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# Reasonableness and Law



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endorses an intention to implement a sufficiently good plan (which must be one of the best among the constructed ones). However, due consideration should be given to the practicability of teleological reasoning: teleological reasoning requires an enormous amount of knowledge, which often is not available. Such knowledge is required not only to address the formidable problem of planning (constructing plans) but also to compare and evaluate the constructed plans. Optimal planning thus seems to exceed human cognitive powers in many contexts.

In fact, in order for there to be a guarantee that a decision-maker will choose the optimal plan, the decision-maker must succeed in both (a) constructing a set of candidate plans that includes the best possible one and (b) making the right choice among the constructed plans. In both regards, optimisation is often out of reach for a bounded decision-maker. Firstly, we cannot consider all possible strategies for achieving certain objectives, and so we may fail to construct the best strategy. For example, in planning an out-of-town dinner, I may fail to detect the restaurant that is better suited to my tastes, since I am not aware of its existence. Similarly, consider how a legislature may fail to see what the most effective solution to economic growth is, and so may adopt a wrong decision (for example, cutting taxes may trigger a recession and a huge deficit rather than favouring economic development, as expected), or how judges or legal scholars may fail to discover optimal solutions to the problems they are considering (for example, punishing certain crimes too harshly may impede rehabilitation and lead convicts to commit further, more serious, crimes).

Secondly, even when we have constructed the best plan (together with other candidate plans), we may not be able to realise that it is the best one, and so may choose an inferior option. Failure to rank the available options according to their merit may depend in particular on the following:

- we have very little knowledge of the factual consequences of many of our choices;
- we have very confused ideas about what ends should inspire our evaluations, and about their relative importance, in various possible situations.

This problem concerns individual psychology, but also the functioning of organisations. It frequently happens that “the connection between organisation activities and ultimate objectives is obscure, and these ultimate objectives are incompletely formulated, or there are internal conflicts and contradictions among the ultimate objectives, or the means selected to achieve them” (Simon 1965, 64). Obviously, such problems are particularly serious in political and legal decision-making, which should ideally take into consideration all valuable goals, namely, all values that are relevant to a community. This makes it very difficult to assess the rationality of decisions impacting on different values by way of a combined assessment of resulting gains or losses with regard to all relevant ends. Consider for example, how difficult it is to assess the rationality of decisions in issues of Internet law, where one has to balance such diverse values as privacy, freedom of information, individual liberty, democracy, economic growth, and technological and scientific development.

Various views have been expressed in this regard. Some authors seem to believe that we can understand and justify decision-making by moving beyond teleological

rationality and focusing instead on *systemic rationality*: we should look at how certain forms and styles of decision-making contribute to the functioning of the social systems in which they take place, regardless of how effective they are in achieving the goals pursued by the decision-makers (this is the view famously advanced in Luhmann 1973). Others, such as Habermas (1999, 259), have rejected the idea that rational decision-making involves assessing and comparing impacts on relevant values, affirming that “weighing takes place either arbitrarily or unreflectingly, according to customary standards and hierarchies.” Unfortunately, in many cases human reasoners have no alternatives to teleological reasoning. We thus need to overcome such dismissive views, all the while seriously addressing the issue of the limitations of teleological reasoning, especially with regard to the problem of the evaluation of plans.

## 9 The Evaluation of Outcomes

In evaluating a plan we need to identify its outcome (the results it will produce), distinguish the relevant desirable or undesirable features involved in that outcome, consider to what degree these features are advanced or impaired by the plan, and finally establish what merit is to be accordingly attributed to the plan. For instance, when considering a plan to go to a restaurant  $r$ , we may consider to what degree we expect a dinner at  $r$  to exemplify the following features: quality of the food, quality of the wines, quality of the service, and price. We would then move from the level of each feature’s realisation to the evaluation of their combination. The most delicate step is the last one, namely, moving from single features to their joint evaluation. Analytical reasoning (ratiocination) is in general not very effective at capturing and assessing interconnected sets of features: this is a task we seem to accomplish through a kind of holistic understanding, similar to pattern recognition in perception (as argued in Thagard 2000). However, under certain conditions, analysis may help. The analytical evaluation of multi-featured decisional outcomes is facilitated when all of the following conditions hold:

- there is a numerical measure for the realisation of each relevant feature;
- the worth of realising each feature grows linearly (always in the same proportion or weight) according to the measure of the realisation of this feature; and
- the desired features are all mutually independent.

