminatory measures, i.e., those that treat imported goods less favourably than domestic ones. *Indistinctly* applicable measures, on the other hand, include those rules and practices which apply “equally” in law but in fact place added burdens on imported products.

⁶ Although such a distinction is firmly established in the Court’s “classic” case-law (see Case C-113/80 *Commission of the European Communities v. Ireland*, in ECR 1981 page 01625, paragraph 10), numerous recent judgements have applied mandatory requirements regardless of the nature of the measure in issue, seemingly extending the scope of the rule of reason. See, for

Although in so doing the Court has created an open-ended list of justifications, which has progressively been expanded over the years, this does not connote the possibility of justifying indistinctly applicable measures on the basis of any interest whatsoever. First of all, it is well established case-law that mandatory requirements, like Treaty justifications, must *not* have an *exclusively* economic character (see Snell 2005, 36) and are thus to be considered as non-market values (see Case C-398/95, *SETTG*, in ECR 1997, page 03091, paragraph 23). Secondly, such judge-made exceptions are limited to legitimate *Community* interests. In fact, by instating a system of coordination between Articles 28 and 94 ECT, the *Cassis de Dijon* judgment aimed to ensure that mandatory requirements safeguard those objectives that should have been protected by EC harmonization measures. Thus, when a Member State invokes what it deems to be a general (national) interest as justification for a violation of free-movement rules, it is for the ECJ to determine whether the interest in question is compatible with the aims of the ECT (see Opinion of Advocate General Van Gerven, Case C-304/90, *Rochdale Borough Council*, in ECR 1992 page 06457, paragraph 23). Only if such conformity subsists will the ECJ acknowledge the existence of a general Community interest, i.e., a mandatory requirement, which may prevail over EC Treaty rules.

That being so, when assessing whether an indistinctly applicable national measure can successfully escape the Treaty provisions on free movement, it is not sufficient for a Member State to claim that it is based on a legitimate mandatory requirement. On the contrary, the ECJ has shown it will engage in an actual balancing of interests, determining whether the adverse effects of the Member State's legislation on free movement can be justified in light of its stated goal. To this end, the ECJ applies the test of proportionality in which it examines whether the national measure is *suitable* to achieve its objective and *necessary* for such a purpose, i.e., whether the Member State could have adopted less restrictive measures to guarantee the same outcome.⁷

example, Case C-120/95, *Nicolas Decker v. Caisse de maladie des employés privés*, in ECR 1998 page 01831; Case C-379/98, *PreussenElektra AG v. Schleswag AG*, in ECR 2001 page 02099; and Case C-443/06, *Erika Waltraud Ilse Hollmann v. Fazenda Pública*, in ECR 2007. In *doctrina*, see Spaventa (2001, 457) and Shuibhne (2002, 408).

⁷ Although beyond the scope of this paper, it should be noted that the ECJ's use of the proportionality test is not always consistent. In certain cases it has adopted a "soft" approach, granting Member States a margin for manoeuvre (as in Case C-36/02, *Omega Spielhallen- und Automatenanstalt v. Oberbürgermeisterin der Bundesstadt Bonn*, in ECR 2004 page 09609; Case C-124/97, *Lääri*, in ECR 1999 page 06067), whilst in others it has followed a more "stringent" approach. The latter is particularly evident where it has applied an analysis of proportionality *stricto sensu*, also known as "true proportionality," finding a national measure not to be proportional where its negative effects on the damaged parties were excessive when compared to the *intrinsic* value of the measure itself (see Case C-302/86, *Commission of European Communities v. Denmark*, in ECR 1998, page 04607).

Originally developed for the free movement of goods, the notion of mandatory requirements is now firmly established in all the fundamental economic freedoms,⁸ and a similar instrument is in its embryonic stage in the field of procedural law (see Joined Cases C-430-431/93, *Jeroen van Schijndel*, in ECR 1995 page 04705; Case C-312/93, *Peterbroeck*, in ECR 1995 page 04599). The basic idea behind such developments is the need to balance rules and exceptions, giving adequate flexibility to the law and consideration to the different interests involved. In this sense, it is not inconceivable to draw an analogy with the “American” rule of reason, been as the outcome of both is a reasonable exception to the rule. Nonetheless, it is important to note that, unlike the “American” rule of reason, which allows the weighing of economic effects on the relevant market, the notion of mandatory requirements ensures the taking into account of non-economic general interests such as the protection of the environment, consumer protection, cultural diversity, public health, and more.⁹

It follows from the above that, if the mandatory requirements doctrine were transposed to EC antitrust law, the latter’s rules could be overridden, subject to proportionality, whenever contrary or harmful to a legitimate non-economic general interest pursued by an agreement.¹⁰ This would stand in stark contrast with the effects that would ensue from the application of the “American” rule of reason, and could allow interests not contemplated by Article 81(3) ECT (economic effects) to be taken into account.). However, it must be emphasised that this reasoning may conflict with the wording of Article 10 of Regulation 1/2003 and relevant guidance letters. In fact, although the latter grant the European Commission the power to declare that an agreement does not conflict with competition rules, it seems that only economic factors can be considered for this purpose.

⁸ For application in the free movement of services, see Case C-76/90, *Manfred Säger*, in ECR 1991, page 04221; for the free movement of workers, see Case C-415/93, *Jean-Marc Bosman*, in ECR 1995, page 04921; for the freedom of establishment, see Case C-55/94, *Reinhard Gebhard*, in ECR 1995 page 04165; for the free movement of capital, see Case C-503/99, *Commission of the European Communities v. Kingdom of Belgium*, in ECR 2002, page 04809.

⁹ It must also be noted that an increasingly important role seems to be accorded to fundamental rights. This is apparent in Cases C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge and Republic of Austria*, in ECR 2003 page 05659 and C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, in ECR 2004 page 09609.

¹⁰ Such an approach has been proposed by Advocates General Jacobs and Leger in their opinions in *Pavlov* (Case C-180-184/98, *Pavlov*, in ECR 2000 page 06451, paragraph 163) and *Arduino* (Case C-35/99, *Arduino*, in ECR 2002 page 01529, paragraphs 89–91) respectively. Both seemed to accept that, in cases involving a *State* measure infringing Articles 81(1) and 10 ECT, it is appropriate to allow the Member State to justify its conduct on grounds of public interest, so long as the principle of proportionality is respected. A similar logic was also defended by the European Commission in its observations on *Macrino et Capodarte* (Case 202/04, *Macrino et Capodarte*, in ECR 2006, page 11421), where it argued that an anti-competitive State measure infringes Articles 10 and 82 ECT unless it is justified by public-interest objectives and proportionate to such goals. On the more general issue of the relationship between national legislation and EC law, see Triantafyllou (1996, 57).

3 The “Grey Area” Between Competition and Free Movement

Deciding whether a matter is to be considered a competition or an internal market issue is not always clear-cut. In this respect, the case-law of the European Court of Justice reveals that a “grey area” exists between EC free-movement and antitrust rules. An example of this may be noted in the field of services of general interest where, in cases such as *Corsica Ferries* (Case C-266/96, *Corsica Ferries*, in ECR 1998 page 03494), the ECJ found that restrictions to both sets of norms, notably Articles 82 ECT (abuse of dominant position), 86 ECT (public services), and 28 ECT (free movement of goods), could be envisaged.¹¹

For the purposes of this paper, it is interesting to note that the ECJ seems to have accepted that the doctrine of mandatory requirements, developed in the free movement context (Section 2 above), may apply to some agreements or practices falling into such “grey areas.” In *Albany* (Case C-67/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, in ECR 1999 page 05751), for example, the restrictive effects on competition, inherent to an understanding creating compulsory affiliation to a sectoral pension scheme, were held to be necessary in order to pursue social objectives. In light of this, the agreement was considered not to fall within the scope of Article 81(1) ECT.

Another interesting example of such reasoning can be found in the *Wouters* judgment (Case C-309/99, *J. C. J. Wouters*, in ECR 2002 page 01577), regarding a 1993 regulation adopted by the Bar of the Netherlands, prohibiting multidisciplinary partnerships between members of the Bar and accountants. Although such legislation had clear anti-competitive effects, the ECJ stated that not all agreements or decisions which restrict the freedom of action of one or more parties must necessarily fall within the framework set by Article 81(1) ECT.¹² In fact, the background against which the agreement or decision is concluded, and the objectives it pursues, must be taken into account. Following such an appraisal, it has then to be determined whether “the consequential effects restrictive of competition are inherent in the pursuit of those objectives” (*Wouters*, paragraph 97), and if that is so, the measure is deemed not to infringe Article 81(1) ECT.¹³

In the above cases, the ECJ showed it was willing to balance anti-competitive effects against public-policy objectives. Despite the fact that the concept of

¹¹ Similarly, in Joined Cases C-115/97, 116/97 and 117/97, *Brentjens*, in ECR 1999 page 06025, the ECJ evaluated the compatibility of a compulsory affiliation to a sectoral-pension scheme with competition rules. It held that “Articles 86 and 90 of the EC Treaty (now Articles 82 EC and 86 EC) do not preclude the public authorities from conferring on a pension fund the exclusive right to manage a supplementary pension scheme in a given sector” (Paragraph 123).

¹² The Courts conclusions on Articles 43 (freedom of establishment) and 49 ECT (free movement of services) will not be analysed here, as the applicability of a rule of reason in those areas of law is not in doubt (see Section 2 above).

¹³ In *Wouters* the ECJ concluded that, despite its inherently restrictive effects on trade, the 1993 regulation adopted by the Netherlands Bar association was necessary to ensure a proper organization of the legal profession (emphasis being placed on the public interest ground linked to professional ethics), and consequently not in breach of Article 81(1) ECT.

“inherent restriction” remains vague, applying the Courts reasoning can lead an agreement which restricts competition to be *compatible* with Article 81(1) ECT where it pursues legitimate non-economic objectives. Although such an approach is clearly reminiscent of the mandatory-requirements doctrine applied for free-movement norms, the absence of a proportionality test is striking and, given the stated parallelism, difficult to explain.

Recent case-law suggests that sporting activities are also amid freemovement and competition rules. In *Deliège* (Joined Cases C-51/96 and 191/97, *Christelle Deliège*, in ECR 2000 page 02549) the ECJ accepted that sports rules requiring professional or semi-professional athletes to obtain an authorisation (or be specifically selected) by their federation, in order to take part in international competitions, could not be considered as infringing the rules on the free movement of services insofar as such requirements were *inherent* in the organisation of sporting events. Even if not expressly mentioned, such a decision evidently stems from the Court’s consideration of the non-economic objectives attached to the subject-matter. As to the applicability of competition rules, the ECJ refused to assess them citing a lack of information and the consequent impossibility of issuing an informed ruling on their interpretation.¹⁴

In the *Meca-Medina* judgment (Case T-313/02, *David Meca-Medina*, in ECR 2004 page 03291), the Court of First Instance (hereinafter the CFI) confirmed *Deliège* when it held that “purely sporting” rules can not be linked to an economic activity or to an economic relationship of competition. Moreover, been as this characteristic is inherent to such rules, they not only fall outside the scope of Articles 39 and 49 ECT but are also not caught by Articles 81 and 82 ECT.

Notwithstanding the above, the concept of “inherent restriction” has suffered a blow following the appeal of the CFI’s judgment in *Meca-Medina* to the ECJ (Case C-519/04, *David Meca-Medina*, in ECR 2006 page 06991). This latter case reversed the previous decision with regard to anti-doping rules and criticised the CFI’s reasoning. In particular the judgement indicates that, in excluding the said rules from the scope of Articles 81 and 82 ECT on the ground that they are classified as being of a “purely sporting” nature with regard to Articles 39 and 49 ECT, the CFI made an error of law. In fact, it should have positively determined whether they fulfilled the specific requirements set by EC antitrust rules, rather than merely recalling their inherently non-economic characteristics.

In conclusion, it should be noted that, even though the case-law in “grey areas” leans towards the application of a rule of reason similar to that developed in free movement cases, it is evident that there are still some uncertainties in the Courts’ approach. In fact, following the *Meca-Medina* saga, the flexible stance to “exceptions” adopted in *Wouters/Deliège/Meca-Medina* (the CFI judgment), seems to be counterbalanced by a stricter approach in which a rigid application of the Treaty rules is preferred.

¹⁴ See *Deliège*, paragraph 38. Even so, it seems that when considering possible violations of free-movement rules and of Articles 81 and 10 ECT, the courts will as far as possible focus on the former in order to benefit from the application of the mandatory-requirements doctrine.

4 The “American” Rule of Reason and Article 81 ECT

Despite the fact that the mandatory-requirements doctrine is well established in the free movement context and has been applied, albeit inconsistently, in grey areas, the use of a rule of reason in “pure” competition cases seems much more problematic.

The difficulties found in this area of the law can readily be appreciated in the *Montecatini* judgment (Case C-235/92 P, *Montecatini SpA*, in ECR 1999 page 04539). In this case, the EU Court of First Instance dismissed the rule-of-reason theory with reference to Article 81(1) finding that, owing to the highly damaging nature of a price-fixing agreement on competition, there was no need to enquire whether this could be offset by positive effects. The agreement was to be considered a *per se* violation of Article 81(1), thus preventing the application of exceptions by virtue of a test of reasonableness.

Although such a decision was upheld by the ECJ on appeal, the latter’s logic was far from identical to that of the CFI. Indeed, the highest jurisdictional Court of the EU, pointed out that “even if the rule of reason did have a place in the context of Article 81(1) of the Treaty” (paragraph 133), its application was precluded by the clear nature of the infringement in question. Such terminology seems to open the door to a possible future application of a rule of reason in EC competition law, especially in cases where an agreement is not manifestly anti-competitive.

Notwithstanding the above, four recent judgments handed down by the CFI expressly reject the application of a rule of reason, explicitly confirming that it has no place in Article 81 ECT.

First of all, in *Métropole télévision (M6)* (Case T-112/99, *Métropole télévision (M6)*, in ECR 2001 page 02459) it was observed that the use of a rule of reason has never been confirmed by Community courts and, furthermore, that there are numerous judgements that suggest that its existence is doubtful (see *Métropole*, paragraph 72). Nevertheless, according to the CFI, this does not necessarily imply that all agreements restricting the freedom of action of one or more parties must automatically fall within the scope of the prohibition in Article 81(1) ECT. On the contrary, when assessing compatibility with the latter, the economic context in which undertakings operate and the actual structure of the market concerned must be taken into account (see paragraph 76). In this way, the prohibition in issue is not extended “wholly arbitrarily and without distinction” (see paragraph 77) to all agreements affecting free competition.

The “pliant” interpretation of Article 81(1) proposed in *Métropole*—and followed in a number of other judgments (see, in particular, Case C-56/65, *Société technique minière and Oude Luttikhuis and Others*, in ECR 1966 page 00235, and Case C-250/92, *DLG*, in ECR 1994 page 05641) does not, however, entail an analysis of the agreement’s pro- and anti-competitive effects. The CFI explicitly states that such an analysis can not be intrinsic to Article 81(1) ECT, thus dashing all hopes of letting the “American” rule of reason in “through the back door.”

Secondly, in *Van den Bergh Foods Ltd* (Case T-65/98, *Van den Bergh Foods Ltd*, in ECR 2003 page 04653) the CFI, referring to well-established case-law, offered

another reason for not accepting the existence of a rule of reason in EC competition law. In fact, it stated that it would be difficult to conceive the interpretation of Article 81(1) as comprising such a balancing exercise, given the structure of the EC Treaty itself. Article 81(3) ECT expressly provides the possibility of exemption for agreements that restrict competition but which satisfy a number of conditions. It follows that it is only within the framework set by that rule that the pro- and anti-competitive effects of an agreement can be weighed (see paragraph 107).¹⁵

Thirdly, in *Brasserie Nationale* (Joined Cases T-49/02–51/02, *Brasserie Nationale*, in ECR 2005 page 03033) the application of the mandatory requirements doctrine, the “European” rule of reason, was excluded in the context of competition law. The CFI found that

Once it has been established that the object of an agreement constitutes, by its very nature, a restriction of competition, such as a sharing of clientele, that agreement cannot, by applying a rule of reason, be exempted from the requirements of Article 81(1) EC by virtue of the fact that it also pursued other objectives. (Paragraph 85)

If read in combination with the CFI’s rejection of the applicant’s reference to the *Cassis de Dijon* case-law, it is obvious that a firm refusal to allow free movement reasoning to permeate competition law is in place.

