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Law and Philosophy Library 86

Reasonableness and Law

Springer

when restricted to "clarifying points of contention and agreement," hopefully with the effect of later "facilitating the processes of political negotiation" (see Trotter 2006, 247).

4 Reasonableness, Law and Ethics

Maybe the contemporary interest legal theory is paying to concepts such as "reasonableness" is only an additional sign of how penetrated by ethical conceptions contemporary legal theory is. Because there is another possible theoretical explanation for evaluative usages of the concept of reasonableness that has not been accounted for hereabove. It may well be, indeed, that those who so refer to the concept do pre-suppose that there is a causal relationship between methods and outcomes but deny however that parliamentary law-making is a reasonable method and recommend that other ones are more satisfactory. Such a posture would somehow resemble a Habermasian perspective in which language (and no longer the State) is the ultimate foundation of democratic norms. In which case, what conceptions of reasonableness that have to do with the idea that "good" outcomes are associated with "good" methods eventually convey is the idea that a reasonable body of norms no longer is essentially associated with political or institutional concepts such as validity, sovereignty and ultimately legitimacy. Instead, it is notions like deliberation, acceptability, participation, etc. that are to be taken into account. These underpinnings are worth reflecting upon.

At any rate, it is quite undisputed that many notions associated to the concepts of political legitimacy and sovereignty have been seriously challenged in contemporary legal thought. Constitutional courts[12] seem to have taken over legislators as the ultimate source of law—all the easier that they have been constructed, over the 20th century, as essentially concerned with fundamental rights, the indisputably legitimate mission *par excellence*. Law is now quite commonly accepted as a potentially State-independent device (see Cohen-Tanugi 1987; Weiler and Wind 2003); post-modernity seems to really mean association of private actors (versus unilateralism) as well as trust in soft law and incitement (versus binding rules)—"old" law is said to be challenged by "new" modes of governance (see Bùrca and Scott 2006; Trubek and Trubek 2006) Institutions-wise, this means that in various regions of the world, governments no longer are considered to be the only relevant source of power, for most of them are integrated in multilevel systems of governance (see Bernard 2002). Hence sovereignty either no longer is thought to lie in the people's representatives or it is no longer thought to necessarily be absolute and ultimate (see Walker 2006). Simultaneously, contemporary legal philosophy (see Cayla 1996,

[12] Actually, this also applies to constitutional courts in a loose sense, ie., one that would include courts that are not technically constitutional but are said to exert constitutional functions, such as obviously the European Court of Justice (see among many examples of the constitutionalization literature applied to the ECJ in Stone Sweet 2004) but also, more recently, to the European Court of Human Rights (see, for example, Greer 2005).

2007) has rejuvenated the idea of the possibility of unveiling something like a universal rationality, mostly throughout a revisitation of procedures as a potentially valid means to valid ends. Communicational Ethics in Habermas' fashion but also Rawls' principle of justice are typical of this theoretical stance. Such premises, for they have been prominent in 20th century political theory, have given rise to much theoretical debate, and some of their criticisms are of unquestionable value (see for example Rosenberg 1998). Here is not the locus to engage upon that path however; for what needs to be presented in the remaining paragraphs are the various forms such ethical conceptions of law have taken in the particular field of biolaw.

Let us first underlie how strong the case is for such pervasiveness to be particularly conspicuous in the field of biolaw. It has been convincingly argued that from a historical perspective, the struggles relative to the exact determination of the borders of legal categories such as "person," "alive" or "dead" (eg., in contemporary vocabulary, biopolitical issues) have been propitious grounds for the affirmation of natural law logics (see Thomas 1995, 2002). Medieval re-readings of Roman law have purported to oppose a number of legal fictions in particular those who contradicted biological life and genealogical orders.[13] Instead, they sought to impose an anthropological understanding of the legal category of "persons" throughout the historically disputable idea that it was meant to apply to all living persons. Contemporary legal debates and especially those who have arisen with respect to biomedical issues seem to confirm this historically inspired analysis for indeed, there are strong links between those issues and the reappearance of axiologically-inspired theories and principles of law (Thomas 2002, 130): "Contemporary law's postulate that the body is inherent to the person traces back to medieval juridical speculations that denatured the originally purely functional sense of the person in Roman law on the basis of theological premises."[14] This is paradigmatically illustrated by the recent fate of the human dignity principle (HDP). Not only has Western legal orders' recent infatuation with the HDP strongly coincided with their facing regulatory challenges in the field of biomedicine (see Beyleveld and Brownsword 2001), the particular field has also strongly echoed a very particular understanding of the principle by valuing "dignity as constraint" way over "dignity as empowerment" (ibid.). Thus the HDP may have been called a "two-edged sword" (see Feldman 1999, 685), it mostly seems to have served the interests of the "dignitarian alliance" (see Brownsword 2003, 2008) in the field of biolaw, as it has been mostly promoted as the vector of duty-led approaches (over rights-conferring ones) and neo-Kantian normative obligations (see Hennette-Vauchez 2008). It is contended that the concept of reasonableness is susceptible of playing similar a role.

