Giorgio Bongiovanni
Giovanni Sartor
Chiara Valentini
Editors

Law and Philosophy Library 86

Reasonableness and Law

Springer

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

References

Braithwaite, J., and P. Pettit. 1990. *Not Just Deserts. A Republican Theory of Criminal Justice*. Oxford: Clarendon.

Brennan, G., and P. Pettit. 2004. *The Economy of Esteem. An Essay on Civil and Political Society*, Oxford: Oxford University Press.

Facchi, A. 2001. *I diritti nell'Europa multiculturale*. Rome–Bari: Laterza.

Ferrajoli, L. 1989. *Diritto e ragione. Teoria del garantismo penale*. Rome–Bari: Laterza.

Ferrajoli, L. 2007. *Principia iuris. Teoria del diritto e della democrazia*. Rome–Bari: Laterza.

Ferrarese, M.R. 2000. *Le istituzioni della globalizzazione. Diritto e diritti nella società transnazionale*. Bologna: Il Mulino.

Ferrarese, M.R. 2002. *Il diritto al presente. Globalizzazione e tempo delle istituzioni*. Bologna: Il Mulino.

Henham, R. 2003. The Philosophical Foundations of International Sentencing. *Journal of International Criminal Justice* 1: 64–85.

Lollini, A. 2003. Le processus de judiciarisation de la résolution des conflits: les alternatives. In *La justice pénale internationale dans les décisions des TPI ad hoc*. Ed. E. Fronza and S. Manacorda. Milan: Giuffré.

Lollini, A. 2005. *Costituzionalismo e giustizia di transizione. Il ruolo costituente della Commissione sudafricana verità e riconciliazione*. Bologna: il Mulino.

Pettit, P. 1997a. *Republicanism. A Theory of Freedom and Government*. Oxford: Clarendon Press.

Pettit, P. 1997b. Republican Theory and Criminal Punishment. *Utilitas* 9: 59–79.

Pettit, P. 2002. Is Criminal Justice Politically Feasible. *Buffalo Criminal Law Review* 5: 427–50.

Re, L. 2006. *Carcere e globalizzazione. Il boom penitenziario negli Stati Uniti e in Europa*. Rome–Bari: Laterza.

Zolo, D. 2006. *La giustizia dei vincitori. Da Norimberga a Baghdad*. Rome–Bari: Laterza.

Part Ic
Reasonableness in Constitutional Adjudication

Proportionality, Judicial Review, and Global Constitutionalism

Alec Stone Sweet and Jud Mathews

1 Introduction

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

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

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

A. Stone Sweet (✉)
Yale Law School, Yale University, New Haven, CT, USA

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

G. Bongiovanni et al. (eds.), *Reasonableness and Law*, Law and Philosophy Library 86,
DOI 10.1007/978-1-4020-8500-0_9,

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

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

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

[3] These two tasks may be distinguished as separate tests.

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

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

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

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

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

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

---

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

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

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

2 Theory

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

2.1 Two-Against-One

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

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

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

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

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

2.2 Courts and Judicial Lawmaking

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

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

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

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

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

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

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

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

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

2.3 Judicial Supremacy: The "New Constitutionalism" and the Trustee Court

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

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

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

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

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

2.4 Balancing, Argumentation, Proportionality

One of our claims is that PA has provided an important *doctrinal* underpinning[13] for the rights-based expansion of judicial authority across the globe. In the rest of

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

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

[12] For an extended discussion, see Stone Sweet 2008.

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

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

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

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

2.4.1 Balancing

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

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

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

---

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