Finally, in *O2* (Case T-328/03, *O2 [Germany] GmbH & Co. OHG*, in ECR 2006 page 01231) the Community judges seemed to expand the concept developed in *Métropole*. In particular, they stated that in order to ascertain the applicability of Article 81(1), the assessment of an agreement need not be limited to the relevant market structure and the economic (or legal) context in which it was concluded, but could involve the consideration of its object, effects and whether it affected intra-community trade. On this basis, the Court established the need to implement a counterfactual” examination, balancing the impact of the agreement on potential and existing competition against the situation that would have existed in its absence.

Although the methodology used in *O2* ensures that Article 81(1) is not extended indistinctly to all agreements which affect the freedom of action of one or more parties, it must not be confused with a reasonableness test. In fact, the CFI once again makes it clear that the reasoning described does not involve the assessment of pro- and anti-competitive effects and can thus not be associated with a rule of reason (see paragraph 69).

5 Flexibility and Coherence: Towards a General Application of the “European” Rule of Reason?

It is clear from the case-law that the ECJ and the CFI are unwilling to apply the same degree of flexibility when dealing with rules on free movement and those pertaining to antitrust/competition law. As regards the former, the European courts have

¹⁵ A similar conclusion is reached by the CFI in *Métropole* at paragraph 77 of its judgment.

adopted an innovative test of reasonableness, based on the doctrine of mandatory requirements and allowing for the balancing of non-economic interests, which is visibly different from the “American” rule of reason. A similar, yet not so firmly established, *raison d’être* seems to pervade the grey areas dealt with in Section 3, where the courts have generally followed a “free movement reasoning.” However, in areas of pure antitrust law, it is evident that the courts are unwilling to permit the application of the same analysis.¹⁶

In this respect, it must be pointed out that such a statement has been tempered by the emergence of a quasi “European State Action Doctrine,” where public interest objectives seem to play an important role. The ECJ has confirmed that national measures with an effect on competition law will be deemed unlawful *only* inasmuch as they favour the adoption of agreements, decisions, or concerted practices contrary to Article 81 ECT or reinforce their effects (see C-198/01, *CIF*, in ECR 2003 page 8055, paragraph 46); or where the State divests its own rules of the character of legislation by delegating to private economic operators responsibility for adopting decisions affecting the economic sphere (see Case C-136/86, *Aubert*, in ECR 1987 page 04789; Case C-250/03, *Mauri*, in ECR 2005 page 01267). As noted by Advocate General Poirares Maduro such case-law “must certainly be construed as meaning that it is necessary to be aware what aims the State is pursuing in order to determine when its action may be made subject to competition law” (see Opinion in Case C-94/04, *Federico Cipolla*, in ECR 2006 page 11421, paragraph 33). It follows that, in a manner not so far removed from the doctrine of mandatory requirements, if a national measure is designed to protect a public interest, it will fall *outside* the scope of antitrust rules. On the other hand, where such a general objective is outweighed by a concern to protect private interests, the Member State’s action will necessarily fall *within* the purview of the said rules.

Leaving national measures and the “European State Action Doctrine” aside, the rationale behind the case-law rejecting the rule of reason in competition law is the existence of Article 81(3) ECT, which clearly amounts to a reasonableness clause with respect to the general prohibition set forth in Article 8(1). Therefore, it seems that the existence of a rule of reason and consequent “additional exceptions” is limited by the structure of the Treaty itself. Yet, been as the existence of justificatory provisions does not preclude the doctrine of mandatory requirements in the context of the free movement rules, one must question whether applying a different approach to antitrust law, which is an inherent part of the internal market, is both coherent and possible.

In support of the courts’ position it could be argued, that whilst Articles 30 ECT *et similia* are exhaustive and to be applied restrictively, Article 81(3) is not subject to such limitations. On the contrary, it provides a series of conditions an agreement must satisfy in order to benefit from the exemption provided therein, and does not

¹⁶ However, on the convergence of free movement and competition rules see: Mortelmans (2001, 613), Van de Gronden (2005, 79), and Wesseling (2005, 59).

therefore establish a closed list of justifications. When coupled with the fact that the distinction between distinctly and indistinctly applicable measures does not subsist in EC competition law, it is not entirely surprising that the Court has rejected the application of a rule of reason.

As mentioned above, the application of Articles 81 and 82 ECT has been reformed (as of May 1, 2004) by Council Regulation No. 1/2003 (16 December 2002, in Official Journal L 1, 4.1.2003, pages 1–25). According to the new rules, although the European Commission still retains the power to impose fines and grant block exemptions, it no longer maintains exclusive competence for the application of Article 81(3) ECT. In fact, it now falls to Member States and to national authorities, administrative and judicial alike, to apply Article 81 ECT as a whole. It follows that, once it is determined that the requirements set forth in Article 81(3) are met, national authorities have the power to legitimately conclude that an agreement is not anti-competitive according to Article 81(1). Nonetheless, does this imply that they can also consider that an agreement or practice” falls outside the scope of Article 81(1) due to positive effects for the general interest? To this end, can national authorities apply the proportionality test to determine exceptions to the rule, as occurs in the framework of the mandatory requirements doctrine? Alternatively, can they compare the costs and benefits an agreement entails for competition, in conformity with the “American” rule of reason?

It seems likely that national judges, not accustomed to the subtle distinctions the ECJ has developed in different fields, will deem that, in order to ensure unity of interpretation of internal market rules, a uniform application of the same is necessary. In giving effect to such a presumption it is possible that judges will apply the free movement reasoning to competition law. Moreover, it may be argued that since the entry into force of the so-called modernization regulation, such logic is no longer necessarily contrary to the case-law of the ECJ and CFI. In fact, if to date the rejection of the rule of reason to EC competition law has been linked to the interpretation of Article 81 ECT as established by Council Regulation No. 17, the same conclusion might not be justified in light of the changes implemented by Regulation 1/2003. We suggest that only a clear pronouncement by the ECJ and CFI judges in Luxembourg can forestall a gradual drift towards a rule of reason. In this sense, the ECJ may be called to interpret the new regulation via a preliminary reference procedure whilst, on the other hand, the CFI is likely to rule on the issue in actions against European Commission decisions imposing fines.

In support of the above, it must be recalled that the Common Market has, since its creation, evolved into an internal market, establishing itself and growing beyond expectations. It is therefore worth questioning whether the system of exemptions provided by Article 81(3), and the economic interests listed therein, are still the only exigencies worthy of protection. This is even more so, if one considers that the market’s evolution has caused a parallel growth in the relevance of non-market considerations. In this respect, a few recent developments in EC law appear to confirm the socioeconomic character of the internal market, conferring value to non-economic objectives not considered in Article 81.

Firstly, the family of integration clauses inserted into the ECT,¹⁷ require certain non-economic objectives to be integrated into the definition and implementation of all community policies.

Secondly, the new Lisbon Treaty seems to place added emphasis on services of general interest, rather than on free competition itself, and a recent communication of the Commission (Communication of 20 November 2007, “Services of general interest, including social services of general interest: A new European commitment,” in COM 2007, 725) stresses the importance that non-economic objectives play in this context.

Thirdly, the Commission Communication on the application of Article 81(3) (27 April 2004, in Official Journal C 101, page 97) states that objectives pursued by other Treaty provisions must be taken into account. It follows that in applying such an Article, analysis should not be limited to considerations of market efficiency.

Finally, Recital 37 of Regulation 1/2003 states

This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.

This statement was most probably inserted to ensure respect for the right of defence and the sharing of the burden of proof. Nonetheless, it is uncertain whether it also allows national competition authorities to take fundamental rights into consideration as mandatory requirements, thereby enabling them to determine when competition rules apply to agreements.¹⁸

In light of the above developments, the necessity to fill the lacunae of Article 81(3) ECT is evident. In this respect, however, the “American” rule of reason seems inadequate, as the internal market is a reality that goes beyond the protection of mere economic interests and requires a high degree of uniformity to ensure its proper functioning.

For these reasons it would probably be better to open the door of EU antitrust rules to the “European” rule of reason. In fact, a “drift” in this direction appears likely, given the newly acquired competence that national judges and authorities have recently been entrusted with in the context of EU antitrust rules.

We suggest that this will not, however, entail abandoning the objective of fair competition (as the Lisbon Treaty instead, seems to suggest). In fact, the mandatory requirements analysis is well established and allows an effective balancing of different interests, whilst the proportionality test ensures that the measure adopted

¹⁷ The first integration clause, relating to the environment, was inserted by Article 130R (now 174–76 ECT) of the Single European Act. The Treaty on European Union inserted five further integration clauses dealing with new European policies on culture (Title XII ECT), public health (Title XIII ECT), industry (Title XVI ECT), economic and social cohesion (Title XVII ECT), and development cooperation (Title XX ECT).

¹⁸ From a legal point of view, this is a difficult theory to defend as the recital refers to the regulation and not to substantive norms (such as Articles 81 and 82 ECT). Numerous authors have thus held that recital 37 merely aims to guarantee the respect of the right of defence of undertakings involved in a competition procedure. See Kerse and Khan 2004; Wils 2006, 3.

is necessary, suitable and the least restrictive option. In this sense, the evaluation carried out by the ECJ is strict, and seldom does a national measure satisfy all requirements. Keeping this in mind, the existence of a legitimate objective will be even more difficult to demonstrate in competition law, where private, and not public, concerns are normally involved.¹⁹

For this reason, applying the doctrine developed in the free movement context, will give undertakings the possibility (albeit remote) of justifying their agreements on “added grounds,” simultaneously guaranteeing that competition is not distorted amongst them.

References

- Delacourt, J.T., and T.J. Zywicki. 2005. The FTC and State Action: Evolving Views on the Proper Role of the Government. *Antitrust Law Journal* 3: 1075–90.
- Kerse, C., and N. Khan. 2004. 5th ed. *EC Antitrust Procedure*. London: Sweet & Maxwell.
- Mortelmans, K. 2001. Towards Convergence in the Application of the Rules on Free Movement and on Competition? *Common Market Law Review* 3: 613–49.
- Nicolaidis, P. 2005. The Balancing Myth: The Economics of Article 81 (1) & (3). *Legal Issues of Economic Integration* 2: 123–45.
- Shuibhne, N. 2002. The Free Movements of Good and Article 28 EC: an Evolving Framework. *European Law Review* 4: 408–25.
- Snell, J. 2005. Economic Aims as Justification for Restrictions on Free Movement. In *Rule of Reason; Rethinking another Classic of EC Legal Doctrine*. Ed. A. Schrauwen, 36–56. Groningen: Europa Law.
- Spaventa, E. 2001. On Discrimination and the Theory of Mandatory Requirements. *Cambridge Yearbook of European Law Studies* 3: 457–78.
- Triantafyllou, D. 1996. Les règles de la concurrence et l’activité étatique y compris les marchés publics. *Revue Trimestrielle de Droit Européen* 1: 57–76.
- Van de Gronden, J.W. 2005. Rule of Reason and Convergence in Internal Market and Competition Law. In *Rule of Reason; Rethinking another Classic of EC Legal Doctrine*. Ed. A. Schrauwen, 79–96. Groningen: Europa Law.
- Wesseling, R. 2005. The Rule of Reason and Competition Law: Various Rules, Various Reasons. In *Rule of Reason; Rethinking another Classic of EC Legal Doctrine*. Ed. A. Schrauwen, 59–78. Groningen: Europa Law.
- Wils, W. 2006. Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: The Interplay between National and European Legislation and Case-Law. *World Competition* 1: 3–24.

¹⁹ Nonetheless, on some occasions, the European Commission and the Courts in Luxembourg have shown an inclination to allow the public interest to effective competition to prevail over the private interests of undertakings (see Case C-374/87, *Orkem*, in ECR 1989 page 03283; Joined Cases C-46/87 and 22788, *Hoechst*, in ECR 1989 page 02859; and Case T-66/99, *Minoan*, in ECR 2003 page 05515).

From State-Centered towards Constitutional “Public Reason” in Modern International Economic Law

Ernst-Ulrich Petersmann

The cosmopolitan ideals of constitutional protection of equal basic freedoms go back to ancient Greek and Roman republicanism. In the Greek and Roman republics, they were realized only for a small part of the population (essentially male citizens owning property). Yet, as illustrated by Immanuel Kant’s theory of constitutional rights to equal freedoms and “cosmopolitan hospitality” as well as by the universal recognition of human rights following World War II, cosmopolitan theories have contributed to “normative learning processes” that have fundamentally changed the perception of national and international legal systems, notably their often discriminatory treatment and “exclusion of others” (e.g., through gender, racial and colonial discrimination). The “intergovernmental reasoning” underlying the Westphalian system of “international law among states” is increasingly challenged by citizens as well as by courts mandated to settle disputes “in conformity with principles of justice and international law” and universal human rights, as prescribed in the Preamble of the 1969 Vienna Convention on the Law of Treaties (VCLT). Governments often continue to portray international law as reciprocal rights and obligations among governments so as to protect their foreign policy discretion, limit their judicial accountability and pursue other self-interests (e.g., in concluding international loan agreements benefiting government elites). Citizens, by contrast, increasingly invoke human rights and constitutional democracy also vis-à-vis foreign policy measures so as to hold governments legally and judicially accountable for governmental restrictions of the transnational exercise of individual freedoms and other constitutional rights. In citizen-driven areas of international law—like international economic and human rights law—, national and international courts increasingly accept claims by citizens to perceive intergovernmental agreements and organizations as mere instruments for individual and democratic self-governance. The judicial protection of individual rights of “access to justice” and to reasoned justification of governmental restrictions of individual freedom illustrates how independent courts often turn out to be the most impartial guardians of constitutional rights and democratic

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self-governance which, under conditions of global interdependence, depends ever more on judicial protection of rule of law and citizen rights across national frontiers.

According to John Rawls, “justice is the first virtue of social institutions, as truth is of systems of thought” (Rawls 1973, 3). In his *Theory of Justice*, Rawls used the idea of reasonableness for designing fair procedures that help reasonable citizens (as autonomous moral agents) to agree on basic equal freedoms and other principles of justice. In his later book on *Political Liberalism*, Rawls reframed his theory of justice as fairness by emphasizing the importance of the public use of reason for maintaining a stable, liberal society confronted with the problem of reasonable disagreement about individual conceptions for a good life and a just society. Reasonableness requires not only constitutional and legislative guarantees of basic equal rights (e.g., freedoms to participate as equals in public discourse) as legal and institutional preconditions for public debate defining the conditions for a stable consensus on the principles of justice; according to Rawls, also independent judicial protection of equal basic rights is of constitutional importance for the “overlapping, constitutional consensus” necessary for a stable and just society among free, equal and rational citizens who tend to be deeply divided by conflicting moral, religious and philosophical doctrines: “in a constitutional regime with judicial review, public reason is the reason of its supreme court” (Rawls 1993, 231ff.).¹ Yet, in his theory of international law, Rawls assigned only a limited role to human rights, constitutional democracy and independent judicial protection in view of Rawls’ focus on freedom and equality of peoples (rather than individuals) which, according to Rawls, require toleration and respect of non-liberal societies (see Rawls 1999).