Under these conditions, we can evaluate an outcome simply by multiplying the measure of the realisation of each feature in that outcome by the weight of the feature, and then adding up the results.<sup>6</sup> This provides an easy way to compute the worth of plans of action, and so an easy way to compare them.

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<sup>6</sup> The evaluation EV of outcome  $\omega$ —where  $\omega$  realises features  $f_1, \dots, f_n$ , to the degrees  $d_1, \dots, d_n$ , and each feature  $f_i$  has weight  $w_i$ —is expressed by the formula  $EU(\omega) = \sum_{i=1}^n (d_i^* w_i)$ .

**Table 1** The expected worth of two restaurant experiences

	Food	Wine	Service	Price	Total
$r_1$	<b>4</b> *3	<b>2</b> *2	<b>2</b> *1	<b>6</b> *(-2)	6
$r_2$	<b>3</b> *3	<b>2</b> *2	<b>1</b> *1	<b>1</b> *(-2)	10

For instance, suppose I assign weights **3** to food, **2** to wines, **1** to service, and **-2** to price. Moreover, I expect that in restaurant  $r_1$  food will score 5, wines 2, service 1, and price 6 (€60), while in restaurant  $r_2$  food will score 3, wines 2, service 1, and price 2 (€20). This allows me to assign points 6 to restaurant  $r_1$  and points 10 to  $r_2$ , as Table 1 shows.

Thus, if the input data are correct, and if all assumptions above hold, rationality requires me to go to the cheaper restaurant  $r_2$ , even though the food and service it offers are lower-quality than at  $r_1$ .

This example shows how this way of evaluating choices gives questionable results, when no precise and objective way is available for quantifying degrees of satisfaction and weights, or when different features interfere. One may rightly challenge my choice for restaurant  $r_2$  (or in any event my procedure for reaching that choice) by pointing out the arbitrariness of assigning degrees of satisfaction and weights—How do I know that food quality at  $r_1$  is 4, and not 5 or 3? How do I know that food quality has weight **3**, and not **4** or **2**?—or by pointing out that these evaluations are contingent on particular individual circumstances (for example, the benefit afforded by the quality of service depends on how much time I have and on how irritable I am on that particular day), or by pointing out their interdependence (having bad service would likely spoil my enjoyment of the food).

However, it may still be possible to compare the degrees of satisfaction of a certain desired feature in different situations. By combining this assumption with the idea of monotonic growth of desires as the degree of the desired feature grows, we obtain some clues on how to develop our preferences.

## 10 Pareto Superiority

If outcome  $\delta$ , in comparison to outcome  $\gamma$ , presents at least one feature at a more desirable degree and no feature at a less desirable degree, then it seems that a rational agent should prefer  $\delta$  to  $\gamma$  (and thus, that it would be irrational for this agent to prefer  $\gamma$  to  $\delta$ ).

Let us state this idea more precisely. Let us write  $x > y$  to mean that  $x$  is strictly preferable to  $y$ . Thus, when  $x$  and  $y$  are degrees of an advantageous feature (a feature that is preferable in a higher degree, like the quality of the food), then  $x > y$  ( $x$  is preferable to  $y$ ) whenever  $x > y$  ( $x$  is greater than  $y$ ). On the contrary, when  $x$  and  $y$  are degrees of a disadvantageous feature (like the price of the food), namely, a feature that is preferable in a lesser degree, then  $x > y$  whenever  $x < y$  ( $x$  is lesser than  $y$ ). Accordingly, we can say that a rational agent should prefer outcome  $\delta$  to outcome  $\gamma$  under the following conditions:

- $\delta$  and  $\gamma$  share the same desirable features  $f_1, \dots, f_n$ , and
- $\delta$  presents these features to degrees  $d_1, \dots, d_n$  and  $\gamma$  to degrees  $g_1, \dots, g_n$ .
- there is an  $i$  such that  $d_i > g_i$ , while for no  $j$ ,  $g_j > d_j$ .

