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Editors

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Reasonableness and Law

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REASONABLENESS AND LAW

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Contents

Contributors ix

Introduction xi

Part I Legal, Political and Constitutional Theory

a. The Reasonableness of the Law

The Reasonableness of Law 5
Robert Alexy

A Sufficientist Approach to Reasonableness in Legal Decision-Making and Judicial Review 17
Giovanni Sartor

Reasonableness, Common Sense, and Science 69
Alberto Artosi

b. The Moral and Political Dimension of Reasonableness

Reciprocity, Balancing and Proportionality: Rawls and Habermas on Moral and Political Reasonableness 81
Giorgio Bongiovanni and Chiara Valentini

Law, Liberty and Reason 109
Philip Pettit

Reasonableness and Value Pluralism in Law and Politics 129
Wojciech Sadurski

Global Legitimation and Reasonableness 147
Sebastiano Maffettone

Philip Pettit's *Law, Liberty and Reason*: Republican Freedom and Criminal Justice 163
Luca Baccelli

c. Reasonableness in Constitutional Adjudication

Proportionality, Judicial Review, and Global Constitutionalism 173
Alec Stone Sweet and Jud Mathews

Constitutional Adjudication and the Principle of Reasonableness 215
Andrea Morrone

Some Critical Thoughts on Proportionality 243
Iddo Porat

Part II Private, Public and International Law

a. Reasonableness in Private Law

Reasonable Persons in Private Law 255
Arthur Ripstein

The Reasonable Consumer under European and Italian Regulations on Unfair Business-to-Consumer Commercial Practices 283
Chiara Alvisi

b. Reasonableness in Administrative and Public Law

Reasonableness in Administrative Law 295
Giacinto della Cananea

Reasonableness in Administrative Law: A Comparative Reflection on Functional Equivalence 311
Michal Bobek

c. Reasonableness in Biolaw

Reasonableness, Bioethics, and Biolaw 329
Carla Faralli

Reasonableness in Biolaw: Is it Necessary? 337
Amedeo Santosuosso

Reasonableness and Biolaw 351
Stephanie Hennette-Vauchez

Reasonableness in Biolaw: The Criminal Law Perspective 363
Stefano Canestrari and Francesca Faenza

d. Reasonableness in EU and International Law

The Principle of Reasonableness in European Union Law 383
Adelina Adinolfi

An Evolving "Rule of Reason" in the European Market 405
Lucia Serena Rossi and Stephen J. Curzon

From State-Centered towards Constitutional "Public Reason" in Modern International Economic Law 421
Ernst-Ulrich Petersmann

Index of Names 459

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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 in 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