This paper argues that the universal recognition of human rights and the increasing number of international courts settling transnational disputes “in conformity with principles of justice” and human rights, as required by the customary methods of treaty interpretation (as codified in the VCLT), entail that judicial and democratic reasoning rightly challenges power-oriented “intergovernmental reasoning” and the state-centred *opinio juris sive necessitatis* that dominated the Westphalian system of “international law among states” (Sections 1, 2, 3). In Europe, three different ways of judicial transformation of intergovernmental treaties into objective constitutional orders—i.e., the judicial “constitutionalization” of the intergovernmental European Community (EC) Treaty and of the European Convention on Human Rights (ECHR), and to a lesser extent also of the European Economic Area (EEA) Agreement—succeeded because their multilevel judicial protection of constitutional citizen rights vis-à-vis transnational abuses of governance powers was accepted by citizens, national courts and parliaments as legitimate (Section 4). Sections 5 and 6 argue that the European “*Solange* method” of judicial cooperation “as long as” other courts respect constitutional principles of justice should be supported by citizens, judges, civil society and their democratic representatives also in judicial cooperation

¹ Rawls (1993, 48ff.) explains the Kantian distinction between the reasonable (aiming at just terms of social cooperation by basing individual actions on universalizable principles) and the rational egoism of individuals (pursuing their individual ends without moral sensibility for the consequences of their actions on other’s well-being).

with worldwide courts and dispute settlement bodies. Section 7 concludes that “public reasonableness” is a precondition for maintaining an “overlapping consensus” on rule of law not only inside constitutional democracies but also in the international division of labor and mutually beneficial cooperation among citizens across national frontiers. Just as “public reason” among the 480 million EC citizens is no longer dominated alone by the reasoning of their 27 national governments, so does the economic integration law beyond Europe require “cosmopolitan public reasoning” complementing the inter-state structures of international law. In a world dominated by power politics and by reasonable “constitutional pluralism,” it is easier for international judges to meet their obligation to settle disputes “in conformity with principles of justice” if courts cooperate and base their “judicial discourses” on impartial “constitutional justice,” notably judicial protection of universal human rights.

1 Public Reasonableness as Requirement of UN Human Rights Law and European Law

UN human rights law proceeds from the Kantian premise that—as emphasized in the Preambles to the 1966 UN Covenants on civil, political, economic, social and cultural rights—human rights “derive from the inherent dignity of the human person” and are based on “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family (as) the foundation of freedom, justice and peace in the world.” The Preambles make clear that human rights precede “the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,” a general obligation universally recognized in UN human rights covenants. Already the Universal Declaration on Human Rights (UDHR) had recognized that “human rights should be protected by the rule of law” (Preamble); yet, they exist as inherent birthrights of every human being independent from their legal recognition in UN human rights instruments. The today universal recognition by all states—in hundreds of UN, regional and national human rights instruments and national constitutions—of inalienable human rights has objectively changed the legal status of individuals as legal subjects of international law: Inalienable human rights now exist *erga omnes* and require respect, legal protection and fulfillment of inalienable human rights by all governments. Due to their progressive transformation into international *ius cogens*, the fragmented, treaty-based UN human rights guarantees gradually evolve into a UN human rights constitution limiting the powers also of international organizations (see Petersmann 2006a). As in European human rights law, international human rights serve only as a “second line of constitutional entrenchment” respecting the right of self-determination of peoples and the constitutional foundation of modern international law in the universal recognition of an inalienable core of human rights.

All six major UN human rights covenants acknowledge in their Preambles the close interrelationship between “the inherent dignity and [...] the equal and inalienable rights of all members of the human family.” The universal recognition of human dignity as the constitutive principle for human rights suggests that a

common understanding cannot be found by interpreting human dignity in the light of theological concepts of “person” (e.g., the creation of man in God’s image). The explicit link made in Article 1 of the UDHR between “All human beings are born free and equal in dignity and rights” (first sentence), and “They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood” (second sentence), confirms that “reason and conscience” must be regarded as the defining elements of humanity and dignity (see Dicke 2002, 111, 117). The appeal to moral conduct “in a spirit of brotherhood” further indicates that “reason and conscience” are referred to not only as anthropological facts, but as sources for moral reasoning enabling mankind to secure universal equal rights as the legal “foundation of freedom, justice and peace in the world” (Preamble UDHR) and of enjoyment by everybody of “an existence worthy of human dignity” (Article 23 UDHR).

Human dignity is also recognized as constitutive principle in Article 1 of the EU Charter of Fundamental Rights proclaimed by the European Parliament, the EU Commission and the EU Council in December 2000² and incorporated into the 2004 Treaty establishing a Constitution for Europe as well as into the 2007 Reform Treaty of the European Union. Some national constitutional systems (e.g., in Germany, India, Israel, South Africa) and regional constitutional systems (like EC law as protected by the EC courts, the ECHR as protected by the European Court of Human Rights) explicitly recognize human dignity as a constitutional value underlying human rights (e.g., the ECHR) or as a human right (e.g., as protected in EC law by the EC Court of Justice). Yet, political and legal conceptions of human rights continue to differ reasonably depending on how human dignity is being conceptualized. For instance, whereas the EC Court and the EU Charter of Fundamental Rights protect “market freedoms” guaranteed in the EC Treaty as conferring “fundamental rights” to individuals, Anglo-Saxon human rights lawyers from common law countries without constitutional guarantees of comprehensive liberty rights often disregard constitutional traditions of protecting liberty rights also in the economy and claim that market freedoms are not directly rooted in human dignity, but are fundamentally different from human rights and “fundamental freedoms” protected by UN human rights law.³ Regardless of whether human dignity is recognized as the most fundamental human right from which all other rights are following (as e.g., in German and Israeli constitutional law), or whether human dignity is viewed only as a constitutional principle: Both legal traditions recognize respect for the moral and rational autonomy of individuals as the normative source of inalienable human rights requiring democratic self-government based on “public reasoning” (as protected by freedom of opinion, freedom of the press, freedom of religion, rights to democratic governance) and entailing obligations by governments to respect, protect and promote human rights “in a spirit of brotherhood” (Article 1 UDHR) and in the context of “an effective political democracy” (Preamble ECHR).

² The text of this Charter is published in the Official Journal of the EC, C 364/1–22 of 18 December 2000. It remains contested whether Article 1 recognizes a fundamental right to human dignity or merely an objective constitutional principle.

³ On this controversy see e.g., Petersmann (2002, 2005).

2 Citizen-Oriented Reasonableness as a Requirement of Constitutional Justice in International Law

A second source of reasonableness as a constitutional principle of international law derives from the customary law requirement of protecting “constitutional justice” as a general principle of international law. Denial of justice is one of the oldest principles of state responsibility in international law. Under the customary international law rules for the protection of aliens, the international minimum standard with respect to the duties of states to provide decent justice to foreigners focused on procedural due process of law and the duty of states “to create and maintain a system of justice which ensures that unfairness to foreigners either does not happen, or is corrected” (Paulsson 2006, 7, 36); state responsibility for denial of justice depended on proof of a systemic failure in the national administration of justice, either by a miscarriage of justice by the judiciary or by non-judicial authorities (e.g., if they prevented the judiciary from administering justice in a fair manner). The universal recognition—in regional and worldwide human rights conventions as well as in national laws—of human rights of access “to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law” for the “determination of civil rights and obligations or of any criminal charge” has reinforced the intergovernmental prohibition of a denial of justice by individual rights of access to justice.⁴ The progressive extension—by an ever larger number of other international treaties, notably in the field of international economic and environmental law—of individual rights of access to courts and to effective legal remedies increasingly confronts judges with a “constitutional dilemma”:

- On the one side, foreigners and their home states increasingly invoke specific treaty obligations (e.g., relating to human rights of access to justice, labor rights, intellectual property rights, investor rights, trading rights, fishing rights and other freedoms of the sea) rather than general international law rules on denial of justice in case of unfair treatment of foreigners.
- On the other side, most intergovernmental treaties on the protection of human rights and other individual rights do not offer effective individual legal and judicial remedies⁵; hence, national and international judges are increasingly

⁴ Cf. Article 6 European Convention on Human Rights and similar guarantees in other regional human rights conventions (e.g., Article 8 American Convention on Human Rights), UN human rights conventions (e.g., Article 14 International Covenant on Civil and Political Rights) and other UN human rights instruments (e.g., Article 10 Universal Declaration of Human Rights), which have given rise to a comprehensive case-law clarifying the rights of access to courts and related guarantees of due process of law (e.g., justice delayed may be justice denied, see Shelton 2005, 113ff.; Francioni 2007).

⁵ See Dugard (2000, par. 25): “To suggest that universal human rights conventions, particularly the International Covenant on Civil and Political Rights, provide individuals with effective remedies for the protection of their human rights is to engage in a fantasy which, unlike fiction, has no place in legal reasoning. The sad truth is that only a handful of individuals, in the limited number of States that accept the right to individual petition to the monitoring bodies of these conventions,

confronted with legal claims that intergovernmental treaty rules on the protection of individual rights (e.g., in UN human rights conventions, WIPO conventions on intellectual property rights, ILO conventions on labor and social rights, WTO rules and regional trade agreements on individual freedoms of trade, investment treaties protecting investor rights) should be legally protected by judges as constituting *individual rights* and legal remedies.

The UN Charter (Article 1) and the Vienna Convention on the Law of Treaties recall the general obligation under international law “that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law,” including “universal respect for, and observance of, human rights and fundamental freedoms for all (VCLT, Preamble). The functional interrelationships between law, judges and justice are reflected in legal language from antiquity (e.g., in the common core of the Latin terms *jus*, *judex*, *justitia*) up to modern times (cf. the Anglo-American legal traditions of speaking of courts of justice, and giving judges the title of Mr. Justice, Lord Justice, or Chief Justice). Like the Roman god *Janus*, justice and judges face two different perspectives: Their “conservative function” is to apply the existing law and protect the existing system of rights so as “to render to each person what is his [right].” Yet, laws tend to be incomplete and subject to change. Impartial justice may require “reformatory interpretations” of legal rules in response to changing social conceptions of justice. This is particularly true following the universal recognition—by all 192 UN member states—of inalienable human rights, which call for citizen-oriented interpretations of the power-oriented structures of international law. Former UN Secretary-General Kofi Annan, in his final address as UN Secretary-General to world leaders assembled in the UN General Assembly on 19 September 2006, criticized the power-oriented UN system as “unjust, discriminatory and irresponsible” in view of its failures to effectively respond to the three global challenges to the United Nations: “to ensure that globalization would benefit the entire human race; to heal the disorder of the post-Cold War world, replacing it with a genuinely new world order of peace and freedom; and to protect the rights and dignity of individuals, particularly women, which were so widely trampled underfoot.” According to Kofi Annan, these three challenges—“an unjust world economy, world disorder and widespread contempt for human rights and the rule of law”—entail divisions that “threaten the very notion of an international community, upon which the UN stands.”⁶ Under which conditions may national and international judges respond to this “constitutional dilemma” by interpreting “principles of justice and international law” from citizen-oriented, human rights perspectives rather than from the state-centered perspectives of governments, whose representatives all too often pursue self-interests in limiting their personal accountability by treating citizens as mere objects of international law and of discretionary foreign policies?

have obtained or will obtain satisfactory remedies from these conventions.” On the dual meaning of remedies (e.g., in terms of access to justice and substantive redress) see Shelton 2005, 7ff., n. 9.

⁶ The speech of Kofi Annan is reproduced in UN document GA/105000 of 19 September 2006.

3 International Courts as Guardians of Public Reason in Modern International Law

The functions of judges are defined not only in the legal instruments establishing courts. Since legal antiquity, judges also invoke inherent powers deriving from the constitutional context of the respective legal systems (such as constitutional safeguards of the independence of courts in the Magna Charta and in the US Constitution), often in response to claims to impartial, judicial protection of “justice.” Article III, Section 2 of the US Constitution provides, for example, that the “judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made [. . .] under their Authority” (etc). Based on this Anglo-Saxon distinction between statute law and equity limiting the permissible content of governmental regulations, courts and judge-made law have assumed a crucial role in the development of “equity law” and “constitutional justice” in many countries (see Allan 2001). Also in international law, international courts invoke inherent powers to protect procedural fairness and principles of reciprocal, corrective and distributive justice, for example by using principles of equity for the delimitation of conflicting claims to maritime waters and to the underlying seabed (see the examples given by Franck 1997, Chapters 3, 10). Since the democratic constitutions of the 18th century, almost all UN member states have adopted national constitutions and international agreements that have progressively expanded the power of judges in most states as well as in international relations (see Guarnieri and Pederzoli 2002). The constitutional separation of powers provides for ever more comprehensive legal safeguards of the impartiality, integrity, institutional and personal independence of judges (see Sajo 2004).

Alexander Hamilton, in the “Federalist Papers,” described the judiciary as “the least dangerous branch of government” in view of the fact that courts dispose neither of “the power of the sword” nor of “the power of the purse” (Hamilton 1961). In modern, multilevel governance systems based on hundreds of functionally limited, intergovernmental treaty regimes, courts remain the most impartial and independent “*forum of principle*” and “*exemplar of public reason.*”⁷ For example, fair and public judicial procedures and “*amicus curiae*” briefs may not only enable all parties involved to present and challenge all relevant arguments; they may also require more comprehensive and principled justification of judicial decisions compared with political and administrative decisions. As all laws and all international treaties use vague terms and incomplete rules, the judicial function goes inevitably beyond being merely “*la bouche qui prononce les mots de la loi*” (Montesquieu 1950, 217). By choosing among alternative interpretations of rules, “filling gaps” in the name of justice and by protecting the general principles underlying the hundreds of specialized treaty regimes, judicial decisions interpret, progressively develop and complement legislative rules and intergovernmental treaties in order to settle disputes “in conformity with principles of justice.” The multilevel judicial protection

⁷ On supreme courts as “exemplar of public reasons” see Rawls (1993, 231ff.)

of constitutional citizen rights in Europe (see Section 4 below) illustrates that the independence and impartiality of national and international judges makes them the most effective guardians of the “constitutional essentials” and “overlapping consensus” (see Rawls 1993) underlying national and international human rights law as the constitutional foundation of democratic self-government. Both positivist-legal theories as well as moral-prescriptive theories of adjudication justify such judicial clarification and progressive development of indeterminate legal rules (e.g., general human rights guarantees) on the ground that independent courts are the most principled guardians of constitutional rights and of “deliberative, constitutionally limited democracy,” of which the public reasoning of courts is an important part.⁸ For example, the judicial protection of equal treatment for children of different colour by the US Supreme Court in the celebrated case of *Brown v. Board of Education* in 1954—notwithstanding earlier denials by the law-maker and by other courts of such a judicial reading of the US Constitution’s safeguards of “equal protection of the laws” (Fourteenth Amendment)—was democratically supported by the other branches of government and is today celebrated by civil society as a crucial contribution to protecting more effectively the goals of the US Constitutions (including its Preamble objective “to establish justice and secure the blessings of liberty”) and human rights.

In its Advisory Opinion on Namibia, the International Court of Justice (ICJ) emphasized that—also in international law—legal institutions ought not to be viewed statically and must interpret international law in the light of the legal principles prevailing at the moment legal issues arise concerning them: “An international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.”⁹ International human rights courts like the European Court of Human Rights (ECtHR), just as economic courts like the EC Court, have often emphasized that effective protection of human rights and of non-discriminatory conditions of competition may require “dynamic interpretations” of international rules with due regard to changed circumstances (such as new risks to human health, competition and the environment). As in domestic legal systems, intergovernmental and judicial rule-making are interrelated also in international relations: As all international treaties remain incomplete and build on general principles of law, the judicial interpretation, clarification and application of international law rules, like judicial decisions on particular disputes, inevitably influence the dynamic evolution and clarification of the “*opinio juris*” voiced by governments, judges, parliaments, citizens and non-governmental organizations with regard to the progressive development of international rules. The universal recognition, by all 192 UN member states, of “inalienable” human rights deriving from respect for human dignity, and the ever more specific legal obligations to protect human rights entail that citizens (as the “democratic owners” of international law and institutions) and

⁸ For a justification of judicial review as being essential for protecting and promoting deliberative democracy see Zurn 2007.