For instance, if a restaurant  $r_1$  offers better food than a restaurant  $r_2$ , and equal or better wines and service, then a rational agent should prefer  $r_1$  to  $r_2$  ( $r_1 \succ r_2$ ).

This is the idea of *Pareto superiority* applied to impacts on different goals or values: when a choice is required between alternative decisions  $\delta$  and  $\gamma$ , and the two decisions impact on the same values (desirable features), but  $\delta$  raises some of these values to a higher degree than  $\gamma$  does, the impact on all other values being equal, then  $\delta$  is to be preferred (for a technical account of multicriteria decision-making, see Keeney and Raiffa 1993). Consider for example, a choice between these two ways of treating videos recorded by cameras located in a street having a high crime rate:

- deleting the data after a week; or
- keeping data for a year.

Let us assume that deleting data after a week enables the value of privacy to be achieved to a higher degree, while there is no difference with respect to the attainment of the value of security (one week being sufficient to check video recordings in connection with serious claims). Under such conditions, a decision to keep the video footage for a year would be irrational according to the idea of Pareto superiority (assuming the only relevant values are privacy and security): an alternative choice would provide a higher achievement of some values without diminishing the level of achievement of any other value.

The idea of Pareto superiority is a useful minimum standard for evaluating decisions. For instance, it seems to subsume some of the standards of *reasonableness* that are used in constitutional and administrative review. For instance, a decision that would undermine certain values without contributing to the realisation of any other value is certainly inefficient, and in this sense it is more than just unreasonable: it is irrational. Similarly, a choice ( $a$ ) would be irrational on grounds of its Pareto inferiority when it achieves certain values by undermining certain other values, and there is an alternative choice ( $b$ ) that would realise the same values to the same extent without undermining any other values (or would do so undermining them to a lesser degree): choice ( $a$ ) would be irrational since it determines a prejudice which is unnecessary to achieve its beneficial outcomes.

The condemnation of Pareto-inferior choices needs to be attenuated with some sufficientist considerations. It would certainly be irrational to choose  $\alpha$  rather than  $\beta$ , knowing that  $\alpha$  is Pareto-inferior to  $\beta$ . However, we may not know that  $\alpha$  is inferior to  $\beta$ , since we may be proceeding on a mistaken appreciation of the impact of the two options on the values at issue. For instance, we may fail to recognise Pareto inferiority owing to our inability to take into account certain complex causal connections (as may happen with regard to choices pertaining to economic policy). When an epistemic mistake remains below the threshold of unreasonableness, the resulting choice remains reasonable, though it may rightly appear Pareto-inferior to an observer immune to the mistake.

## 11 Weighing Alternatives

The idea of Pareto superiority does not, help us make choices in those situations where there are alternative choices  $\alpha$  and  $\beta$ , such that  $\alpha$  advances certain values more than  $\beta$ , and  $\beta$  advances certain other values more than  $\alpha$ . Consider, for example, the problem of making a choice between two restaurants  $r_1$  and  $r_2$ , such that  $r_1$  offers better food,  $r_2$  provides better service, and all other relevant features are satisfied to the same degrees. Similarly, consider the problem of choosing whether to delete video footage after one day or after seven days of recording, assuming that deletion after one day yields a higher level of privacy while deletion after seven days provides a higher level of security.

It may be said that such issues can be solved through a comparative analysis that takes into account (a) the degree to which the values are satisfied by different choices and (b) the importance of the values. Choice  $\alpha$  is better than choice  $\beta$  if the comparative gains relative to the values that are better promoted by  $\alpha$  outweigh the comparative loss relative to the values that are better promoted by  $\beta$ . For instance, rationality requires me to go to restaurant  $r_1$  instead of restaurant  $r_2$  if the comparative advantage in food quality outweighs the disadvantage in service quality. Similarly, it may be said that rationality requires deleting footage after seven days rather than after one day if the gain in security outweighs the loss in privacy.

