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# Reasonableness and Law

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normative consensus among an elite group, whose claim to authority and influence is knowledge-based. Judges and law professors are such a group, and those committed to PA are relatively coherent and self-regarding.

Although one finds support for the basic claims made in Section 2, it is also clear that the kind of simple theory we have offered is neither meant or equipped to deal with much of the variance in how different courts actually use PA, on the ground as it were. The diffusion of PA adds layers of complexity to any truly comparative analysis, and some of this complexity will always escape attempts to build more general theory. Thus, though we find important similarities across cases, at least at some moderately high level of abstraction, we also confront important differences in how judges use PA, across time and jurisdiction. Most important, even a cursory survey of practice will show that, in every system, judges shape PA to their own purposes, with use, and how they do so may change over time.

One source of change will be exogenous: new issues and changing circumstances will lead judges to use PA differently. In this mode of adjudication, it is context, not the law per se, that varies. Change may also occur endogenously. A court, in processing a stream of cases in the same policy domain, may choose to accord more deference to legislative choices, over time, to the extent that lawmakers demonstrate that they are taking seriously proportionality requirements when they legislate. This latter dynamic, found wherever proportionality review is minimally effective, constitutes a mechanism of institutionalization (positive feedback). On the other hand, a court is likely to be stricter on necessity when PA is less entrenched as a general mode of policymaking, not least, because the Court may see the need to "teach" the basics of PA to lawmakers. Further, a point that has generated a great deal of controversy in some jurisdictions (notably Canada and the ECHR), courts may expand and contract the discretion they grant to lawmakers, at the suitability or necessity stage, when it is not confident that it has anything to teach them. This flexibility, which we count as a virtue rather than a vice of PA, is never immune from attack by those who believe that a more determinate, more principled, approach to rights adjudication is possible, or that PA is just a fancy way to package judicial policy making.

Variance in how courts conceive the nature and purpose of each stage of PA may also be meaningful. In Canada and the EC/EU, most laws that fail proportionality testing do so at the necessity phase, and judges rarely move to the "balancing in the strict sense" stage—although there is evidence that this reticence might be changing. Judges may be acting on the view that post-LRM balancing exposes them too much as balancers, that is, as lawmakers. Like their counterparts on the AB of the WTO and on the Strasbourg Court, Canadian judges often engage in (what the German and Israeli Courts would consider to be) *de facto* "balancing in the strict sense," as part of suitability or necessity analysis. The American Supreme Court may be doing the same when it examines a rights claim in light of the government's "compelling interest," in strict scrutiny analysis. In contrast, the German and Israeli Courts move more systematically to the final, balancing stage, especially when it comes to the most politically controversial issues. Compared with the Canadian Court, the German Court seems to calculate the legitimacy costs of doing so differently (see Grimm 2007, 393–95). It uses the first two stages to pay its respects, first, to the

importance of the policy consideration generally and, second, to the legislator's own deliberations on the proportionality of the law. If and how such differences actually matter to outcomes (right protection, policymaking, the relationship between judges and legislators) remains a mystery, but is worthy of exploration.

Last, although PA today dominates other approaches to rights adjudication today, courts could have chosen to proceed otherwise. Judges could have developed and maintained strong deference doctrines, assuring that "judicial" authority to supervise "political" authority—when it comes to balancing situations—would be exercised only at the margins or not at all. But that is not what they have done. Traditional reasonableness postures remain defensible (Waldron 2004), but not from the standpoint of contemporary, rights-oriented constitutionalism.