⁹ ICJ Reports, 1971, at p. 31, par. 53.

judges (as the most independent and impartial guardians of “principles of justice” underlying international law) can assert no less democratic legitimacy for defining and protecting human rights than governments that often dislike empowering citizens in international relations and prefer treating citizens as mere objects of international law in most UN institutions. From the perspective of citizens and “deliberative democracies,” active judicial protection of constitutional citizen rights (including human rights) is essential for “constitutionalizing,” “democratizing” and transforming international law into a constitutional order, as it is emerging for the more than 800 million European citizens benefiting from human rights and fundamental freedoms protected by the ECtHR, and especially for the 480 million EC citizens who have been granted by EC law and by European courts constitutional freedoms and social rights across the EC that national governments had never protected before. The inalienable *jus cogens* and *erga omnes* core of human rights, and the judicial obligation to settle disputes “in conformity with principles of justice and international law,” are of constitutional importance for protecting “constitutional justice” in international law in the 21st century.

4 Constitutional Pluralism: Three Different Kinds of Multilevel Judicial Protection of Citizen Rights in Europe

An ever larger number of empirical political science analyses of the global rise of judicial power, and of “judicial activism” by supreme courts and international courts in Europe, confirm the political impact of judicial interpretations on the development of national and European law and policies.¹⁰ This Section 4 argues that the “multilevel judicial governance” in Europe—notably between the EC Court of Justice and its Court of First Instance, the EC courts and national courts, the European Free Trade Area (EFTA) Court and national courts, and the ECtHR and national courts—was successful due to the fact that this judicial cooperation was justified as multilevel protection of constitutional citizen rights and, mainly for this reason, was supported as reasonable and “just” by judges, citizens and parliaments. Sections 5 and 6 explain why the European “*solange*-method” of judicial cooperation “as long

¹⁰ Stone Sweet describes how much third-party dispute resolution and judicial rule-making have become privileged mechanisms of adapting national and intergovernmental rule-systems to the needs of citizens and their constitutional rights (see Stone Sweet 2000). In his book on *The Judicial Construction of Europe*, Stone Sweet (2004) analyzes the judicial “constructing of a supra-national constitution” (Chapter 2) as a self-reinforcing system driven by self-interested private market actors, litigators, judges, European parliamentarians and academic communities. The former EC Court judge P. Pescatore confirmed that—when deciding the case *van Gend & Loos*—the judges had a certain idea of Europe, and that these judicial ideas—“and not arguments based on legal technicalities of the matter”—had been decisive (Pescatore 1983, 157). On the criticism of such “judicial law-making” see Mähner (2005) who criticizes the inadequate democratic legitimacy of the ECJ’s expansive case-law limiting national sovereignty in unforeseen ways (e.g., by judicial recognition of fundamental rights as general principles of Community law). From the point of view of “deliberative democracy,” however, the ECJ’s case-law has been approved by EC member states, parliaments and citizens.

as” other courts respect constitutional principles of justice, should be supported by citizens, judges, civil society and their democratic representatives as the most reasonable basis for judicial cooperation, judicial dialogues and “judicial competition” also in international relations beyond Europe. Section 7 concludes that—in a world dominated by power politics and by reasonable “constitutional pluralism”—it is easier for international judges to meet their obligation to settle disputes “in conformity with principles of justice” if courts cooperate and base their “judicial discourses” on “public reason” and judicial protection of the constitutional principles underlying human rights law.

Judicial protection of human rights deriving from respect for human dignity as “foundation of freedom, justice and peace,” and multilevel judicial protection of equal liberty rights in the European economy no less than in the polity, were the driving forces in the progressive transformation of the intergovernmental EC treaties and the ECHR into constitutional instruments protecting citizen rights and community interests (such as the EC’s common market and multilevel democracy) across national frontiers by three different kinds of “multilevel judicial governance” and of “multilevel constitutionalism”:

- The multilevel judicial governance in the EC among national courts and European courts remains characterized by the supranational structures of EC law and the fact that the fundamental freedoms of EC law and related social guarantees go far beyond the national laws of EC member states (below 1).
- The multilevel judicial governance of national courts and the ECtHR in the field of human rights differs fundamentally from the multilevel judicial governance in European economic law: Both the ECtHR and the ECHR assert only subsidiary constitutional functions vis-à-vis national human rights guarantees and respect diverse democratic traditions in the 47 countries that have ratified the ECHR (below 2).
- The multilevel judicial governance among national courts and the EFTA Court has extended the EC’s common market law to the three EFTA members (Iceland, Liechtenstein and Norway) of the European Economic Area (EEA) through intergovernmental modes of cooperation rather than by using the EC’s constitutional principles of legal primacy, direct effect and direct applicability of the EC’s common market law. This different kind of multilevel judicial cooperation (e.g., based on voluntary compliance with legally non-binding preliminary opinions by the EFTA Court) confirms the legitimacy of constitutional pluralism: citizens in third countries can effectively benefit from the legal “market freedoms” and social benefits of European integration law without full membership in the EC (below 3).

4.1 Multilevel Judicial Protection of EC Law has Extended the Constitutional Rights of EC Citizens

A citizen-driven common market with free movement of goods, services, persons, capital and payments inside the EC can work effectively only to the extent that

the common European market and competition rules are applied and protected in coherent ways in national courts in all 27 EC member states. As the declared objective of an “ever-closer union between the peoples of Europe” (Preamble to the EC Treaty) was to be brought about by economic and legal integration requiring additional law-making, administrative decisions and common policies by the European institutions, the EC Treaty differs from other international treaties by its innovative judicial safeguards for the protection of rule of law—not only in intergovernmental relations among EC member states, but also in the citizen-driven common market as well as in the common policies of the European Communities. Whereas most international jurisdictions (like the ICJ, the Permanent Court of Arbitration, the Law of the Sea Tribunal, WTO dispute settlement bodies) remain characterized by intergovernmental procedures, the EC Treaty provides unique legal remedies not only for member states, but also for EC citizens and EC institutions as guardians of EC law and of its “constitutional functions” for correcting “governance failures” at national and European levels:

- The citizen-driven cooperation among national courts and the EC Court in the context of preliminary rulings procedures (Article 234 EC) has uniquely empowered national and European judges to cooperate, at the request of EC citizens, in the multilevel judicial protection of citizen rights protected by EC law.
- The empowerment of the European Commission to initiate infringement proceedings (Article 226 EC) rendered the ECJ’s function as an intergovernmental court much more effective than it would have been possible under purely inter-state infringement proceedings (Article 227 EC).
- The Court’s “constitutional functions” (e.g., in case of actions by member states or EC institutions for annulment of EC regulations), as well as its functions as an “administrative court” (e.g., protecting private rights and rule of law in response to direct actions by natural or legal persons for annulment of EC acts, failure to act, or actions for damages), offered unique legal remedies for maintaining and developing the constitutional coherence of EC law.
- The EC Court’s teleological reasoning based on communitarian needs (e.g., in terms of protection of EC citizen rights, consumer welfare, and of undistorted competition in the common market) justified constitutional interpretations of “fundamental freedoms” of EC citizens that would hardly have been acceptable in purely intergovernmental treaty regimes.

The diverse forms of judicial dialogues (e.g., on the interpretation and protection of fundamental rights), judicial contestation (e.g., of the scope of EC competences) and judicial cooperation (e.g., in preliminary ruling procedures) emphasized the need for respecting common constitutional principles deriving from the EC member states’ obligations under their national constitutions, under the ECHR (as interpreted by the ECtHR) as well as under the EC’s constitutional law. This judicial respect for “constitutional pluralism” promoted judicial comity among national courts, the ECJ and the ECtHR in their complementary, multilevel protection of constitutional rights, with due respect for the diversity of national constitutional and judicial traditions. Arguably, it was this multilevel

judicial protection of common constitutional principles underlying European law and national constitutions which enabled the EC Court, and also the ECtHR, to progressively transcend the intergovernmental structures of European law by focusing on the judicial protection of individual rights in constitutional democracies and in common markets rather than on state interests in intergovernmental relations.

4.2 *Multilevel Judicial Enforcement of the ECHR: Subsidiary “Constitutional Functions” of the ECtHR*

The European Convention on Human Rights (ECHR), like most other international human rights conventions, sets out minimum standards for the treatment of individuals that respect the diversity of democratic constitutional traditions of defining individual rights in democratic communities. The 14 Protocols to the ECHR and the European Social Charter (as revised in 1998) also reflect the constitutional experiences in some European countries (like France and Germany) with protecting economic and social rights as integral parts of their constitutional and economic laws. For example, in order to avoid a repetition of the systemic political abuses of economic regulation prior to 1945,¹¹ the ECHR also includes guarantees of property rights and rights of companies. The jurisdiction of the ECtHR for the collective enforcement of the ECHR—based on complaints not only by member states but also by private persons—prompted the Court to interpret the ECHR as a constitutional charter of Europe¹² protecting human rights across Europe as an objective “constitutional order.”¹³ The multilevel judicial interpretation and protection of fundamental rights, as well as of their governmental restriction “in the interests of morals, public order or national security in a democratic society” (Article 6), are of a constitutional nature. But ECtHR judges rightly emphasize the subsidiary functions of the ECHR and of its Court:

these issues are more properly decided, in conformity with the subsidiary logic of the system of protection set up by the European Convention on Human Rights, by the national judicial authorities themselves and notably courts of constitutional jurisdiction. European control is a fail-safe device designed to catch the breaches that escape the rigorous scrutiny of the national constitutional bodies. (Wildhaber 2002, 161)

¹¹ For example, the wide-ranging guarantees of economic regulation and legally enforceable social rights in Germany’s 1919 Constitution for the “Weimar Republic” had led to ever more restrictive government interventions into labour markets, capital markets, interest rates, as well as to expropriations “in the general interest” which—during the Nazi dictatorship from 1933 to 1945—led to systemic political abuses of these regulatory powers.

¹² See *Ireland v. United Kingdom* (1979), 2 *European Human Rights Reports* 25.

¹³ See the judgment of the ECtHR in *Loizidou v. Turkey* (preliminary objections) of 23 March 1995, par. 75, referring to the status of human rights in Europe. Unlike the ECJ, the ECtHR has no jurisdiction for judicial review of acts of the international organization (the Council of Europe) of which the Court forms part.

The Court aims at resisting the “temptation of delving too deep into issues of fact and of law, of becoming the famous ‘fourth instance’ that it has always insisted it is not” (ibid., n. 24). The Court also exercises deference by recognizing that the democratically elected legislatures in the member states enjoy a “margin of appreciation” in the balancing of public and private interests, provided the measure taken in the general interest bears a reasonable relationship of proportionality both to the aim pursued and the effect on the individual interest affected (see Schokkenbrock 1998). Rather than imposing uniform approaches to the diverse human rights problems in ECHR member states, the ECtHR often exercises judicial self-restraint, for example

- by leaving the process of implementing its judgments to the member states, subject to the “peer review” by the Committee of Ministers of the Council of Europe, rather than asserting judicial powers to order consequential measures;
- by viewing the discretionary scheme of Article 41 ECHR for awarding just satisfaction “if necessary” as being secondary to the primary aim of the ECtHR to protect minimum standards of human rights protection in all Convention states (Wildhaber 2002, 164–65, n. 24);
- by concentrating on “constitutional decisions of principle” and “pilot proceedings” that appear to be relevant for many individual complaints and for the judicial protection of a European public order based on human rights, democracy and rule of law; and
- by filtering out early manifestly ill-founded complaints because the Court perceives its “individual relief function” as being subsidiary to its constitutional function.

Article 34 of the ECHR permits individual complaints not only “from any person,” but also from “non-governmental organizations or groups of individuals claiming to be the victim of a violation” of ECHR rights by one of the State parties. Whereas the African, American, Arab and UN human rights conventions protect human rights only of individuals and of people, the ECHR and the European Social Charter protect also human rights of non-governmental legal organizations (NGOs). The protection of this *collective dimension* of human rights (e.g., of legal persons that are composed of natural persons) has prompted the ECtHR to protect procedural human rights (e.g., under Articles 6, 13, 34 ECHR) as well as substantive human rights of companies (e.g., under Articles 8, 10, 11 ECHR, Protocol 1; see Emberland 2006) in conformity with the national constitutional traditions in many European states as well as inside the EC (e.g., the EC guarantees of market freedoms and other economic and social rights of companies). The rights and freedoms of the ECHR can thus be divided into 3 groups:

- Some rights are inherently limited to natural persons (e.g., Article 2: right to life) and focus on their legal protection (e.g., Article 3: prohibition of torture; prohibition of arbitrary detention in Article 5; Article 9: freedom of conscience).
- Some provision of the ECHR explicitly protect also rights of “legal persons” (e.g., property rights protected in Article 1 of Protocol 1).

- Rights of companies have become recognized by the ECtHR also in respect of other ECHR provisions that protect rights of “everybody” without mentioning rights of NGOs, notably rights of companies to invoke the right to a fair trial in the determination of civil rights (protected under Article 6), the right to respect one’s home (protected under Article 8), freedom of expression (Article 10), freedom of assembly (Article 11), freedom of religion (Article 9), the right to an effective remedy (Article 13), and the right to request compensation for non-material damage (Article 41). Freedom of contract and of economic activity is not specifically protected in the ECHR which focuses on civil and political rights; but the right to form companies in order to pursue private interests collectively is protected by freedom of association (Article 11), by the right to property (Protocol 1) and, indirectly, also by the protection of “civil rights” in Article 6 ECHR.

This broad scope of human rights protection is reflected in the requirement of Article 1 to secure the human rights “to everyone within their jurisdiction,” which protects also traders and companies from outside Europe and may cover even state acts implemented outside the national territory of ECHR member states or implementing obligations under EC law. Yet, compared with the large number of complaints by companies to the EC Court of Justice, less than 3% of judgments by the ECtHR relate to complaints by companies. So far, such complaints concerned mainly Article 6:1 (right to a fair trial), Article 8 (right to respect for one’s home and correspondence), Article 10 (freedom of expression including commercial free speech), and the guarantee of property rights in Protocol 1 to the ECHR.

Similar to the constitutional and teleological interpretation methods used by the EC Court, the ECtHR—in its judicial interpretation of the ECHR—applies principles of “effective interpretation” aimed at protecting human rights in a practical and effective manner. These principles of effective treaty interpretation include a principle of “dynamic interpretation” of the ECHR as a “constitutional instrument of European public order” that must be interpreted with due regard to contemporary realities so as to protect “an effective political democracy” (which is mentioned in the Preamble as an objective of the ECHR).¹⁴ Limitations of fundamental rights of economic actors are being reviewed by the ECtHR as to whether they are determined by law, in conformity with the ECHR, and whether they are “necessary in a democratic society.” Governmental limitations of civil and political human rights tend to be reviewed by the ECtHR more strictly (e.g., as to whether they maintain an appropriate balance between the human right concerned and the need for “an effective political democracy”) than governmental restrictions of private economic activity that tend to be reviewed by the Court on the basis of a more lenient standard of judicial review respecting a “margin of appreciation” of governments.

Article 1 of Protocol 1 to the ECHR protects “peaceful enjoyment of possessions” (par. 1); the term “property” is used only in par. 2. The ECtHR has clarified

¹⁴ On the Court’s teleological interpretation of the ECHR in the light of its “object and purpose” see Emberland 2006, 20ff.

that Article 1 guarantees rights of property not only in corporeal things (rights *in rem*) but also intellectual property rights and private law or public law claims *in personam* (e.g., monetary claims based on private contracts, employment and business rights, pecuniary claims against public authorities).¹⁵ In *Immobiliare Saffi v. Italy*, the Court also recognized positive state duties to protect private property, for example to provide police assistance in evacuating a tenant from the applicant’s apartment; the lack of such police assistance for executing a judicial order to evacuate a tenant was found to constitute a breach of the applicant’s property right.¹⁶ The inclusion of the right to property into the ECHR confirms that property is perceived as a fundamental right that is indispensable for personal self-realization in dignity.¹⁷ As the moral justifications of private property do not warrant absolute property rights, Article 1 recognizes—in conformity with the constitutional traditions of many national European constitutions which emphasize individual as well as social functions of property (e.g., in Article 14 of the German Basic Law)—that private property can be restricted for legitimate reasons. The case-law of the ECtHR confirms that such restrictions may include, for example:

- taxation for the common financing of public goods (including redistributive taxation if it can be justified on grounds of reciprocal benefit, correction of past injustices or redistributive justice);
- governmental control of harmful uses of property (e.g., by police power regulations designed at preventing harm to others); as well as
- governmental takings of property by power of eminent domain, whose lawful exercise depends on the necessity and proportionality of the taking for realizing a legitimate public interest and—especially if the taking imposes a discriminatory burden only on some individuals—may require payment of compensation for the property taken.

