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Reasonableness and Law

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The Reasonableness of Law

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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.

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