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# Constitutional Adjudication and the Principle of Reasonableness

**Andrea Morrone**

## 1 Introduction

There is a very close relationship between the Italian Constitutional Court and the principle of reasonableness.[1] The principle of reasonableness expresses the specific character of constitutional adjudication.[2] All types of review carried out by the Constitutional Court (i.e., the review of statute law and the resolution of disputes between branches of government and between regional and central bodies) imply a review of reasonableness. Reasonableness, when applied to disputes between states, regions, and local governments, translates into the well-known caselaw on *interests*,[3] and when it is applied to disputes between branches of government, it translates into the principle of *loyal cooperation*.[4] Moreover, reasonableness is also invoked in judgments on the admissibility of abrogative referendums, which is the least concrete of all types of review. Reasonableness is applied to such referendums through the well-known criterion of homogeneity of the referendum request, as well as through that of proportionality[5] and that of balancing of constitutional interests.[6]

Limiting analysis to judicial review of statute law, reasonableness is normally applied to three types of judgments aimed at evaluating the law's compliance with the Constitution: reasonableness as equality, reasonableness as rationality, and reasonableness as applied to the balancing of interests. These three merely descriptive

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[1] This paper is an update of a wider study carried out in Morrone (2001a).
[2] For a comparative analysis see Cerri (1994).
[3] Constitutional Court, Decisions 177/1988 and 303/2003.
[4] Constitutional Court, Decisions 379/1992 and 31/2006.
[5] Constitutional Court, Decisions 30/1997; 35, 36, and 37 of 2000; and 41, 42, 43, and 44 of 2003.
[6] Constitutional Court, Decisions 26/1981; 35/1997; 18/1997; 42/2000; and 45, 46, 47, 48, and 49 of 2005.

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models will be used heuristically in this paper, so as to make it possible to fully understand the meaning of the principle of reasonableness.[7]

## 2 Reasonableness as Reasonable Equality

### *2.1 Judicial Review Based on the Principle of Equality*

It is empirically evident that the most common application of the principle of reasonableness is judicial review based on the formal principle of equality, as set forth in Article 3(1) of the Italian Constitution. However, not all judgments on equality necessarily coincide with reasonableness understood as reasonable equality.

It is common knowledge that equality presupposes a relationship. This is because it implies a comparison between at least two elements so as to establish a relationship. Simplifying to the extreme, there are only three possibilities from a logical standpoint: *identity, similarity*, and *difference*. One will have *identity* when there is a situation of absolute equality between all parties involved (A=A, B=B, etc.). One will have *similarity* when equality is limited to certain elements. Finally, one will have *difference* when there is a total lack of equality or similarity between the two parties, i.e., they have nothing in common (A≠B, B≠C, etc.).

Equality from a legal standpoint refers to *identity* and *similarity*. However, due to the fact that absolute equality does not exist (at least not in the natural world) it would not make sense for a legal system to provide for it. Therefore, in legal terms, one has equality when there is substantial coincidence between the elements being compared. This leads one to a "relative" notion of both equality and inequality. Equality is defined as similarity to something else, and inequality as difference from something else. This notion of equality has an effect on judgment. In fact, the decision is greatly influenced by the relevance attributed to the constitutive characteristics of the two elements being compared. If there is substantial coincidence, then the two elements will be treated as equal. If there is substantial difference, then the two elements will be distinguished.

### *2.2 Reasonable Equality*

It is easy to understand why "reasonableness" is rooted in a judgment concerned with equality. In fact, "one is equal to someone or something *because of some other thing* (i.e., the element that makes the two terms equal)," thus making the identification and the evaluation of this element decisive.

The Italian Constitutional Court has used this sort of legal reasoning from the outset. The court has never limited its review to the mere scrutiny of the constitutive

[7] For a more comprehensive approach, see Scaccia (2000), D'Andrea (2005), and Morrone (2001a).

characteristics of the two elements so as to verify the correspondence between the factual situation and the rules laid down by the lawmaker (i.e., a judgment about equality *stricto sensu*). On the contrary, it analyses the decision-making process, and in particular the discretionary choices made by the lawmaker. It does this in order to evaluate whether the choice so made by the lawmaker in treating the two situations equally or differently is reasonable or not.