Even though the ECtHR respects a wide margin of appreciation of states to limit and interfere with property rights (e.g., by means of taxation) and to balance individual and public interests (e.g., in case of a taking of property without full compensation), the Court’s expansive protection—as property or “possessions”—of almost

¹⁵ On private law and constitutional law meanings of property (as a relationship to objects of property and to other legal subjects that have to respect property rights), and on the different kinds of property protected in the case-law of the ECtHR, see Coban 2004, Chapters 2, 6.

¹⁶ *Immobiliare Saffi v. Italy*, Reports 1999-V (2000), 30 EHRR 756.

¹⁷ On the moral foundations of market freedoms see Petersmann 2006a, 29, 48ff. Coban justifies property rights as *prima facie* human rights on the basis of four arguments: (1) both the use value and the exchange value of property are essential for private autonomy; (2) a system of private property is also essential for personal self-realization; (3) respect for individual autonomy requires respect for the entitlement of people to the fruits of their labor as well as respect for the outcome of peaceful, voluntary cooperation (e.g., in markets driven by consumer demand and competition); and (4) a system of private property further encourages fruitful initiative and an autonomy-enhancing society based on welfare-increasing competition, division of labor and satisfaction of consumer demand. See Coban 2004, Chapter 3.

all pecuniary interests and legitimate expectations arising from private and public law relationships reveals a strong judicial awareness of the importance of private economic activities and economic law for effective protection of human rights and personal self-realization in the economy and civil society. The Court's review of governmental limitations of, and interferences with, property rights is based on "substantive due process" standards that go far beyond the "procedural due process" standards applied by the US Supreme Court since the 1930s.¹⁸ In the different European context of creating an ever broader "social market economy" across the 47 member states of the Council of Europe, the ECtHR's constitutional approach to the protection of broadly defined property rights and fundamental freedoms, including those of companies, appears reasonable.

4.3 Diversity of Multilevel Judicial Governance in Free Trade Agreements (FTAs): The Example of the EFTA Court

The 1992 Agreement between the EC and EFTA states (Iceland, Liechtenstein and Norway) establishing the European Economic Area (EEA)¹⁹ is the legally most developed of the more than 250 FTAs (in terms of GATT Article XXIV) concluded after World War II. The EFTA Court illustrates the reasonable diversity of judicial procedures and approaches to the interpretation of international trade law, and confirms the importance of "judicial dialogues" among international and domestic courts for the promotion of rule of law in international trade. In order to ensure that the extension of the EC's common market law to the EFTA countries would function in the same manner as in the EC's internal market, the 1991 Draft Agreement for the EEA had provided for the establishment of an EEA Court, composed of judges from the ECJ as well as from EFTA countries, and for the application by the EEA Court of the case-law of the EC Court. In *Opinion 1/1991*, the EC Court objected to the structure and competences of such an EEA Court on the ground that its legally binding interpretations could adversely affect the autonomy and exclusive jurisdiction (Articles 220, 292 EC) of the EC Court (e.g., for interpreting the respective competences of the EC and EC member states concerning matters governed by

¹⁸ The US Constitution (Amendments V and XIV) includes strong guarantees of private liberty and property rights against takings without "due process of law" and "just compensation." Up to the late 1930s, the US Supreme Court frequently overturned legislation on the ground that it violated economic liberties. Yet, since the Democrats "packed" the US Supreme Court in 1937, the Court has limited judicial protection of "substantive due process of law" essentially to civil and political rights; in the economic field, the Court introduced a constitutional presumption (in the famous *Carolene Products* case of 1938, 304 U.S. 144) that legislative restrictions of private property are presumed to be lawful and no longer subject to judicial review of "economic due process of law." Also the commerce clause in the US Constitution does not guarantee individual economic liberties as in the EC Treaty, but merely gives regulatory authority to the US Congress.

¹⁹ Signed on 2 May 1992 and in force as of 1 January 1994, OJ EC 1994, L 1/3.

EEA provisions).²⁰ Following the Court’s negative Opinion, the EEA Agreement’s provisions on judicial supervision were re-negotiated and the EEA Court was replaced by an EFTA Court with more limited jurisdiction and composed only of judges from EFTA countries. In a second Opinion, the EC Court confirmed the consistency of the revised EEA Agreement²¹ subject to certain legal interpretations of this agreement by the EC Court.²² In order to promote legal homogeneity between EC and EEA market law, Article 6 of the revised EEA Agreement provides for the following principle of interpretation and judicial cooperation:

“Without prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the [EC Treaty and the ECSC Treaty] and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the (EC) given prior to the date of signature of the agreement.”²³

According to the 1994 Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA),²⁴ the Court has jurisdiction for infringement proceedings by the EFTA Surveillance Authority against an EFTA state (Article 31), actions concerning the settlement of disputes between EFTA states (Article 32), advisory opinions on the interpretation of the EEA Agreement (Article 33), review of penalties imposed by the EFTA Surveillance Authority (Article 35), as well as jurisdiction in actions brought by an EFTA state or by natural or legal persons against decisions of the EFTA Surveillance Authority (Article 36) or against failure to act (Article 37). Out of the 62 cases lodged during the first ten years of the EFTA Court, 18 related to direct actions, 42 concerned requests by national courts for advisory opinions, and 2 related to requests for legal aid and suspension of a measure (see Graver 2005, 79ff.).

In its interpretation of EC law provisions that are identical to EEA rules (e.g., concerning common market and competition rules), the EEA Court has regularly followed ECJ case-law and has realized the homogeneity objectives of EEA law in terms of the outcome of cases, if not their legal reasoning. In its very first case, *Restamark*,²⁵ the EFTA Court interpreted the notion of court or tribunal (in the sense of Article 34 SCA regarding requests by national courts for preliminary opinions) by proceeding from the six-factor-test applied by the ECJ in its interpretation of the corresponding provision in Article 234 EC: the referring body must, in order

²⁰ Opinion 1/91, *Agreement on the EEA*, ECR 1991 I-6079, pars. 31ff.

²¹ See Official Journal EC 1994, L 1/3.

²² See Opinion 1/92, *Agreement on the EEA*, ECR 1992 I-2821.

²³ The limitation to prior case-law was due to the refusal by EFTA countries to commit themselves to unforeseeable, future case-law of the EU courts on which they are not represented (Skouris 2005, 123ff.). Skouris concludes, however, that “it does not seem that the EFTA Court has treated the ECJ case-law differently depending on when the pertinent judgments were rendered” (ibid., 124).

²⁴ Official Journal EC 1994, L 344/1.

²⁵ Case E-1/94, EFTA Court Reports 1994–1995, 15.

to constitute a “court or tribunal,” (1) be established by law (rather than by private agreement as in the case of commercial arbitration); (2) be permanent; (3) have compulsory jurisdiction for legally binding decisions on issues of a justiciable nature (*res judicata*); (4) conduct *inter-partes* procedures; (5) apply rules of law and evidence; and (6) be independent. Yet, the EFTA Court considered the request admissible even if, as frequently in administrative court proceedings in Finland and Sweden, only one party appeared in the proceedings. In the EC Court judgments in cases *Dorsch Consult* of 1997²⁶ and *Gabalfrixa* of 2000,²⁷ the ECJ followed suit and acknowledged that the *inter-partes* requirement was not absolute. The EFTA Court’s case-law on questions of *locus standi* of private associations to bring an action for nullity of a decision of the EFTA Surveillance Authority offers another example for liberal interpretations by the EFTA Court of procedural requirements.²⁸

The EC Court, in its Opinion 1/91, held that the Community law principles of legal primacy and direct effect were not applicable to the EEA Agreement and “irreconcilable” with its characteristics as an international agreement conferring rights only on the participating states and the EC.²⁹ The EFTA Court, in its *Restamark* judgment of December 1994, followed from Protocol 35 (on achieving a homogenous EEA based on common rules) that individuals and economic operators must be entitled to invoke and to claim at the national level any rights that could be derived from precise and unconditional EEA provisions if they had been made part of the national legal orders.³⁰ In its 2002 *Einarsson* judgment, the EFTA Court further followed from Protocol 35 that such provisions with quasi-direct effect must take legal precedence over conflicting provisions of national law.³¹ Already in 1998, in its *Sveinbjörnsdóttir* judgment, the EFTA Court had characterized the legal nature of the EEA Agreement as an international treaty *sui generis* that had created a distinct legal order of its own; the Court therefore found that the principle of state liability for breaches of EEA law must be presumed to be part of EEA law.³² This judicial recognition of the corresponding EC law principles was confirmed in the 2002 *Karlsson* judgment, where the EFTA Court further held that EEA law—while not prescribing that individuals and economic operators be able to directly rely on non-implemented EEA rules before national courts—required national courts to consider relevant EEA rules, whether implemented or not, when interpreting international and domestic law.³³

²⁶ Case C-54/96, ECR 1997 I-4961.

²⁷ Cases C-110/98 to C-147/98, ECR 2000 I-1577.

²⁸ See Baudenbacher 2005, 24 (who mentions that this liberal tendency might be influenced by the fact that the EFTA Court, unlike the ECJ, is not overburdened).

²⁹ Opinion 1/91, *EEA Agreement*, ECR 1991 I-6079, par. 28.

³⁰ Case E-1/94, EFTA Court Reports 1994-95, 15.

³¹ Case E 1/01 EFTA Court Reports 2002, 1.

³² Case E 7/97 EFTA Courts Reports 1998, 95.

³³ Case E 4/01 EFTA Court Reports 2002, 240 (par. 28).

5 Lessons from the European “Solange-Method” of Judicial Cooperation for Worldwide Economic and Human Rights Law?

From the perspectives of economics and international law, FTAs are sometimes viewed as sub-optimal compared with the rules of the World Trade Organization (WTO) for trade liberalization, rule-making and compulsory dispute settlement at worldwide levels. For example:

- As most FTAs only provide for *diplomatic* dispute settlement procedures (e.g., consultations, mediation, conciliation, panel procedures subject to political approval by member states) without preventing their member countries from submitting trade disputes to the *quasi* judicial WTO dispute settlement procedures, the compulsory WTO dispute settlement system may offer comparatively more effective legal remedies. This is illustrated by the fact that most intergovernmental trade disputes among the 3 member countries of the North American Free Trade Agreement (NAFTA) have been submitted to the WTO dispute settlement system rather than to the legally weaker dispute settlement procedures of Chapter 20 of the NAFTA Agreement.³⁴
- Submission of trade disputes among FTA member countries to the WTO has only rarely given rise to legal problems, for example if the respondent country could not invoke in WTO dispute settlement procedures legal justifications based on FTA rules³⁵ or on FTA dispute settlement procedures.³⁶ The rare instances of successive invocations of FTA and WTO dispute settlement procedures challenging the same trade measure³⁷ did not amount to “abuses of rights,” for WTO Members have rights to conclude regional trade agreements with separate dispute settlement procedures as well as rights to the *quasi* automatic establishment of

³⁴ See Davey 2006. There have been only 3 intergovernmental disputes under Chapter 20 since NAFTA entered into force in 1994. On the other six NAFTA dispute settlement procedures and their very diverse records see de Mestral 2006.

³⁵ For example, in the WTO dispute between the USA and Canada over Canadian restrictions on “split-run periodicals” (WTO Panel Report, *Canada-Periodicals*, WT/DS31/R, adopted 30 July 1997), Canada did not consider it was entitled to justify in the WTO its violation of GATT Article III by invoking Article 2106 NAFTA permitting preferential measures in favour of cultural industries, see *ibid.*, 364–65.

³⁶ For instance, the WTO Appellate Body report on *Mexico-Tax Measures on Soft Drinks* (WT/DS308/AB/R, adopted in May 2006) upheld the WTO Panel’s conclusion that the Panel had no discretion “to decline to exercise its jurisdiction” based on the existence of a NAFTA dispute on an allegedly related matter (see pars. 44–53).

³⁷ Examples would include challenges of US import restrictions on Canadian lumber in both NAFTA and WTO panels, challenges of EC import restrictions on bananas and genetically modified organisms in the ECJ and in the WTO, challenges of Argentine import restrictions on cotton and of Brazilian import restrictions of retreaded tyres in both Mercosur and WTO dispute settlement proceedings; see Kwak and Marceau 2006.

WTO dispute settlement bodies examining complaints in the WTO on the different legal basis of WTO law.

Yet, from the perspective of citizens and their economic rights as protected by courts in Europe, the EC and EFTA courts offer citizens direct access and judicial remedies that appear economically more efficient, legally more effective and democratically more legitimate than politicized, intergovernmental procedures among states for the settlement of disputes involving private economic actors. The fact that the EC Court has rendered only three judgments in international disputes among EC member states since the establishment of the ECJ in 1952 illustrates that many intergovernmental disputes (e.g., over private rights) could be prevented or settled by alternative dispute settlement procedures if governments would grant private economic actors more effective legal and judicial remedies in national and regional courts against governmental restrictions. Unfortunately, national and international judges often fail to cooperate in their judicial protection of the rule of law in international relations beyond the EC and ECHR, for example because they perceive international and domestic law as being based on mutually conflicting conceptions of justice. For instance, US courts claim that WTO dispute settlement rulings “are not binding on the US, much less this court”³⁸; similarly, the EC Court has refrained long since—at the request of the political EC institutions who have repeatedly misled the ECJ about the interpretation of WTO obligations so as to limit their own judicial accountability³⁹—from reviewing the legality of EC measures in the light of the EC’s GATT and WTO obligations. WTO law tends to be perceived as intergovernmental rules, which governments and domestic courts may ignore without legal and judicial remedies by their citizens adversely affected by welfare-reducing violations of WTO guarantees of market access and rule of law.⁴⁰ Both the EC and US governments have requested their respective domestic courts to refrain from applying WTO rules at the request of

³⁸ US Court of Appeals for the Federal Circuit, judgment of 21 January 2005 (Corus Staal), available at <http://www.fedcir.gov/opinions/04-1107.pdf>. In the Corus Staal dispute, the US Supreme Court denied petition for certiorari on 9 January 2006 (<http://www.supremecourtus.gov/docket/05-364.htm>), notwithstanding an amicus curiae brief filed by the EC Commission supporting this petition (“We argue that the Federal Circuit went too far by construing the Uruguay Round Agreements Act to make considerations of compliance with international obligations completely irrelevant in construing a Department of Commerce anti-dumping determination, and further argue that the Department’s “zeroing” methodology—held invalid by both a WTO Appellate Body and a NAFTA Binational Panel—is not entitled to Chevron deference because it would bring the United States into noncompliance with treaty obligations” (available at <http://www.robbinsrussell.com/pdf/265.pdf>).

³⁹ See Kuijper (2005, 1334) who claims that “it is difficult to point out one specific moment at which it can be established beyond doubt that WTO rules have been breached, even after a decision of a panel or report of the Appellate Body,” and “that it is rarely or never possible to speak of a sufficiently serious breach of WTO law” by the political EC institutions justifying the EC’s non-contractual liability for damages pursuant to Article 288 EC Treaty.

⁴⁰ See, e.g., the criticism by the EC’s legal advisor Kuijper of the ECJ’s “Kupferberg jurisprudence” on the judicial applicability of the EC’s free trade area agreements at the request of citizens as politically “naïve” (*ibid.*, 1320).

citizens or of NGOs⁴¹; in order to limit their own judicial accountability, they have repeatedly encouraged their respective courts to apply domestic trade regulations without regard to WTO dispute settlement findings on their illegality.⁴² The simultaneous insistence by the same trade politicians that WTO rules are enforceable at their own request in *domestic courts* vis-à-vis violations of WTO law by states inside the EC or inside the US, illustrates the political rather than legal nature of such Machiavellian objections against judicial accountability for violations by trade bureaucracies of the international rule of law.

