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Abstract

In law, the category of reasonableness, when used in a "strong sense", is inherently lied 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 to the scrutiny of restrictions of constitutional rights carries certain disadvantages because of an unfortunate alignment of the judicial role with the role of legislator, but it 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. In turn in political philosophy the notion of reasonableness applies to the determination of the standards of justifications 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. 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. 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 to liberal, egalitarian and consensus-oriented values.

Keywords

Legitimacy - fundamental (human) rights - judicial review.

"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 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 two 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 paper 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: Art. 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 Art. 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 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.

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[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.

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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 Art. 36) is that any limits on constitutional rights must be "reasonable and justifiable in an open and democratic society".

The second possible taxonomy is best 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, however, in brief, 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 in *Wednesbury* based on which a court may correct an administrative decision for its unreasonableness.

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[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.

Also, the Italian administrative law knows the category of "*manifesta irragionevolezza*",[6] 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 one: 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 b 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 law (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, with the proportionality analysis. Perhaps the best-known and the most influential example of such analysis is a doctrine of the German *Bundesverfassungsgerich*, 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:

[6] See Giacinto della Cananea, "Reasonableness in Administrative and Public Law", unpublished paper presented to the conference "Reasonableness in Law", European University Institute, Florence, 16 November 2007.

> "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*".[7]

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 constitutionality 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 (perhaps, a sort of "ideal model" in Max Weber's meaning) 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 purpose 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),[8] 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 our 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

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7 Paul Craig, *EU Administrative Law* (OUP 2006) at 674, emphasis added.

8 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", id. at 678.

(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 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 one: 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 that 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")[9] 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 correspond to a "pressing

[9] 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 No. 4 (liberty of movement within a state); and Article 1 of the Protocol No. 7 (right of an alien not to be expelled before certain conditions are met).

social need" and be "proportionate to the legitimate aim pursued".[10] As one commentator has noted, "from 'necessity' to proportionality is but a small step",[11] 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".[12] 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*".[13]

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

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[10] See e.g. Goodwin v. United Kingdom 22 E.C.H.R. 123, 143-4 (1996); for discussion see Alastair Mowbray, *Cases and Materials on the European Convention of Human Rights* (Butterworths, London 2001) at 411-2, 448.

[11] Marc-Andre Eissen, quoted by Mowbray, id. at 413.

[12] See P van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3rd ed. (Kluwer Law International: The Hague, 1998) at 81.

[13] Constitutional Court Case No. CCT/3/94 (6-6-1995), para. 104.

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 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 very 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.[14]

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 that 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

[14] See generally Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press 1982) at 89-112.

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.[15] 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.[16]

Proportionality analysis leads to different consequences. But before I give account if 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

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[15] Similarly Alec Stone Sweet, "Proportionality, Balancing, and Global Constitutionalism", unpublished paper presented to the conference „Reasonableness in Law", European University Institute, Florence, 16 November 2007.

[16] Id.

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 in compatible 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, 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 availability 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 has 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 to 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".[17] 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 difference may make all the difference. So there is a consolation for the losing party: it

[17] Stone Sweet, op.cit.

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 its 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 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.[18] To say it very briefly, Rawls's "reasonableness": is about those moral capacities which allow us it 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",[19] "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 whish 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'.[20] 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

[18] John Rawls, *Political Liberalism* (Columbia University Press: New York 1993) at 48-54.

[19] Id. at 49.

[20] Id. 137.

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: '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'.[21] 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?"[22]

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 from 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 dangers.

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.

[21] Jeremy Waldron, *Liberal Rights* (Cambridge University Press: New York 1993) at p.44, emphases in the original.

[22] Donald Dworkin, *Justice in Robes* (Cambridge Mass, Harvard University Press, 2005) at p.252.

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 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 "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 borders on the absurd. Rather what matters is that we pout 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 a 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 extreme: 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 if 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 justifies 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.

Conclusions

In the Introduction to this paper 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 paper 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 lied 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 the political philosophy the notion of reasonableness registers primarily in the liberal theory and applies to the determination of the standards of justifications 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.[23] Such justifications can be seen to reflect the reciprocity principle which can be seen as a version (albeit a weak one) of hypothetical social contract: it demands that only such rationales be provided for authoritative directives which can 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

[23] 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 Wojciech Sadurski, “Law’s Legitimacy and ‘Democracy-Plus’”, *Oxford Journal of Legal Studies*, 26 (2006): 377-409.

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 paper 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.

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