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[13] The classical example being the legal fiction allowing the unborn son to inherit from the deceased father. For other examples, see Thomas (2002, 137).

[14] "L'inhérence du corps à la personne, qui est un postulat du droit contemporain, plonge ses racines, en réalité, dans les speculations juridiques médiévales qui, à partir de prémisses théologiques, dénaturèrent le sens purement fonctionnel de la personne en droit romain".

References

Alexy, R. 2009. *The Reasonableness of Law*, this volume.
Bayertz, K. 1994. *The Concept of Moral Consensus, The Case of technological interventions in human reproduction*. Dordrecht: Kluwer.
Beauchamp, T.L., and J.F. Childress. 1979. *Principles of Biomedical Ethics*. New York, N.Y.: Oxford University Press.
Bernard, N. 2002. *Multilevel Governance in the EU*. Dordrecht: Kluwer.
Beyleveld, D., and R. Brownsword. 2001. *Human Dignity in Bioethics and Biolaw*. Oxford: Oxford University Press.
Bishop, P., and F. Jotterand. 2006. Bioethics as Biopolitics. *The Journal of Medicine and Philosophy* 31: 205–12.
Brownsword, R. 2003. Bioethics Today, Bioethics Tomorrow: Stem Cell Research and the "Dignitarian Alliance". *University of Notre Dame Journal of Law, Ethics and Public Policy* 71: 15–51.
Brownsword, R. 2005. Stem Cells and Cloning: Where the Regulatory Consensus Fails. *New England Law Review* 39: 535–71.
Brownsword, R. 2008. *Rights, Regulation and the Technological Revolution*. Oxford: Oxford University Press.
Cayla, O. 1996. Droit. In *Dictionnaire d'Ethique et de Philosophie Morale*. Ed. M. Canto-Sperber. Paris: Presses Universitaires de France.
Cayla, O. 2007. L'angélisme d'une théorie pure (du droit) chez Habermas. *Revue du droit public* 6: 1541–68.
Cohen-Tanugi, L. 1987. *Le droit sans l'Etat. Sur la démocratie en France et en Amérique.* Paris: Presses universitaires de France.
de Bùrca, G., and J. Scott, eds. 2006. *Law and New Governance in the EU and the US*. Oxford: Hart.
de Sousa Santos, B. 1995. *Towards a New Common Sense. Law, Science and Politics in the Paradifmatic Transition*. New York, N.Y.: Routledge.
Department of Health and Social Security. 1984. *Report of the Committee of Inquiry into Human Fertilizationand Embryology*.
Engelhardt, H.T. 1986. *The Foundations of Bioethics*. New York, N.Y.: Oxford University Press.
Engelhardt, H.T. ed. 2006. *Global Bioethics: the Collapse of Consensus*, Salem: M&M Scrivener.
Faralli, C. 2009. Reasonableness, Bioethics, and Biolaw, this volume.
Feldman, D. 1999. Human Dignity as a Legal Value (Part I). *Public Law*: 682–702.
Feldman, D. 2000. Human Dignity as a Legal Value (Part II). *Public Law*: 61–76.
Flis Trèves, M., D. Mehl, and E. Pisier. 1991. Contre l'acharnement législatif. *Pouvoirs* 56: 121.
Franklin, B. 1995. The Value of Consensus. In *Committee on the Social and Ethical Impacts of Development in Biomedicine. Society's Choices: Social and Ethical Decision Making in Biomedicine*. Ed. R.E. Bulger and E.M. Bobby. Washington: National Academy Press, 1995.
Girard, C. 2006. Le droit international de la bioéthique. L'universalisation à visage humain? In *Bioéthique, Biodroit, Biopolitique, Réflexions à l'occasion de la loi du 6 août 2004*. Ed. S. Hennette-Vauchez, 51–69. Paris: LGDJ.
Greer, S. 2005. *The European Convention of Human Rights. Achievements, Problems and Prospects*. Cambridge: Cambridge University Press.
Hennette-Vauchez, S. 2005. Article II–63. In *Traité établissant une Constitution pour l'Europe. Partie II: La Charte des droits fondamentaux*. Ed. L. Burgorgue-Larsen, A. Levade and F. Picod, 52–63. Brussels: Bruylant.
Hennette-Vauchez, S. 2008. A Human *Dignitas*? The Contemporary Principle of Human Dignity As a Mere Reappraisal of an Ancient Legal Concept. In *EUI LAW Working Papers Series*. European University Institute. http://cadmus.eui.eu/dspace/bitstream/1814/9009/1/LAW_2008_18.pdf.