This contribution began by arguing that the universal recognition of inalienable human rights requires national and international courts to review whether—in their judicial settlement of “disputes concerning treaties, like other international disputes [...], in conformity with the principles of justice and international law” (Preamble VCLT)—human rights and other principles of justice (like due process of law) justify judicial application of international guarantees of freedom, non-discrimination, rule of law and social safeguard measures for the benefit of citizens. Section 4 described the citizen-driven, multilevel judicial protection of the EC, EEA and ECHR guarantees of freedoms, fundamental rights and rule of law as models for decentralizing and transforming intergovernmental rules and dispute settlement procedures for the benefit of citizens. Sections 5 and 6 suggest that the “*Solange-Method*” of conditional cooperation by national courts with the EC Court “as long as” (which means “solange” in German) the ECJ protects the constitutional rights of citizens (below 1), as well as the judicial self-restraint by the ECtHR vis-à-vis alleged violations of human rights by EC institutions “as long as” the EC Court protects the human rights guarantees of the ECHR (below 2), should serve as a model for “conditional cooperation” among international courts and national courts also in international economic law, environmental law and human rights law beyond Europe. Section 7 concludes by asking whether the judicial function to settle disputes in conformity with principles of procedural and substantive justice can assert democratic legitimacy in international relations which—beyond rights-based European integration law—continue to be dominated by power politics. It is argued that the legitimacy of judicial cooperation, self-restraint, “judicial competition” and

⁴¹ On the exclusion of “direct applicability” of WTO rules in the EC and US laws on the implementation of the WTO agreements see Petersmann 1997, 19ff. At the request of the political EC institutions, the EC Court has refrained long since from reviewing the legality of EC acts in the light of the EC’s GATT and WTO obligations; the Court refers only very rarely to WTO rules and WTO dispute settlement rulings in support of the ECJ’s interpretations of EC law. In the US, courts are barred by legislation from challenging the WTO-consistency of US federal measures.

⁴² See Restani and Bloom 2001. On the controversial relationship between the “Charming Betsy doctrine” of consistent interpretation and the “Chevron doctrine” of judicial deference see Davies 2007. The European Court of Justice has a long history of ignoring GATT and WTO rules at the request of political EC bodies which have often misinformed the EC Court on the meaning of GATT/WTO rules and dispute settlement reports (e.g., in Case 112/80, Dürbeck, ECR 1981, 1095, the Commission misinformed the EC Court on an unpublished GATT dispute settlement finding against the EC, and the Court relied on this information without verifying the obviously wrong information submitted to the Court).

“judicial dialogues” among courts derives from their protection of constitutional citizen rights as a constitutional precondition for individual and democratic self-development in a constitutionally protected framework of “participatory,” “deliberative” and “cosmopolitan democracy.” Citizens and courts have reason to support the multilevel, judicial protection of citizen rights in European law and to challenge international judges (e.g., in worldwide and non-European institutions) if they perceive themselves as mere agents of governments and disregard the constitutional obligation of judges to settle disputes in conformity with human rights.

5.1 The “Solange-Method” of Judicial Cooperation Among the German Constitutional Court and the EC Court in the Protection of Fundamental Rights

The EC Court, the EFTA Court and the ECtHR have—albeit in different ways—interpreted the intergovernmental EC-, EEA- and ECHR treaties as objective legal orders protecting also *individual rights* of citizens. All three courts have acknowledged that the human rights goals to empower individuals and effectively protect human rights, like the objective of international trade agreements to enable citizens to engage in mutually beneficial trade transactions under non-discriminatory conditions of competition, call for “dynamic judicial interpretations” of treaty rules with due regard to the need for judicial protection of citizen interests in economic markets and constitutional democracies. These citizen-oriented interpretations of the EC- and EEA Agreements were influenced by the long-standing insistence by the German Constitutional Court on its constitutional mandate to protect fundamental rights and constitutional democracy also vis-à-vis abuses of EC powers affecting citizens in Germany. The “*Solange* jurisprudence” of the German Constitutional Court, like similar interactions between other national constitutional courts and the EC Court (see Mayer 2006), contributed to the progressive extension of judicial protection of human rights in Community law:

- In its *Solange I* judgment of 1974, the German Constitutional Court held that “as long as” the integration process of the EC does not include a catalogue of fundamental rights corresponding to that of the German Basic Law, German courts could, after having requested a preliminary ruling from the EC Court, also request a ruling from the German Constitutional Court regarding the compatibility of EC acts with fundamental rights and the German Constitution.⁴³ This judicial insistence on the then higher level of fundamental rights protection in German constitutional law was instrumental for the ECJ’s judicial protection of human rights as common, yet unwritten constitutional guarantees of EC law.⁴⁴

⁴³ BVerfGE 37, 327.

⁴⁴ The ECJ’s judicial protection of human rights since 1969 (Case 29/69, *Stauder v. City of Ulm*, ECR 1969, 419; Case 11/70 *Internationale Handelsgesellschaft*, ECR 1970, 1125; Case 4/73, *Nold*, ECR 1974, 491) continues to evolve.

- In view of the emerging human rights protection in EC law, the German Constitutional Court held—in its *Solange II* judgment of 1986⁴⁵—that it would no longer exercise its jurisdiction for reviewing EC legal acts “as long as” the EC Court continued to generally and effectively protect fundamental rights against EC measures in ways comparable to the essential safeguards of German constitutional law.
- In its *Maastricht* judgment (*Solange III*) of 1993, however, the German Constitutional Court reasserted its jurisdiction to defend the scope of German constitutional law: EC measures exceeding the limited EC competences covered by the German Act ratifying the EU Treaty (“*ausbrechende Gemeinschaftsakte*”) could not be legally binding and applicable in Germany.⁴⁶
- Following GATT and WTO dispute settlement rulings that the EC import restrictions of bananas violated WTO law, and in view of an ECJ judgment upholding these restrictions without reviewing their WTO inconsistencies, several German courts requested the Constitutional Court to declare these EC restrictions to be *ultra vires* (i.e., exceeding the EC’s limited competences) and to illegally restrict constitutional freedoms of German importers. The German Constitutional Court, in its judgment of 2002⁴⁷ (*Solange IV*), declared the application inadmissible on the ground that it had not been argued that the required level of human rights protection in the EC had *generally* fallen below the minimum level required by the German Constitution.
- In its judgment of 2005 on the German act implementing the EU Framework Decision (adopted under the third EU pillar) on the European Arrest Warrant, the Constitutional Court held that the automatically binding force and mutual recognition in Germany of arrest orders from other EU member states were inconsistent with the fundamental rights guarantees of the German Basic Law.⁴⁸ The limited jurisdiction of the EC Court for third pillar decisions concerning police and judicial cooperation might have contributed to this assertion of national constitutional jurisdiction for safeguarding fundamental rights vis-à-vis EU decisions in the area of criminal law and their legislative implementation in Germany.

The progressively expanding legal protection of fundamental rights in EC law in response to their judicial protection by national and European courts illustrates how judicial cooperation has been successful in Europe far beyond economic law. Judge A. Rosas (2005, 163, 169) has distinguished the following five “stages” in the case-law of the EC Court on the protection of human rights:

- In the supra-national, but functionally limited European Coal and Steel Community, the Court held that it lacked competence to examine whether an ECSC

⁴⁵ BVerfGE 73, 339, at 375.

⁴⁶ BVerfGE 89, 115.

⁴⁷ BVerfGE 102, 147.

⁴⁸ BVerfGE 113, 273.

decision amounted to an infringement of fundamental rights as recognized in the constitution of a member state.⁴⁹

- Since its *Stauder* judgment of 1969, the EC Court has declared in a series of judgments that fundamental rights form part of the general principles of Community law binding the member states and EC institutions, and that the EC Court ensures their observance.⁵⁰
- Since 1975, the ever more extensive case-law of the EC courts explicitly refers to the ECHR and protects ever more human rights and fundamental freedoms in a wide array of Community law areas, including civil, political, economic, social and labour rights, drawing inspiration “from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories.”⁵¹
- Since 1989, the ECHR has been characterized by the EC Court as having “special significance” for the interpretation and development of EU law⁵² in view of the fact that the ECHR is the only international human rights convention mentioned in Article 6 EU.
- In the 1990s, the EC courts have begun to refer to individual judgments of the ECtHR⁵³ and have clarified that—in reconciling economic freedoms guaranteed by EC law with human rights guarantees of the ECHR that admit restrictions—all interests involved have to be weighed “having regard to all circumstances of the case in order to determine whether a fair balance was struck between those interests,” without giving priority to the economic freedoms of the EC Treaty at the expense of other fundamental rights.⁵⁴ The EC courts have also been willing to adjust their case-law to new developments in the case-law of the ECtHR,⁵⁵

⁴⁹ Case 1/58, *Storck v. High Authority*, ECR 1959, 43.

⁵⁰ See the cases cited in note 44.

⁵¹ See, e.g., Opinion 2/1994 on the ECHR, ECR 1996 I-1759, par. 33.

⁵² Joined Cases 46/87 and 222/88, *Hoechst*, ECR 1989, 2859, par. 13.

⁵³ See Case 13/94, *P v. S*, ECR 1996 I-2143, par. 16.

⁵⁴ See Case C-112/00, *Schmidberger*, ECR 2003 I-5659. The Court began by examining the EC’s economic freedom, as requested by the national court, and observed that “since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods”; “unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose” (par. 80). The judicial balancing by the ECJ refutes the claim that the ECJ gives priority to economic freedoms at the expense of other human rights.

⁵⁵ In Case C-94/00, *Roquette Frères*, ECR 2002 I-9011, par. 29, for example, the ECJ referred explicitly to new case-law of the ECtHR on the protection of the right to privacy of commercial enterprises in order to explain why—despite having suggested the opposite in the ECJ’s earlier judgment in *Hoechst*—such enterprises may benefit from Article 8 ECHR: “For the purposes of determining the scope of that principle in relation to the protection of business premises, regard

and to differentiate—as in the case-law of the ECtHR—between judicial review of EC measures,⁵⁶ state measures⁵⁷ and private restrictions of economic freedoms in the light of fundamental rights.⁵⁸

5.2 “Horizontal” Cooperation Among the EC Courts, the EFTA Court and the ECtHR in Protecting Individual Rights in the EEA

Judicial cooperation between the EC courts and the EFTA Court was legally mandated in the EEA Agreement (e.g., Article 6) and facilitated by the fact that the EEA law to be interpreted by the EC and EFTA courts was largely identical with the EC’s common market rules (notwithstanding the different context of the EC’s common market and the EEA’s free trade area). The EC Court of First Instance, in its *Opel Austria* judgment of 1997, held that Article 10 of the EEA Agreement (corresponding to the free trade rules in Articles 12, 13, 16 and 17 EC Treaty) had direct effect in EC law in view of the high degree of integration protected by the EEA Agreement, whose objectives exceeded those of a mere free trade agreement and required the contracting parties to establish a dynamic and homogenous EEA.⁵⁹ In numerous cases, EC court judgments referred to the case-law of the EFTA Court, for example by pointing out “that the principles governing the liability of an EFTA state for infringement of a directive referred to in the EEA Agreement were the subject of the EFTA Court’s judgment of 10 December 1998 in *Sveinbjörnsdóttir*.”⁶⁰ In its *Ospelt* judgment, the EC Court emphasized that “one of the principal aims of the EEA Agreement is to provide for the fullest possible realization of the four

must be had to the case-law of the European Court of Human Rights subsequent to the judgment in *Hoehst*. According to that case-law, the protection of the home provided in Article 8 of the ECHR may in certain circumstances be extended to cover such premises (see, in particular, the judgment of 16 April 2002 in *Colas Est and Others v. France, not yet published in the Reports of Judgments and Decisions*) and second, the right of interference established by Article 8(2) of the ECHR might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case.”

⁵⁶ See, e.g., the ECJ cases listed in note 44 above.

⁵⁷ See, e.g., the *Omega* Case C-36/02, ECR 2004 I-9609, in which the ECJ acknowledged that the restriction of market freedoms could be necessary for the protection of human dignity despite the fact that the German conception of protecting human dignity as a human right was not shared by all other EC member states.

⁵⁸ See *Emberland* 2006 and Cases C-341/05, *Laval*, Judgment of 18 December 2007 (nyr), as well as Case C-438/05, *Viking Line*, Judgment of 11 December 2007 (nyr): the ECJ recognized that trade unions are legally bound by the EC’s common market freedoms, and that the private plaintiffs in these cases could rely directly on the EC Treaty in their judicial challenge of restrictions imposed on market freedoms by trade unions invoking their social rights to strike (e.g., in order to prevent relocation of *Viking Line* to another EC member state).

⁵⁹ Case T-115/94, ECR 1997 II-39.

⁶⁰ Case C-140/97, *Rechberger*, ECR 1999 I-3499, par. 39.

freedoms within the whole EEA, so that the internal market established within the European Union is extended to the EFTA states.”⁶¹

The case-law of the EFTA Court evolved in close cooperation with the EC courts, national courts in EFTA countries and with due regard also to the case-law of the ECtHR. In view of the intergovernmental structures of the EEA Agreement, the legal homogeneity obligations in the EEA Agreement (e.g., Article 6) as well as in the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (e.g., Article 3) were interpreted only as *obligations de résultat* with regard to the legal protection of market freedoms and individual rights in EFTA countries. Yet, the EFTA Court effectively promoted “*quasi-direct effect*” and “*quasi-primacy*” (C. Baudenbacher) as well as full state liability and protection of individual rights of market participants in national courts in all EEA countries.⁶² In various judgments, the EFTA Court followed the ECJ case-law also by interpreting EEA law in conformity with the human rights guarantees of the ECHR and the judgments of the ECtHR (e.g., concerning Article 6 ECHR on access to justice, Article 10 on freedom of expression). In its *Asgeirsson* judgment, the EFTA Court rejected the argument that the reference to the EFTA Court had unduly prolonged the national court proceeding in violation of the right to a fair and public hearing within a reasonable time (Article 6 ECHR); referring to a judgment by the ECtHR in a case concerning a delay of two years and seven months due to a reference by a national court to the ECJ (pursuant to Article 234 EC), the EFTA Court shared the reasoning of the ECtHR that adding the period of preliminary references (which was less than 6 months in the case before the EFTA Court) could undermine the legitimate functions of such cooperation among national and international courts in their joint protection of the rule of law.

The ECtHR has frequently referred in its judgments to provisions of EU law and to judgments of the ECJ. In *Goodwin*, for example, the ECtHR referred to Article 9 of the EU Charter of Fundamental Rights (right to marry) so as to back up its judgment that the refusal to recognize a change of sex for the purposes of marriage constituted a violation of Article 12 ECHR.⁶³ In *Dangeville*, the ECtHR’s determination that an interference with the right to the peaceful enjoyment of possessions was not required in the general interest took into account the fact that the French measures were incompatible with EC law.⁶⁴ In cases *Waite and Kennedy v. Germany*, the ECtHR held that it would be incompatible with the purpose and object of the ECHR if an attribution of tasks to an international organization or in

⁶¹ Case C-452/01, ECR 2003 I-9743, par. 29.

⁶² See the EFTA Court President C. Baudenbacher (2005) and H.P. Graver: “Direct effect of primary law, state liability and the duty of the courts to interpret national law in the light of EEA obligations have been clearly and firmly accepted in national law by Norwegian courts” (Graver 2005, 97).

⁶³ *Goodwin v. United Kingdom*, judgment of 11 July 2002, Reports of Judgments and Decisions 2002-VI, pars. 58, 100.