In one of its decisions, the court clearly states that "the principle of equality is infringed as well when the law, without reason, treats citizens in the same situation differently."[8]

Usually, judicial review has a binary structure, that is, it involves a comparison between the statute under scrutiny and a constitutional parameter. The reasonable-equality test has, by contrast, a triadic structure. The triad is composed of (*i*) the provision under scrutiny; (*ii*) a *tertium comparationis*, i.e., the provision used as a term of comparison; and (*iii*) the principle of equality, i.e., the constitutional parameter. Even so, the "triad" is just a *fictio iuris*, i.e., a legal fiction, a scheme that, in itself, does not allow any decision to be delivered in terms of equal or differential treatment. In order to apply the reasonable-equality test and to justify the lawmaker's abstract classification, a judgment on the "relevant point of view" adopted by the lawmaker is required. A few common elements are not sufficient to justify equal treatment under the law. Equal treatment needs to be based on the ground of an adequate element. The "relevant point of view" is a hypostasis, just as the relation between the two terms is a hypostatic abstraction. The two situations are not the same, but through the "relevant point of view" they are treated as if they were.

In Decision 1009/1988, the Constitutional Court clearly stated the following: "The principle of equality contained in Article 3 of the Constitution is infringed not only when identical factual situations are differently treated from a legal standpoint, but also when the different treatment is irrational and in contrast to the rules of practical discourse, because the two factual situations are different, but reasonably similar."

## *2.3 Case (a): Putting What Is Equal on a Par: The Tertium Comparationis and the Extension of a General Rule*

The reasonable-equality test is used in particular in cases of arbitrary differentiation of equal situations. In Decision 10/1980, the Italian Constitutional Court outlined the essential components of this test: "Constitutional review of the law based on the principle of equality is carried out in various areas of the legal system and follows different models, but it always requires a comparison. The provision under review must be compared with another provision (taking into account even defective provisions or *lacunae legis*) in order to decide whether the rules adopted by the lawmaker are so unreasonable as to be declared unconstitutional."

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[8] Constitutional Court, Decision 15/1960.

The reasonable-equality test as outlined in the above-mentioned case was taken as a model by the leading Italian scholar Livio Paladin (1965, 169ff.; 1984). The test is essentially aimed at comparing situations regulated by a special provision with those regulated by a general rule, in order to determine the reasonableness of the *ratio derogandi*. It should be noted that referring to general rules does not mean completely excluding special provisions but rather means identifying a general rule considering the legal context of its application. As a consequence, "to affirm that the principle of equality is respected in its logical terms makes it necessary to conduct the comparison in such a way as to put on a par the discriminatory provision with the rule to be applied."[9]

An analysis of the Italian Constitutional Court's caselaw brings to light the steps involved in the test and the different types of cases in which a general rule has been extended because the rule had been unreasonably made subject to derogation: in order to evaluate whether or not treatment is equal on the basis of a "relevant point of view," it is important to verify (*i*) the existence of a pertinent *tertium comparationis* and (*ii*) the suitability of the rule that will be taken as a term of comparison between the two elements.[10]

The *tertium comparationis* will generally be specified by the judge *a quo*, but it can also be specified through the Constitutional Court's interpretation, which can correct, integrate, or even replace the judge's a quo reference.[11] The *tertium comparationis* must be a rule (i.e., a provision that is part of the legal system and has legal effects, or else a "normative situation," meaning a situation that only excludes such facts as are totally independent of any legal provision).[12] Moreover, the *tertium comparationis* must be unambiguous, with regard to both its abstract meaning and its concrete application. Otherwise, the decision that follows would be ambiguous.[13] Finally, the *tertium comparationis* must be a law in force; in other words, the court cannot use repealed provisions or, more in general, provisions referring to normative contexts that have different *ratione temporis*.[14]

The *tertium comparationis* is extended when the differential legal treatment is not sufficiently justified. Despite the heterogeneity of the caselaw, the "relevant point of view" appears to be crucial for the court's final ruling.[15] For example, the Constitutional Court declared a Lombardy Region law unconstitutional because it provided free transport for people with total disability, but on the condition that they

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[9] Constitutional Court, Decisions 220/1982, 46/1983, 237/1984, and 282/1987.

[10] Constitutional Court, Decisions 217/1996, 79/1992, and 217/1997.

[11] The Constitutional Court's caselaw also presents significant variations. Compare, for example, Decisions 212 /1985 and 214/1996.