Hennette-Vauchez, S. 2009. Words Count. How interest in stem cells made the embryo available: a look at the French law of bioethics. *Medical Law Review*. Already available in the *EUI LAW Working Papers Series*. European University Institute. http://cadmus.eui.eu/dspace/bitstream/1814/9048/1/LAW_2008_19.pdf.

Jasanoff, S. 2005. *Designs on Nature. Science and Democracy in Europe and the United States*. Princeton, NJ: Princeton University Press.

Moreno, J. 1994. Consensus by Committee: Philosophical and Social Aspects. In *The Concept of Moral Consensus. The Case of technological interventions in human reproduction.* Ed. K. Bayertz. Dordrecht: Kluwer.

Moreno, J. 1995. *Deciding Together. Bioethics and Moral Consensus*. New York, N.Y.: Oxford University Press.

Mulkay, M. 1997. *The Embryo Research Debate. Science and the Politics of Reproduction*. Cambridge: Cambridge University Press.

Nyssen, H., ed. 1985. *Génétique, Procréation et Droit*. Paris: Actes Sud.

Pellegrino, E. 2000. Bioethics at the Century's Turn: Can Normative Ethics Be Retrieved? *The Journal of Medicine and Philosophy* 25: 655–75.

Rosenberg, M. 1998. Overcoming Interpretation through Dialogue. A Critique of Habermas's Proceduralist Conception of Justice. In *Just Interpretations. Law Between Ethics and Politics*, 114–49. Berkeley Calif.: University of California Press.

Tao, J. 2006. A Confucian Approach to a "Shared Family Decision Model" in Health Care: Reflections on Moral Pluralism. In *Global Bioethics: the Collapse of Consensus*. Ed. H.T. Engelhardt. Salem: M&M Scrivener.

Stone Sweet, A. 2004. *The Judicial Construction of Europe*. New York, N.Y.: Oxford University Press.

Thomas, Y. 1995. Fictio Legis. L'empire de la fiction romaine et ses limites médiévales. *Droits. Revue française de théorie juridique* 21: 17–63.

Thomas, Y. 2002. Le sujet concret et sa personne. In *Du droit de ne pas naître. A propos de l'affaire Perruche*. Ed. O. Cayla and Y. Thomas, 91–170. Paris: Gallimard.

Trotter, G. 2006. Bioethics and Deliberative Democracy: Five Warnings from Hobbes. *The Journal of Medicine and Philosophy* 31: 235–50.

Trubek, D., and L. Trubek. 2006. New Governance and Legal Regulation: Complementarity, Rivalry and Transformation. *Columbia Journal of European Law* 13: 539.

Walker, N., ed. 2006. *Relocating Sovereignty*. Dartmouth: Ashgate.

Weiler, J.H., and M. Wind, ed. 2003. *European Constitutionalism Beyond the State*. Cambridge: University Press.