⁶⁴ *SA Dangeville v. France* judgment of 16 April 2002, Reports of Judgments and Decisions 2002-III, pars. 31ff.

the context of international agreements could absolve the contracting states of their obligations under the ECHR.⁶⁵ In the *Bosphorus* case, the ECtHR had to examine the consistency of the impounding by Ireland of a Yugoslavian aircraft on the legal basis of EC regulations imposing sanctions against the former Federal Republic of Yugoslavia; the ECtHR referred to the ECJ case-law according to which respect for fundamental rights is a condition of the lawfulness of EC acts, as well as to the ECJ preliminary ruling that “the impounding of the aircraft in question [...] cannot be regarded as inappropriate or disproportionate”; in its examination of whether compliance with EC obligations could justify the interference by Ireland with the applicant’s property rights, the ECtHR proceeded on the basis of the following four principles⁶⁶:

- (a) “a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations”;
- (b) “State action taken in compliance with such legal obligations is justified as long as the relevant organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides”;
- (c) “If such equivalent protection is considered to be provided by the organization, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organization.”
- (d) “However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention’s role as a ‘constitutional instrument of European public order’ in the field of human rights.”

After examining the comprehensive EC guarantees of fundamental rights and judicial remedies, the ECtHR found “that the protection of fundamental rights by EC law can be considered to be, and to have been at the relevant time, ‘equivalent’ [...] to that of the Convention system. Consequently, the presumption arises that Ireland did not depart from requirements of the Convention when it implemented legal obligations flowing from its membership of the EC.” As the Court did not find any “manifest deficiency” in the protection of the applicant’s Convention rights, the relevant presumption of compliance with the ECHR had not been rebutted.⁶⁷

⁶⁵ *Waite and Kennedy v. Germany*, judgment of 18 February 1999, Reports of Judgments and Decisions 1999-I, par. 67.

⁶⁶ *Case of Bosphorus Hava Yollari Turizm v. Ireland*, judgment of 30 June 2005, European Human Rights Reports 42 (2006) 1, pars. 153ff.

⁶⁷ *Case of Bosphorus Hava Yollari Turizm v. Ireland* (n. 66), pars. 165–66.

6 Conditional “*Solange-Cooperation*” Among International Trade and Environmental Courts Beyond Europe?

Competing multilateral treaty and dispute settlement systems with “forum selection clauses” enabling governments to submit disputes to competing jurisdictions (with the risk of conflicting judgments) continue to multiply also outside economic law and human rights law, for example in international environmental law, maritime law, criminal law and other areas of international law. Proposals to coordinate such overlapping jurisdictions through hierarchical procedures (e.g., preliminary rulings or advisory opinions by the ICJ) are opposed by most governments. Agreement on exclusive jurisdiction clauses (as in Article 292 EC Treaty, Article 23 DSU/WTO, Article 282 Law of the Sea Convention) may not prevent submission of disputes involving several treaty regimes to competing dispute settlement *fora*. For example, in the dispute between Ireland and the United Kingdom over radioactive pollution from the MOX plant in Sellafield (UK), four dispute settlement bodies were seized and used diverging methods for coordinating their respective jurisdictions:

6.1 *The OSPAR Arbitral Award of 2003 on the MOX Plant Dispute*

In order to clarify the obligations of the United Kingdom to make available all information “on the state of the maritime area, on activities or measures adversely affecting or likely to affect it” pursuant to Article 9 of the Convention for the Protection of the Marine Environment of the North-East Atlantic” (OSPAR), Ireland and the United Kingdom agreed to establish an arbitral tribunal under this OSPAR Convention. Even though Article 35, par.5,a of the Convention requires the tribunal to decide according to “the rules of international law, and in particular those of the Convention,” the tribunal’s award of July 2003 was based only on the OSPAR Convention, without taking into account relevant environmental regulations of the EC and of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (ratified by all EC member states as well as by the EC). The OSPAR arbitral tribunal decided in favour of the United Kingdom that the latter had not violated its treaty obligations by not disclosing the information sought by Ireland (see McDorman 2004).

6.2 *The UNCLOS 2001 Provisional Measures and 2003 Arbitral Decision in the MOX-Plant Dispute*

The UN Convention on the Law of the Sea (UNCLOS) offers parties the choice (in Articles 281 ff) of submitting disputes to the International Tribunal for the Law of the Sea (ITLOS), the ICJ, arbitral tribunals or other dispute settlement *fora* established by regional or bilateral treaties. As Ireland claimed that the discharges released by the MOX Plant contaminated Irish waters in violation of UNCLOS, it requested establishment of an arbitral tribunal and—pending this procedure—

requested interim protection measures from the ITLOS pursuant to Article 290 UNCLOS. The ITLOS order of December 2001, after determining the *prima facie* jurisdiction of the Annex VII arbitral tribunal to decide the merits of the dispute, requested both parties to cooperate and consult regarding the emissions from the MOX plant into the Irish Sea, pending the decision on the merits by the arbitral tribunal. The arbitral tribunal suspended its proceedings in June 2003 and requested the parties to clarify whether, as claimed by the United Kingdom, the EC Court had jurisdiction to decide this dispute on the basis of the relevant EC and EURATOM rules, including UNCLOS as an integral part of the Community legal system (see Shany 2004).

6.3 The EC Court Judgement of May 2006 in the MOX Plant Dispute

In October 2003, the EU Commission started an infringement proceeding against Ireland on the ground that—as the EC had ratified and transformed UNCLOS into an integral part of the EC legal system—Ireland’s submission of the dispute to tribunals outside the Community legal order had violated the exclusive jurisdiction of the EC Court under Article 292 EC and Article 193 of the EURATOM Treaty. In its judgment of May 2006, the Court confirmed its exclusive jurisdiction on the ground that the UNCLOS provisions on the prevention of marine pollution relied on by Ireland in its dispute relating to the MOX plant “are rules which form part of the Community legal order.”⁶⁸ The Court followed from the autonomy of the Community legal system and from Article 282 UNCLOS that the system for the resolution of disputes set out in the EC Treaty must in principle take precedence over that provided for in Part XV of UNCLOS. As the dispute concerned the interpretation and application of EC law within the terms of Article 292 EC, “Articles 220 EC and 292 EC precluded Ireland from initiating proceedings before the Arbitral Tribunal with a view to resolving the dispute concerning the MOX plant.”⁶⁹ By requesting the arbitral tribunal to decide disputes concerning the interpretation and application of Community law, Ireland had violated the exclusive jurisdiction of the Court under Article 292 EC as well as the EC member states’ duties of close cooperation, prior information and loyal consultation of the competent Community institutions as prescribed in Article 10 EC.

6.4 The 2004 IJzeren Rijn Arbitration between the Netherlands and Belgium

The IJzeren Rijn arbitration under the auspices of the Permanent Court of Arbitration concerned a dispute between Belgium and the Netherlands over Belgium’s right

⁶⁸ ECJ Case C-459/2003, *Commission v. Ireland* ECR (2006) I-4635, par. 121.

⁶⁹ ECR (2006) I-4635, par. 133.

to the use and reopening of an old railway line leading through a protected natural habitat and the payment of the costs involved (see Lavranos 2006). The arbitral tribunal was requested to settle the dispute on the basis of international law, including if necessary EC law, with due respect to the obligations of these EC member states under Article 292 EC. The Tribunal agreed with the view shared by both parties that there was no dispute within the meaning of Article 292 EC because its decision on the apportionment of costs did not require any interpretation of EC law (e.g., the Council Directive on the conservation of natural habitats).

6.5 The “Solange-Method” as Reciprocal Respect for Constitutional Justice

The above-mentioned examples for competing jurisdictions for the settlement of environmental disputes among European states raise questions similar to those regarding overlapping jurisdictions for the settlement of trade disputes, human rights disputes or criminal proceedings in national and international criminal courts. The UNCLOS provisions for dispute settlement on the basis of “this Convention and other rules of international law not incompatible with this Convention” (Article 288) prompted the ITLOS to affirm *prima facie* jurisdiction in the MOX plant dispute. The Annex VII Arbitral Tribunal argued convincingly, however, that the prospect of resolving this dispute in the EC Court on the basis of EC law risked leading to conflicting decisions which, bearing in mind considerations of mutual respect and comity between judicial institutions and the explicit recognition of mutually agreed regional jurisdictions in Article 282 UNCLOS, justified suspending the arbitral proceeding and enjoining the parties to resolve the Community law issues in the institutional framework of the EC.

WTO law recognizes similar rights of WTO Members to conclude regional trade agreements with autonomous dispute settlement procedures; yet, the lack of a WTO provision corresponding to Article 282 UNCLOS, and the WTO rights to the *quasi* automatic establishment of WTO dispute settlement panels entail that WTO dispute settlement bodies must respect the right of WTO Members to receive a WTO dispute settlement ruling on the WTO obligations of members of FTAs, even if the respondent WTO Member would prefer to settle the dispute in the framework of the FTA procedures. The EC Court’s persistent refusal to decide disputes on the basis of the WTO obligations of the EC and its member states offers an additional argument for WTO dispute settlement bodies to respect the rights of WTO Members (including EC member states) to WTO dispute settlement rulings on alleged violations of WTO rights and obligations (e.g., by the EC Council’s import restrictions on bananas), notwithstanding the exclusive ECJ jurisdiction for settling disputes inside the EC over WTO law as an integral part of the Community legal system: “As long as” the EC Court continues to ignore the WTO obligations of the EC in its dispute settlement practices and offers EC member states no judicial remedy against EC majority decisions violating WTO law, WTO dispute settlement bodies may see no reason to exercise judicial self-restraint in WTO disputes over violations by the EC

of its WTO obligations vis-à-vis EC member states.⁷⁰ The lack of a treaty provision similar to Article 282 UNCLOS might also have prompted the OSPAR arbitral tribunal to decide on the claim of an alleged violation of the OSPAR Convention, without any discussion of Article 292 EC and without prejudice to future dispute settlement proceedings in the EC Court based on EC law (which, arguably, includes more comprehensive information disclosure requirements). The IJzeren Rijn arbitral tribunal examined, as requested by the parties, the legal relevance of Article 292 EC and decided the dispute without prejudice to EC law.

The “*Solange*-principle” conditions respect for competing jurisdictions on respect of constitutional principles of human rights and rule of law. It has also been applied by the EC Court itself, for instance when—in its Opinion 1/91 on the inconsistency of the EEA Draft Agreement with EC law—the EC Court found the EEA provisions for the establishment of an EEA Court to be inconsistent with the “autonomy of the Community legal order” and the “exclusive jurisdiction of the Court of Justice” (e.g., in so far as the EEA provisions did not guarantee legally binding effects of “advisory opinions” by the EEA Court on national courts in EEA member states).⁷¹ The “*Solange*-principle” can explain the jurisprudence of both the EC Court⁷² as well as the EFTA Court⁷³ that voluntarily agreed, private arbitral tribunals are not recognized as courts or tribunals of member states (within the meaning of Article 234 EC and Article 33 SCA) entitled to request preliminary rulings by the European courts. The fact that international arbitral tribunals (like the OSPAR and IJzeren Rijn arbitral tribunals mentioned above) are likewise not entitled to request preliminary rulings from the European Courts, may justify judicial self-restraint and deference to the competing jurisdiction of European courts in disputes requiring interpretation and application of European law. To the extent conflicts of jurisdiction and conflicting judgments cannot be prevented by means of exclusive jurisdictions and hierarchical rules,⁷⁴ international courts should follow the example of national civil and commercial courts and European courts and resolve conflicts through judicial cooperation and “judicial dialogues” based on principles of judicial comity and judicial protection of constitutional principles (like due process of law, *res judicata*, human rights) underlying modern international law. The horizontal cooperation among national and international courts with overlapping jurisdictions

⁷⁰ Such challenges in the WTO by EC member states of EC acts violating WTO law have never occurred so far. Most Community lawyers argue that not only from the point of view of Community law, but also “from the point of view of international law, the supremacy of Community law within the EC and its member states must be accepted” (Lavranos 2006, 10–11). Yet, it is arguable even from the point of view of Community law that the duty of loyalty (Article 10 EC) applies “as long as” the ECJ offers effective judicial remedies against obvious violations by EC institutions of their obligations (e.g., under Articles 220, 300 EC) to respect the rule of law and protect EC member states from international legal responsibility for EC majority decisions violating mixed agreements.

⁷¹ ECJ Opinion 1/91, *EEA Draft Agreement* ECR 1991 I-6079.

⁷² Case C-125/2004, *Denuit/Cordenier v. Transorient*, ECJ judgment of 27 January 2005.

⁷³ See above note 25.

⁷⁴ Cf. Lavranos 2006, 20: “[T]he key to all solutions is hierarchy.”

for the protection of constitutional rights in Europe reflects the constitutional duty of judges to protect “constitutional justice”; it should serve as a model for similar cooperation among national and international courts with overlapping jurisdictions in other field of international law,⁷⁵ notably if the intergovernmental rules protect cooperation among citizens across national frontiers, such as the settlement of transnational trade, investment and environmental disputes. Especially in those areas of intergovernmental regulation where states remain reluctant to submit to review by international courts (e.g., as in the second and third pillars of the EU Treaty), *national courts* must remain vigilant guardians so as to protect citizens and their constitutional rights from inadequate judicial remedies at the international level of multilevel governance for the collective supply of international public goods demanded by citizens.

7 Judicial Protection of “Principles of Justice” as Constitutional Limitation on Intergovernmental Power Politics

The prevailing perception of the “international law among states” as a foreign policy instrument for advancing *national* interests in an anarchic world prompts many international lawyers and diplomats to argue that effective international tribunals must remain “dependent” tribunals staffed by ad hoc judges closely controlled by governments, for example through their power of reappointment and threats of retaliation. Independent international courts are perceived with suspicion because independent judges risk allowing moral ideals and interests of third parties to influence their judgments; the domestic ideal of rule of law is seen as inappropriate for the reality of international power politics: “Dependent tribunals” are more likely to “render judgments that reflect the interests of the states at the time that they submit the dispute to the tribunal.”⁷⁶ In support of such power-oriented conceptions of international judges as agents of the governments which appoint them, reference is also made to the empirical voting patterns of ad hoc judges (e.g., in the ICJ and arbitral tribunals) who side much more often with the legal claims of the government nominating the judge than with the legal claims of the other party to the dispute (see Posner and de Figueiredo 2005). From such state-centered rather than citizen-oriented perspectives, intergovernmental trade and economic rules should be interpreted and applied as intergovernmental commitments about reciprocal market access without private rights of action (see Sykes 2005).

⁷⁵ “[I]f the *Solange*-method would be applied by all international courts and tribunals in case of jurisdictional overlap, the risk of diverging or conflicting judgments could be effectively minimized, thus reducing the danger of a fragmentation of the international legal order [. . .]. One could argue that the *Solange*-method, and for that matter judicial comity in general, is part of the legal duty of each and every court to deliver justice” (Lavranos 2008, 235).

⁷⁶ See Posner and Yoo (2005, 6), who define the function of international tribunals as providing states with neutral information about the facts and the law in a particular dispute.

Citizen-oriented constitutional approaches, by contrast, emphasize the “constitutional functions” of international law for correcting governance failures at national levels and for enabling citizens to collectively supply private and public goods that are ever more important for individual and democratic self-development in a globally interdependent world. The more citizens live and cooperate not only in local and national, but also in transnational communities (e.g., as EC citizen, migrant worker protected by ILO conventions, refugees protected by UN human rights and humanitarian assistance, researchers protected by UNESCO and WIPO conventions), the more the universal recognition of inalienable human rights calls for providing citizens with effective legal and judicial remedies across national frontiers. As empirical evidence confirms that most national parliaments no longer effectively control intergovernmental rule-making in worldwide organizations,⁷⁷ parliamentary democracy must be supplemented by more decentralized forms of participatory, rights-based democracy empowering self-interested individuals by more effective legal and judicial remedies. The ideal of “deliberative democracy”—i.e., that all rules and governance powers be justified through a fully inclusive, informed discourse among all persons affected by the rules—remains utopian in view of the rational ignorance of individuals, their limited cognitive capacities, and the inevitable “discourse failures” (e.g., due to asymmetries of power and knowledge; see Teson and Pincione 2006; Kuper 2004). Rights-based “cosmopolitan justice” and independent, impartial courts settling disputes “in conformity with principles of justice and international law” offer horizontal and vertical “checks and balances” that limit abuses of public and private power without relying on unrealistic idealization of citizens, civil society, organizations and rulers.