[12] Constitutional Court, Decisions 139/1984, 167/1984, 216/1997, and 403/1991. On the irrelevance of de facto disparity, see Constitutional Court, Decision 417/1996.

[13] Constitutional Court, Decisions 453/1992 and 119/1997.

[14] Constitutional Court, Decisions 353/1994 and 259/2002 and Ordinance 46/1996. There are several exceptions: for example, Constitutional Court, Decisions 37/1977, 178/1987, and 185/1995.

[15] Constitutional Court, Decisions 81/2006, 433/2005, 438/2005, 444/2005, and 493/2002. Other cases uphold, by contrast, a differential treatment under the law because it is found to be reasonable: see Constitutional Court, Decisions 442/2005, 82/2003, 89/2003, 334/2002, and 71/2003.

resided in Italy *and* were Italian citizens. The judges found the provision unconstitutional because they considered the law's purpose (i.e., "solidarity") a "relevant point of view": they did not, by contrast, take Italian citizenship into account.[16] In particular, the court did not recognize Lombardy Region's argument that citizenship, like residence, can be a precondition on which basis to provide a public service. In fact, the court continued, residence "appears a reasonable criterion for granting the benefit of the service" in relation to a public service provided by the region. "Citizenship, by contrast, represents a further condition, one that is incoherent with a hypothetical special status constituting a social measure in favour of people with 100% disability." It is thus "arbitrary to differentiate the application of the provision under discussion by distinguishing Italian citizens from aliens—EU nationals or non-EU nationals—or from stateless people. In fact, there is no reasonable correlation between the positive condition for entitlement to the beneficial treatment (citizenship) and the other specific requirements (residence and 100% disability) that define the law's *ratio* and function."

## *2.4 Case (b): Differentiating What Is Different*

The reasonable-equality test does not only have the function of putting on a par what had been unreasonably differentiated. It is used in the first place in cases where "situations that are different are arbitrarily equally treated." What is unreasonable in such circumstances, and hence unconstitutional, is not the different treatment of like situations but rather an equal treatment of situations that should, from a constitutional point of view, be differently treated. The leading case here is Decision 21/1961, which repealed the rule of *solve et repete*. This is the rule on which basis a claim against an allegedly unjust fiscal investigation can be filed only after payment of what is due. The Court found the law unconstitutional because the lawmaker unreasonably treats equally different types of taxpayers: richer taxpayers, who can pay first (*solvere*) and then file a claim (*repetere*), are treated under the law in the same way as poorer taxpayers, who can find themselves in financial difficulties upon paying what is due and could therefore find it impossible to seek justice. A similar example is that of career mobility, and in particular of access to lead positions in the fire-fighting service.[17] The law required a minimum height for all candidates, men and women alike, as a condition to cover the lead position. This law was found to be unreasonable because it was based on an incorrect empirical assumption that the average height of men and women is the same. The court thus struck down the law because, in establishing conditions for taking part in the selection process, it did not differentiate between men and women with regard to minimum height.[18]

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[16] Constitutional Court, Decision 432/2005.
[17] Constitutional Court, Decision 163/1993.
[18] See also Constitutional Court, Decision 104 /2003.

## 2.5 Case (c): Extension of a Derogating Provision

Second, reasonable equality is used in cases that can be defined as an "extension of a special or derogating provision." This is a variation on the main model, the model on which the principle of equality is a means for reviewing statutory classifications. As a result, the model should only be used to bring a certain situation under a general rule when the law has, without any justified reason, regulated the situation in a derogative way. In other words, even when the principle of equality is inflected as a principle of reasonableness, it is used to make sure that similar situations are regulated in the same way, i.e., under the terms of a general law.