Reasonableness in Biolaw: The Criminal Law Perspective

Stefano Canestrari and Francesca Faenza

1 Reasonableness and Legislative Discretion in Framing Criminal Law in Matters of Bioethics: Limits and Peculiarities

There is an extra layer of justification to deal with in continental criminal law when choosing the principle of reasonableness as a guide by which to explore biolaw. Indeed, as concerns Italy in particular, the tradition is for the Constitutional Court to exercise much self-restraint in its use of the test of reasonableness in matters of criminal law, enveloping this test in a cascade of accompanying cautions and caveats. Such caution is owed to the constitutional principle expressed in the formula *nullum crimen sine lege* (Article 25, second paragraph, of the Italian Constitution), whereby the power to establish criminal penalties vests exclusively in Parliament. According to this principle, criminal offences can be defined and regulated only by statutory laws created by Parliament. The constitutional foundation of Parliament's monopoly on criminal law makes it all the more peremptory for the Constitutional Court not to challenge in any way the discretionary evaluations carried out by Parliament when criminal laws are in question (Insolera 2006, 326ff.; Manes 2005, 218ff.; Palazzo 1998, 371ff.). However, the trend in the Constitutional Court's case law is showing a growing use of reasonableness in testing the legitimacy of criminal laws: the evolution of reasonableness as way by which to counterbalance the discretionary power of Parliament has contributed to widening the margins within which the Constitutional Court can review legislature's choices in the area of criminal law.[1]

In this context, bioethics offers an interesting perspective precisely on account of the wide discretion available to lawmaker in framing criminal statutory provisions on bioethics: the large role that value judgments play in biolaw offers a vantage point from which to observe both the limits and the potential of the reasonableness test in constitutional adjudication.

Then, too, it is worth underscoring the significance of discussing reasonableness in relation to biolaw—especially in relation to the *criminal* regulation of

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[1] Italian Constitutional Court, decision 409/1989.

G. Bongiovanni et al. (eds.), *Reasonableness and Law*, Law and Philosophy Library 86,
DOI 10.1007/978-1-4020-8500-0_19,

bioethical subject matter—in that reasonableness is a "context-sensitive" notion (MacCormick 2003, 529), or a "notion à contenu variable" (Perelman and Vender Elst 1984), for it gets specified in different ways depending on context. As far as criminal subject matter is concerned, reasonableness inclines to combine with the different constitutional principles that underpin criminal law. This can be considered the distinguishing feature of the idea of reasonableness in criminal law: on the model of reasonableness used in criminal law, reasonableness gets shaped in different ways depending on the constitutional principles of criminal law it combines with, and which in turn help to shape the dialectic between criminal law and the Constitution (Manes 2007, 751). In what follows, we will illustrate the different manifestations of criminal reasonableness by drawing on what is already a rich store of statutory and case law on bioethics. Our particular focus will be on the biolegal issues involving the beginning and end of human life.

2 Different Criteria on Which Reasonableness in Criminal Law Is Based When Regulating Bioethical Subject Matter

Reasonableness comes to bear on different questions in criminal law. For example: What guidelines should the lawmaker use in framing criminal laws? Which limits does the Constitutional Court have in evaluating the reasonableness of criminal provisions? How to weigh the good or interest being protected by criminal law? Is the punishment established by statutes commensurate with such an interest? And how to go about setting out the kinds of behaviour that count as crimes? In each of these areas there is need to work out standards or criteria to which to anchor the judgment of reasonableness. Three such standards are worth mentioning in this regard. First, the reasonable-person standard, used sometimes with respect to the physician ("professional standard") and sometimes with respect to the patient (in which case we have the "reasonable-patient standard," or *verständiger Patient*, in German) (Dolgin and Shepher 2005, 59). In the second place, the empirical-statistical criterion traceable to the rule of *id quod plerumque accidit* ("that which generally happens").[2] Finally, the best-practice standards established by the *leges artis* specific to a trade or profession depending on the case at hand.

The first of these criteria is mainly used in English-speaking areas in rendering judgments in civil malpractice or medical liability cases, but it may also be applied in criminal law as a basis on which to assess what would count as a "reasonable member of the medical profession," in which use the standard can contribute to blocking out the idea of a model professional, here a physician having the best skills and knowledge available to date. It can be observed, with regard to the two other criteria just mentioned, that they are subject to an inescapable margin of uncertainty

[2] Constitutional Court, decision 333/1991 (also see Constitutional Court decisions 1/1971, 139/1982, 126/1983, and 71/1978).

which often appears accentuated when exploring the new, uncharted territory one finds in working through the issues of bioethics.