The *jus cogens* core of inalienable human rights, the ever increasing number of international “treaty constitutions” limiting national policy discretion by collective rule-making and international adjudication, the proliferation of and cooperation among international courts, their judicial protection of rule of law and judicial clarification of “constitutional principles” continue to transform the intergovernmental structures of international law (notably in Europe) by procedural as well as substantive “constitutional restraints.” Multilevel constitutionalism and rights-based “constitutional justice” have become a reality for ever more European citizens thanks to the multilevel cooperation of judges in European integration. Disputes among European states have become rare not only in the EC Court, the EFTA Court and in the ECtHR; they are also decreasing in worldwide courts (e.g., the ICJ) and in other dispute settlement bodies (such as the WTO). The ever closer networks of independent regulatory agencies and other multilevel governance institutions in Europe, and the rare recourse to the “horizontal” enforcement mechanisms of international law (such as inter-state sanctions) in relations among European democra-

⁷⁷ On the inadequate parliamentary control of intergovernmental rule-making in the WTO see, e.g., the following two publications by the European Parliament: *Role of Parliaments in Scrutinising and Influencing Trade Policy* (European Parliament Study December 2005, DV/603690.doc); *The Parliamentary Dimension of the WTO* (2006).

cies, confirm that “state sovereignty” is “disaggregating” in Europe.⁷⁸ Constitutional rights and principles of justice have been protected more effectively by means of the “*Solange*-method” of multilevel judicial cooperation in transnational relations among European states than at any previous time during the centuries of intergovernmental power politics depending on national majorities and interest group support for periodically elected governments.

In Europe, the “public reasoning” and multilevel cooperation of independent and impartial judges has become an important constitutional constraint on intergovernmental power politics and on one-sided governmental definitions of *opinio juris* in international law. Multilevel judicial governance has become one of the most dynamic and “principled” parts of constitutional democracy in Europe. Yet, the limited role of European courts in the second and third “pillars” of the European Union as well as the limited cooperation among European and worldwide courts (like the ICJ and the WTO’s Appellate Body) illustrate the political limits of international courts also in Europe, notably in areas of national security and foreign policy disputes over the distribution of power or the legitimacy of international law rules. Beyond Europe, international relations remain dominated by power politics, refusal by most UN member states to submit to the compulsory jurisdiction of the ICJ, insistence on state sovereignty and introverted “constitutional nationalism” impeding collective supply of global public goods.⁷⁹ Proposals for extending European “multilevel constitutionalism” to worldwide organizations (such as the UN and the WTO) are opposed by most states outside Europe (including the United States) in view of their different constitutional and democratic traditions and power-oriented foreign policies. The more intergovernmental networks and worldwide organizations evade parliamentary and democratic control, and the more legislators fail to correct the ubiquitous “market failures” and “governance failures” in international relations, the more citizens—as legal subjects of international law and “democratic principals” of government agents—have reason to appeal to the “public reasoning” of independent and impartial courts mandated to protect constitutional rights and rule of law “in conformity with principles of justice.”

If democratic institutions are perceived as instruments for protecting the constitutional rights of citizens without which individual and democratic self-development in dignity is not sustainable (e.g., due to public and private abuses of power, including majoritarian abuses of parliamentary powers), then multilevel judicial protection of fundamental freedoms of citizens can be justified as a necessary precondition for constitutional democracy in a globally integrated world. The risk of paternalist abuses of judicial powers must be countered by “deliberative democracy” and “public reasoning.” Rights-based “judicial discourses” focusing on “principles of justice” tend to be more precise and more rational than political promises to protect

⁷⁸ More generally on “disaggregated sovereignty” see Slaughter 2004, 266ff.

⁷⁹ On this “globalization paradox” (i.e., needing multilevel governance for the collective supply of international public goods, but fearing and opposing such governance) see Slaughter 2004, at 8ff. On the need for “multilevel constitutionalism” as a necessary legal framework for collective, democratic supply of international public goods see Petersmann (2006b).

vaguely defined “public interests.” Similar to European courts, national constitutional judges and international courts outside Europe increasingly argue that constitutional democracies must be premised on “active liberty”; hence, the exercise of rights to individual and democratic self-government (in citizen-driven “political markets” no less than in consumer-driven economic markets) may serve as a “source of judicial authority and an interpretative aid to more effective protection of ancient and modern liberty alike.”⁸⁰ Judicial determination of the international *opinio juris sive necessitatis* must insist today that legitimacy no longer derives from (inter)governmental *fiat*, but from democratic and judicial justification of the relevant rules as being reasonable and *just*.⁸¹ The independence, impartiality and constitutional function of judges to protect constitutional rights against abuses of power legitimize adjudication as a necessary component of constitutional democracy. Citizens must hold judges more accountable for meeting their constitutional obligation to protect “constitutional justice” in terms of justifying legal interpretations and judicial decisions in conformity with the human rights obligations of government institutions and the constitutional rights of citizens. The increasing cross-references in ECJ and EFTA judgments to their respective case-law, as well as to other European and international courts (such as the ECtHR, WTO dispute settlement rulings, the ICJ), should serve as models for cooperation also among other international courts in order to better coordinate their respective jurisprudence on the basis of common legal principles (Rosas 2006).

Civil society and their democratic representatives rightly challenge traditional conceptions of international justice shielding an authoritarian “international law among states” as being inconsistent with the universal recognition of inalienable human rights, which call for constitutional conceptions of justice as a shield of the individual and of her human rights against abuses of power. As long as world governance for the collective supply of the ever more needed “global public goods” (such as international “democratic peace,” respect for universal human rights, poverty reduction, protection of the global environment) remains so deficient as it is, legal and judicial protection of constitutional rights in transnational relations “in conformity with principles of justice and international law” remain essential for protecting human rights through pragmatic piecemeal reforms of international legal practices. It is to be welcomed that ever more international dispute settlement bodies (e.g., in the WTO and investor-state arbitration)—by admitting *amicus curiae* briefs—are willing to listen to the public reasoning of citizens, whose *opinio juris*—as the “democratic principals” of government agents—may be relevant for judicial limitations of abuses of government powers (e.g., if concession contracts with non-

⁸⁰ See US Supreme Court justice S. Breyer (2005).

⁸¹ On the diverse (e.g., rational Kantian, contractarian Rawlsian and discursive Habermasian) methodological approaches to identifying just rules see, e.g., Nino (1994, 275, 286ff). On “justice as fairness” and “first virtue of social institutions” see Rawls (1973, 3). See also Forst (2007), who infers from the Kantian idea of reason based on universalizable principles that individuals can reasonably claim moral and legal rights to participation in decision-making affecting them, as well as to receive a justification of restrictions of individual freedoms.

democratic rulers are influenced by corruption). Just as multilevel constitutionalism in Europe was rendered possible by the intergovernmental creation and judicial protection of common markets and of rights-based, transnational communities (rather than by “Wilsonian liberalism” projecting national democratic institutions to the worldwide level), so will the needed “constitutionalization” of intergovernmental power politics and “cosmopolitan peace” depend crucially on the vigilance of democratic citizens and on the wisdom and courage of judges supporting citizen-oriented reforms of international economic law and judicial protection of constitutional rights in the peaceful cooperation among citizens across national frontiers.

References

- Allan, T.R.S. 2001. *Constitutional Justice. A Liberal Theory of the Rule of Law*. Oxford: Oxford University Press.
- Baudenbacher, C. 2005. The EFTA Court Ten Years On. In *The EFTA Court. Ten Years On*. Ed. C. Baudenbacher, P. Tresselt, and T. Orlygsson, 13–51. Oxford: Hart.
- Breyer, S. 2005. *Active Liberty: Interpreting Our Democratic Constitution*. New York, N.Y.: Knopf.
- Coban, A.R. 2004. *Protection of Property Rights Within the European Convention on Human Rights*. Aldershot: Ashgate.
- Davey, W.J. 2006. Dispute Settlement in the WTO and RTAs: A Comment. In *Regional Trade Agreements and the WTO Legal System*. Ed. L. Bartels and F. Ortino, 343–57. New York, N.Y.: Oxford University Press.
- Davies, A. 2007. Connecting or Compartmentalizing the WTO and United States Legal Systems? The Role of the Charming Betsy Canon. *Journal of International Economic Law* 10: 117–49.
- de Mestral, A. 2006. NAFTA Dispute Settlement: Creative Experiment or Confusion? In *Regional Trade Agreements and the WTO Legal System*. Ed. L. Bartels and F. Ortino, 359–81. New York, N.Y.: Oxford University Press.
- Dicke, K. 2002. The Founding Function of Human Dignity in the Universal Declaration of Human Rights. In *The Concept of Human Dignity in Human Rights Discourse*. Ed. D. Kretzmer and E. Klein, 111–19. The Hague: Kluwer.
- Dugard, J. 2000. First Report on Diplomatic Protection. *International Law Commission UN Doc. A/CN.4/506*.
- Emberland, M. 2006. *The Human Rights of Companies. Exploring the Structure of ECHR Protection*. Oxford: Oxford University Press.
- Francioni, F., ed. 2007. *Access to Justice as a Human Right*. Oxford: Oxford University Press.
- Forst, R. 2007. *Das Recht auf Rechtfertigung*. Frankfurt: Suhrkamp.
- Franck, T. 1997. *Fairness in International Law and Institutions*. Oxford: Oxford University Press.
- Graver, H.P. 2005. The Effects of EFTA Court Jurisprudence on the Legal Orders of the EFTA States. In *The EFTA Court. Ten Years On*. Ed. C. Baudenbacher, P. Tresselt, and T. Orlygsson, 79–99. Oxford: Hart.
- Guarnieri, C., and P. Pederzoli. 2002. *The Power of Judges*. Oxford: Oxford University Press.
- Hamilton, A. 1961. The Judiciary Department, The Federalist Papers No. 78. In A. Hamilton, J. Madison and J. Jay, *The Federalist Papers*, 521–30. Middletown, Conn: Wesleyan University Press. (1st ed. 1789.)
- Kuijper, P.J. 2005. WTO Law in the European Court of Justice. *Common Market Law Review* 5: 1313–55.
- Kuper, A. 2004. *Democracy Beyond Borders. Justice and Representation in Global Institutions*. Oxford: Oxford University Press.

- Kwak, K., and G. Marceau. 2006. Overlaps and Conflicts of Jurisdiction between the WTO and Regional Trade Agreements. In *Regional Trade Agreements and the WTO Legal System*. Ed. L. Bartels and F. Ortino, 465–85. New York, N.Y.: Oxford University Press.
- Lavranos, N. 2006. The MOX Plant and IJzeren Rijn Disputes: Which Court is the Supreme Arbitrator? *Leiden Journal of International Law* 19: 1–24.
- Lavranos, N. 2008. Towards a *Solange*-Method between International Courts and Tribunals? In *The Shifting Allocation of Authority in International Law*. Ed. T. Broude and Y. Shany, 217–35. Oxford: Hart.
- Mähner, T. 2005. *Der Europäische Gerichtshof als Gericht*. Berlin: Duncker & Humblot.
- Mayer, F.C. 2006. The European Constitution and the Courts. In *Principles of European Constitutional Law*. Ed. A. von Bogdandy and J. Bast, 281–334. Oxford: Hart.
- McDorman, T.L. 2004. Access to Information under Article 9 OSPAR Convention (Ireland v. UK), Final Award. *American Journal of International Law* 2: 330–38.
- Montesquieu, C.d.S.d. 1950. De l’Esprit des Loix. In *Œuvres de Monsieur De Montesquieu*. Ed. M.A. Masson. Paris: Garnier. (1st ed. 1748.)
- Nino, C.S. 1994. Can there be Law-abiding Judges? In *1789 et l’invention de la constitution*. Ed. M. Troper and L. Jaume, 275–94. Paris: Bruylant.
- Paulsson, J. 2006. *Denial of Justice in International Law*. Cambridge: Cambridge University Press.
- Pescatore, P. 1983. The Doctrine of Direct Effect. *European Law Review* 8: 155–77.
- Petersmann, E.U. 1997. *The GATT/WTO Dispute Settlement System*. The Hague: Kluwer.
- Petersmann, E.U. 2002. Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston. *European Journal of International Law* 4: 845–51.
- Petersmann, E.U. 2005. Human Rights and International Trade Law: Defining and Connecting the Two Fields. In *Human Rights and International Trade*. Ed. T. Cottier, J. Pauwelyn, and E. Burgi Bonanomi, 29–94. Oxford: Oxford University Press.
- Petersmann, E.U. 2006a. Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution. In *International Trade and Human Rights*. Ed. F.M. Abbott, C. Breining-Kaufmann and T. Cottier, 29–67. Ann Arbor, Mich.: University of Michigan Press.
- Petersmann, E.U. 2006b. Multilevel Trade Governance Requires Multilevel Constitutionalism. In *Constitutionalism, Multilevel Trade Governance and Social Regulation*. Ed. C. Joerges and E.U. Petersmann, 5–57. Oxford: Hart.
- Posner, E., and F.P. de Figueiredo. 2005. Is the International Court of Justice Politically Biased? *Journal of Legal Studies* 34: 599–630.
- Posner, E., and J.C. Yoo. 2005. Judicial Independence in International Tribunals. *California Law Review* 93: 1–74.
- Rawls, J. 1973. *A Theory of Justice*. Oxford: Oxford University Press.
- Rawls, J. 1993. *Political Liberalism*. New York, N.Y.: Columbia University Press.
- Rawls, J. 1999. *The Law of Peoples*. Cambridge, Mass.: Harvard University Press.
- Restani, J.A., and I. Bloom. 2001. Interpreting International Trade Statutes: Is The Charming Betsy Sinking? *Fordham International Law Journal* 5: 1533–47.
- Rosas, A. 2005. Fundamental Rights in the Luxembourg and Strasbourg Courts. In *The EFTA Court. Ten Years On*. Ed. C. Baudenbacher, P. Tresselt, and T. Orlygsson, 163–75. Oxford: Hart.
- Rosas, A. 2006. With a Little Help from My Friends: International Case-Law as a Source of Reference for the EU Courts. In *The Global Community Yearbook of International Law and Jurisprudence 2005*. Ed. G. Ziccardi Capaldo, vol. 1, 201–30. Dobbs Ferry, N.Y.: Oceana.
- Sajo, A., ed. 2004. *Judicial Integrity*. Leiden: Brill Academic Publishers.
- Schokkenbrock, J. 1998. The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights. *Human Rights Law Journal* 19: 30–6.
- Shany, Y. 2004. The First MOX Plant Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures. *Leiden Journal of International Law* 17: 815–28.

- Shelton, D. 2005. *Remedies in International Human Rights Law*. 2nd ed. Oxford: Oxford University Press.
- Slaughter, A.M. 2004. *A New World Order*. Princeton, NJ: Princeton University Press.
- Skouris, V. 2005. The ECJ and the EFTA Court under the EEA Agreement: A Paradigm for International Cooperation between Judicial Institutions. In *The EFTA Court. Ten Years On*. Ed. C. Baudenbacher, P. Tresselt, and T. Orlygsson, 123–29. Oxford: Hart.
- Stone Sweet, A. 2000. *Governing with Judges. Constitutional Politics in Europe*. Oxford: Oxford University Press.
- Stone Sweet, A. 2004. *The Judicial Construction of Europe*. Oxford: Oxford University Press.
- Sykes, A.O. 2005. Public versus Private Enforcement of International Economic Law: Standing and Remedy. *Journal of Legal Studies* 34: 631–66.
- Teson, F., and G. Pincione. 2006. *Rational Choice and Democratic Deliberation: A Theory of Discourse Failure*. Cambridge: Cambridge University Press.
- Wildhaber, L. 2002. A Constitutional Future for the European Court of Human Rights? *Human Rights Law Journal* 23: 161–65.
- Zurn, C.F. 2007. *Deliberative Democracy and the Institutions of Judicial Review*. New York, N.Y.: Cambridge University Press.

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