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Reasonableness and Law

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Reasonableness and Value Pluralism in Law and Politics

Wojciech Sadurski

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

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

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

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

1 Reasonableness in Law

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

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

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

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

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

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

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

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

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

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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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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