Take, for example, the crimes of cloning or producing hybrids or chimeras:[3] the rule of *id quod plerumque accidit* seems to offer little guidance in these cases, considering that there is nothing in the way of precedent from which to draw maxims based on experience. A more solid standard in bioethics is therefore the third one mentioned: the *leges artis* standard of best medical practice. This seems borne out by the case law of the Italian Constitutional Court, which has found that "legislation establishing whether a given therapy is appropriate cannot simply be based on the discretion of the lawmakers themselves but should instead provide that policies be worked out which take into account the latest scientific knowledge and experimental evidence [. . .], and such knowledge and evidence should in any event be reflected in the legislation in question."[4] It is the Constitutional Court's view, then, that the discretionary evaluations carried out by the lawmaker find a limit in reasonableness understood as a law's agreement with the best or most reliable science and experience to date. As we will see, it is this notion of reasonableness—based on the standard of the best available or latest science and technology—that comes to bear on the question (yet to be decided) of the constitutionality of the statutory provisions on medically assisted procreation making it criminal in Italy to produce surplus embryos and to cryopreserve them (the provisions at issue being found in Article 14, paragraphs 2 and 3, of Law No. 40/2004).

It can in any event be observed that mere conformity to the best-practice and most reliable science and experience standards do not suffice to guarantee that the criminalizing provision or law will be reasonable: these standards need to be supplemented with further criteria that concur in substantiating a judgment of reasonableness in matters of criminal law. Four criteria that become relevant in this respect are those of reasonableness as proportionality, as adequacy of the means of protection in relation to its ends, as constitutionality of the interests protected by criminal law, and as system-wide coherence.

3 Reasonableness as Proportionality of the Punishment's Severity, or *Quantum*: The Punishments Euthanasia Is Subject to Under Italian Law

One of the main uses of reasonableness in criminal law consists in determining whether a punishment is proportional to, or commensurate with, the interest being protected. The judgment of reasonableness as proportionality has traditionally been made by comparing the different punishments established for different violations or sets of facts. It would be unreasonable, in this sense, to establish punishments of

[3] These new offences were introduced in Italy with Law n. 40/2004 on medically assisted procreation, under Article 13, paragraph 3, letters (c) and (d).

[4] Constitutional Court, decision 282/2002.

equal severity for acts or facts of different gravity, just as, conversely, it would be unreasonable if homogeneous facts were differentially treated. The proportionality test so understood is based on a triadic scheme whereby reasonableness is assessed by reference to a *tertium comparationis*. This scheme tends to be put aside now in favour of other models of judgment not based on a comparison against a *tertium comparationis* (Luther 1997, 349; Insolera 2006, 321ff.; Manes 2007, 746). But it should be noticed that whatever method is chosen, it is a particularly delicate task to assess whether a punishment (or its severity) is reasonable: "Translating quality into quantity" (or applying a measure to any choice to act in one way or another) "is the one function that more than any other pertains to legislative discretion" (Palazzo 1998, 374; Pagliaro 1997, 774ff.). As the Italian Constitutional Court has stated, "it is part of the legislator's discretionary power to statutorily set the degree of punishment [. . .]; nor can this Court pass judgment on legislative policy,"[5] except in precisely those cases where the law is unreasonable.

Reasonableness as proportionality can be used in bioethics as a model by which to assess the criminal regulation applicable to mercy killings under Italian law. It should be observed here, by way of a preamble, that the Italian legal system does not have any regulation specific to euthanasia. Euthanasia consequently falls under the general legal forms applicable to offences against life, and this results in punishments so harsh they fail to pass the test of reasonableness as proportionality. Let us consider cases of euthanasia in which a person takes the life of another at that other person's clear and express request. These cases appear at first sight to be classifiable as unlawful killing of a consenting party ("omicidio del consenziente," Article 579 of the Italian Criminal Code). Under this provision, anyone who causes a consenting person's death is punishable by imprisonment of from six to fifteen years. While consent does not make the act legal, it does mitigate the gravity of the act and therefore translates to a lesser punishment (Canestrari 2006, 129ff.). However, it is only rarely that euthanasia by consent should in practice be brought under the purview of Article 579 of the Italian Criminal Code. Indeed, Article 579 provides, under its third paragraph, that the provisions in articles regarding murder be applied when the act is done to someone who is mentally incompetent or has any kind of mental incapacity from whatever cause, including abuse of substance, whether it be alcohol or a narcotic. Now, it is precisely this state of mental incapacity that often describes patients physically and psychologically exhausted by an illness or by a debilitating medical treatment or use of pain killers. Mercy killings will therefore tend to more easily be classifiable as murder, and the punishment will accordingly be harsher.