The difficulty, however, consists in finding a sufficiently precise characterisation of how one should rationally “weigh” such alternatives. It may be said that the weighing judgement depends both on the quantities that are gained or lost and on the importance of what is gained and lost, but this offers very little help to the decision-maker, for whom the problem is exactly that of establishing quantities and relative importance.

Moreover, the importance of a gain or a loss relative to a certain value does not only depend on the “quantity” of the value that is gained or lost (whatever is meant by *quantity*) and on the importance of the value at issue: it also depends on the level from which we measure a gain or loss. With many values, there are two distinct aspects to be considered: the quantitative measure of the value and the benefit (the impact on human wellbeing) of achieving that value up to that quantitative measure. For instance, when buying a flat, a valuable aspect to be considered is the spaciousness of the flat, as measured by the surface area of the flat, but even though the benefit of having a flat of a certain surface increases in proportion as surface does (this benefit being a monotonic function of the surface), this proportion is not fixed: while the additional benefit obtained by moving from 20 to 40 square meters is usually very important, the additional benefit obtained by moving from 200 to 220 is likely to be less significant.

Let us consider now a more significant value—nutrition, the object of the right to food, much discussed nowadays by human-rights scholars—and let us assume that any intake below 2,000 is insufficient to sustain human health. A 1,000-calorie drop below that minimum would thus constitute a very significant failure of nutrition (it would lead to starvation, and probably to death), whereas adding 1,000 calories

on top of an already more-than-sufficient of 3,000 calories would not bring any additional benefit as far as nutrition is concerned.

A similar analysis would also apply to less-quantifiable values, such as liberty. Having a wider (more inclusive) set of options increases one’s liberty. Suppose that  $A_1 \subset A_2$ ,  $A_1$  contains 100 options, while  $A_2$  contains 110, and the additional 10 options in  $A_2$  have the same average significance as the options in  $A_1$ . We will then certainly be able to say that having choices  $A_2$ , rather than  $A_1$ , is significantly more beneficial as far as liberty is concerned. However, consider two sets of choices  $A_3$  and  $A_4$ , such that  $A_3 \subset A_4$  and  $A_3$  contains 1,000,000 options while  $A_4$  contains 1,000,010, and the additional 10 options in  $A_4$  have the same average significance as the options in  $A_3$ . In this case, the difference in the benefit provided by having  $A_4$  rather than  $A_3$  would be much less important, probably quite imperceptible. Finally, suppose that one has the possibility of choosing from a range of only 20 options (e.g., kinds of jobs one may aspire to), and that a piece of legislation reduces this range to 10 by eliminating 10 options previously available. This would certainly be a very serious inference in the core of one’s freedom of employment.

In Fig. 5 you can see the difference between a value providing a benefit that increases linearly (in a fixed proportion) relative to increases in the associated quantitative measure, and a value providing a benefit that increases nonlinearly, bringing a diminishing marginal benefit (as represented by the curve). As Alexy (2002b, 103) observes, the latter pattern characterises not only economic goods (whose marginal utility usually diminishes, i.e., an additional unit of a good  $G$  brings less benefit when one has a larger quantity of  $G$ ) but also legal values. The difficulties I have just considered should lead us to be wary and critical (maybe even sceptical) of any pretence to “objective” or “scientific” evaluations