The case dealt with in this section is the exact opposite: we have here not a general provision that broadens its scope as a consequence of a derogating rule being declared unconstitutional but, conversely, a derogating rule that broadens its scope as a consequence of a general rule being declared unconstitutional. In other words, the derogating rule is applied to all those situations that had unreasonably come under the general rule. It should be underscored that the reasonableness test applied to a derogating or special provision is not aimed at extending the *ius singulare* to all the cases in life that come under the scope of the general rule (such an extension has been excluded by the Constitutional Court).[19] The reasonableness test is aimed, on the contrary, at determining whether the special rule's *ratio derogandi* is such as to extend the rule's own application to other situations. The most emblematic example of this reasoning is the caselaw on the minimum pension.[20] The Constitutional Court has progressively extended the derogating rule to the general pension law so as to apply the rule to situations that the lawmaker had previously excluded. As a result, on the basis of the principle of reasonableness, the court has turned an exception into a general rule.

## 2.6 Case (d): The Unreasonable Tertium Comparationis

The reasoning described in the last section tends to overcome the traditional model based on comparing different rules. It also tends to overlap with the "material" review of the law, as happens when special provisions can be applied to individuals originally excluded. Constitutional caselaw, however, also has a more "extreme" case, which is when the constitutionality of the term of comparison is questioned. This is defined as the "unreasonable *tertium comparationis*." The review thus aims at eliminating the unjustified privilege granted by a law used as a term of comparison in a judgment on an unreasonably discriminatory rule.[21] As a result, the *tertium*

[19] Constitutional Court, Decision 298/1994; see also Decisions 162/1981, 2/1982, 35/1986, 132/1986, 508/1988, 8/1996, and 344/1999.

[20] Constitutional Court, Decisions 230/1974, 263/1976, 34/1981, 102/1982, 503/1988, and 104/1996.

[21] Constitutional Court, Decisions 421/1995, 219/1995, and 62/1994 and Ordinance 294/1993; Constitutional Court, Decision 289/1994 and Ordinance 136/1982; Constitutional Court, Decision

*comparationis* is repealed and the application of the law originally questioned by the judge *a quo* is extended. It is therefore evident that the principle of equality is not used in this case to put different situations on a par (given that the law is general) but that, on the contrary, it tends to level down protection.

Without including the case of intrinsic lack of reasonableness of the law that is scrutinised without using a *tertium comparationis* (Section 3 below), the unreasonable *tertium comparationis* test works in a very different way with respect to the traditional model of judicial review. Conventionally, the reasonableness test can only be a judgment on equality carried out on the basis of a triadic scheme that brings into comparison a general provision, a derogating rule, and a *tertium comparationis* (which has to be a legal provision, and necessarily a general one). Otherwise, the judgment cannot be considered judicial review. In other words, if the reasonableness test is not based on a triadic scheme as per Article 3(1) of the Italian Constitution, it becomes a test by which to judge whether a law is fair, which is somewhat problematic.[22]

This analysis shows evident limits in light of the developments in the Constitutional Court's caselaw. In fact, reasonableness has taken on the traits of a constitutional principle and also of an autonomous parameter for judicial review. Reasonableness as applied in the conventional judgment on equality only involves one aspect of the content of Article 3 of the Italian Constitution, i.e., equality *of* relationships or legal classifications in the context of the legal system. The reasonableness-equality test, by contrast, also involves equality *in* relationships, an equality related more to the *individual situations* underlying each law than to the law itself. Similarly to the principle of substantive equality (Article 3(2) of the Italian Constitution), equality *in* relationships implies not only equal treatment but also the promotion of equality through reasonable legal discrimination. In a nutshell, reasonableness is a correction of equality and is aimed not only at equal freedom but also at equal rights.[23]

## 3 Reasonableness as Rationality

### *3.1 Reasonableness and Coherence of the Legal System*

Reasonableness and equality were empirically separated from each other when the Constitutional Court started declaring laws unconstitutional not by comparing them with other provisions, but simply by judging them as inherently unreasonable. The first official signal of this new course came with the annual report issued in 1987 by Saja, who was then serving as president of the Constitutional Court. In this report

128/1983 and Ordinance 95/1980; Constitutional Court, Decision 20/1982 and Ordinance 230/1975; Constitutional Court, Decision 179/1976 and Ordinance 100/1970; Constitutional Court, Decision 190/1970.

[22] On which point, see Paladin (1965), who is influenced by Esposito (1954).

[23] Constitutional Court, Decision 50/2006.