The punishment does not in any way seem reduced in severity by Article 62(1) or 62 *bis* of the Italian Criminal Code, respectively providing for cases in which "the act was motivated by highly compelling moral or social values" or in which

[5] Constitutional Court, decision 109/1968. In this decision the Court has found that the power of the Constitutional Court to review the laws cannot be expanded to include a judgment as to "the congruence between a crime and its punishment," unless "the two are so disproportionate that there is no conceivable way to justify the punishment."

"attenuanti generiche" (other kinds of extenuating circumstances) apply. Indeed, on the one hand, the Court of Cassation has ruled that no compelling moral or social values apply to mercy killings, the reason being that mercy killing does not have on its side "society's unconditional approval" that the rule in question requires. On the other hand, the extenuating circumstances made may wind up being outweighed by the aggravating circumstances that often apply in cases involving euthanasia, examples being premeditation, killing by use of poisons, and a relation of kinship with the victim. It needs to be stressed here that such cases of aggravated murder may be punished with life inprisonment—and such an outcome seems to contradict the standard of reasonableness as proportionality. The punishment, in other words, seems disproportionate to the act's import all things considered, in that no allowance is made for the motive of compassion or for the patient's extreme suffering, both of which are central to mercy killing and distinguish it from murder at large. So, if this criminal framework appears unreasonable, this is because the same punishment applies equally to situations marked by different objective and subjective features, and it is difficult to find a *ratio parificandi* on which basis such different situations may be equated.

It seems that a more reasonable—because more proportional—framework can be found in this sense in Spain's *Código Penal* of 1995, which provides a much more lenient punishment for cases of active and direct euthanasia by consent. The Spanish law sets forth a specific, more lenient provision for cases involving "active causation and cooperation by way of necessary acts aimed at bringing about another person's death, but only if this person (the victim) has expressly made an earnest and unequivocal request and is affected by a serious terminal condition or by a permanent condition causing nearly unbearable suffering (Article 143, paragraph 4, of the *Código Penal*) (Tordini Cagli 2008, 64ff.). In this way, the punishment that may be dispensed will be more proportional to the crime, for it will take into account the features specific to euthanasia.

Finally, a few comments should be made on the role the previously mentioned "social value" criterion provided in Article 62(1) of the Italian Criminal Code can play in judging the reasonableness of a criminal provision. We saw that the social-value criterion carries little weight in cases of mercy killing; Joel Feinberg's offence principle, by contrast, uses it as a criterion by which to assess "the reasonableness of conduct that happens to cause offence to others" (Feinberg 1985, 44): social value figures among the so-called mediating maxims that, for Feinberg, govern "the application of the offence principle to legislative or judicial deliberation." This is to say that social value does not just express an appeal to fairness or clemency but operates as a specific standard of reasonableness, and so as a standard that can come into play in the legal balancing between the "seriousness" of offensive conduct and its "reasonableness." Certainly, the theoretical differences between offence and harm are such that the criteria applicable to offence cannot immediately be carried over to harm. Still, social value seems to make a significant contribution as a criterion by which to judge the reasonableness of conduct, even in cases of euthanasia (or mercy killing), beyond the strict allowances made by Article 62(1) of the Italian Criminal Code.

4 The Reasonableness of Criminal Laws and Assisted Suicide: The Prohibition Against Discriminating Between Equals (*Ratione Subiecti*) and the Means-to-Ends Judgment of Adequacy with Respect to the Aims of Protection

In *Pretty v. The United Kingdom*, a case brought before the European Court of Human Rights (ECHR) in Strasbourg, the UK criminal law on assisted suicide was assessed using reasonableness as the basic guide.[6] Reasonableness was framed by the court in this context as a twofold concept, understood on the one hand on the model of reasonableness as equality, and on the other hand on the model of reasonableness as adequacy of means to the ends of protection.

With the Suicide Act of 1961, attempted suicide was made criminally irrelevant in the United Kingdom, but not so *assisted* suicide: Section 2(1) of the act provides that "a person who aids, abets, counsels or procures the suicide of another, or attempts by another to commit suicide, shall be liable of conviction on indictment to imprisonment for a term not exceeding fourteen years." The appellant claimed that this rule is discriminatory because it sets up a disparity between persons, favouring the able-bodied (who are capable of taking their own lives and are free to do so) over those who are *not* able-bodied, who can only do so with the help of a third person. The UK law thus violates the prohibition against differential treatment set forth in Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The ECHR rejected this argument, finding that there is a reasonable justification on which basis not to distinguish between "those who are and those who are not physically capable of committing suicide." The reasonableness test thus wound up in this case favouring the UK law: the court found that "cogent reasons" existed—like the need to protect human life and to prevent potential abuse—such that the provision at issue in the Suicide Act cannot be constructed as violating Article 14 of the European Convention on Human Rights. The court upheld the general principle that there is a single exception to the prohibition against differential treatment. This is the exception of a reasonable justification for such treatment: "For the purposes of Article 14 a difference in treatment between persons in analogous or relevantly similar positions is discriminatory if it has no objective and reasonable justification" (§ 87).

This pronouncement clearly has its basis in the familiar model of reasonableness as equality. But reasonableness is further specified by the ECHR in application to criminal law in the sense of requiring a "reasonable relationship of proportionality between the means employed and the aim sought to be realized." On this interpretation, then, the reasonableness test is used not to assess the *aims* of protection (that which a legislature seeks to protect in framing criminal laws) but rather the *means* of protection as they relate to those aims: in this specification, we have a test by which to assess whether the means are adequate to their end, or whether "the crime and the

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[6] *Pretty v. The United Kingdom*, European Court of Human Rights, Application n. 2346/2002.

corresponding punishment are suited to achieving an aim assumed to be legitimate" (Palazzo 1998, 381–82). The suitability of means with respect to the aims of protection is judged on the basis of well-established criteria worked out by the constitutional courts of Europe in cases of involving criminal law. Thus, for example, the Federal Constitutional Court of Germany (or *Bundesverfassungsgericht*) has settled on the view of means-to-ends adequacy as a three-pronged requisite that breaks down into the constituent criteria of suitability (*Geeignetheit*), necessity (*Erforderlichkeit*), and appropriate or reasonable fairness (*Angemessenheit*) (Luther 1997, 345; Manes 2005, 283). It can be observed in these cases that the reasonableness test takes the form of a judgment whose object has to do with rationality with respect to the aims (or *Zweckrationalität*) involved in working toward such an end—and yet such means-to-ends rationality still remains inherently political.

5 Reasonableness and Alternative Models by Which to Regulate Euthanasia: The Procedural Justification, or *Prozedurale Rechtfertigungen*

The procedural-justification model has been used in different areas of the criminal law applicable to bioethics: examples are its use in connection with induced abortion and euthanasia, and physician-assisted suicide in particular. A well-known procedural-regulation model for physician assisted suicide is that offered by the Dutch law (2002), which provides that a physician will not be held criminally liable for a euthanasia or assisted suicide carried out in compliance with the procedure set forth in the law. On the procedural approach, the legislators abstain from any direct evaluation of the interests at play—and so do not set forth beforehand, and once and for all, which of these interests should prevail—but rather confine themselves to stating the conditions, methods, and procedures defining the boundaries within which a person may freely choose and self-determine a course of action. We thus have a combination of substantive and procedural rules: compliance with the procedure legitimates the act by providing a basis on which to rule out the act's illegality or its punishability; conversely, a failure to comply with the procedure will entail criminal liability (Donini 2004, 27ff.; Eser 2000, 43ff.; Magro 2001, 253ff.).

Procedural justification offers an alternative to the regulative model based on balancing and ranking by law the conflicting interests at play: on the procedural model, responsibility for deciding on a prevailing interest rests with the concerned persons themselves, and no liability arises so long as the established procedure is followed. This procedural approach is conceived as a way to deal with the issues of sociocultural pluralism forming the background to legal systems in the West, where legislatures, especially as concerns bioethical issues, have little chance of invoking a standard of reasonableness based on a wide consensus on the part of the citizenry.

The role of reasonableness on the procedural model is that of a guideline useful in working out the legal procedure following which an otherwise prohibited behaviour will not be subject to punishment. Certain necessary guarantees need to