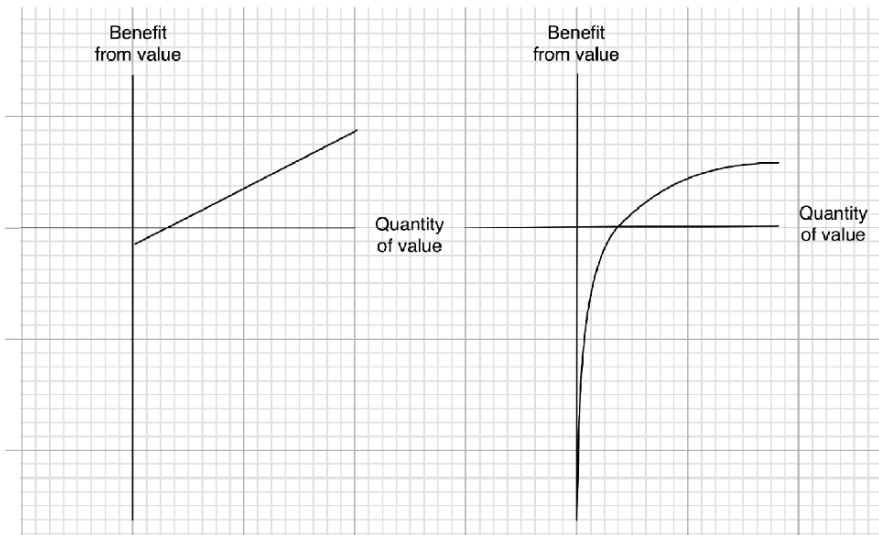


Fig. 5 Quantitative measure and benefit: linear (left) and non linear case (right)

of decisional alternatives. However, they should not lead us to conclude that the rational comparison of alternatives is impossible, that the tools of decision theory are useless, or that every choice puts us in front of the incommensurable or the “absurd,” as existentialists used to say, and that it calls for (or at least presupposes) an arbitrary commitment (cf. Sartre 1993). In fact, we need to approach the problem of weighing and balancing on the basis of our awareness, not only of our failures, but also of our cognitive powers and, in particular, of the power of our implicit cognition. As a matter of fact, we know how to take many decisions impacting on different goals and values, and we can approach this task in a way that, though far from perfect, is sufficiently good for most of our purposes. Humans seem to possess an adequate cognitive faculty to evaluate and compare alternative plans of action under conditions of uncertainty, though we cannot tell precisely how this faculty works, nor can we fully replicate its functioning through explicit reasoning. It is no accident that even decision theorists, when they have to make choices involving multiple aspects in complex domains (choosing a partner or a profession or buying a house or even a car), rely more on their intuitive judgement than on the conceptual tools provided by their discipline. So the fact that our comparative evaluations usually involve an unconscious process does not imply that they are random or absurd. On the contrary, our implicit cognition usually also takes into account data that are explicitly provided, and it processes these data unconsciously, along with information which remains implicit, and which we do not have the ability or the time to express and consciously evaluate. For instance, my choice to buy a certain car may be influenced by the information I find in automobile magazines, or by suggestions by friends, along with various other things I know, though I can only partially articulate this data.

Moreover, we can articulate this implicit knowledge at least in part (and in important cases we *should* articulate it) at the stage where we are critically analysing our choices, trying to rationalise them, as being based on good grounds. For instance, before making a check out to the car dealer, I may try to consider whether my intuitive preference is really based upon relevant grounds, by explicitly listing the pros and cons of a certain particular choice, as compared to the available alternatives. I should stop only at the stage where I have found equilibrium between intuition and reason, that is, when intuitive assessment and explicit reasoning converge on the same result.

The situation is no different in legal decision-making. Consider, for instance, a judge who has to decide, in the absence of a precise rule, whether a certain way of processing data taken through street cameras is permissible, or whether an employer is allowed to have access to e-mails an employee sent and received using the account provided by the company. One can take a stand on such issues only with reference, on the one hand, to the individual and collective legal values at stake (individual security, individual privacy, the efficiency of the economic system, and so forth) and, on the other hand, to the technological and social knowledge concerning the ways in which different arrangements are going to impact on these values. All of this knowledge is brought to bear, usually unconsciously, on one’s evaluation as to whether a certain policy or choice unduly undermines the value of privacy as



compared to what other possible policies or arrangements might do. This intuitive judgement, however, needs to be rationalised by articulating the grounds for it, and this rationalisation should lead the decision-maker to find an equilibrium between intuition and reasoned assessment.

We can thus say that, in balancing the benefits obtained by achieving different values, explicit reasoning should process and rationalise the outcomes of intuition (implicit cognition) rather than substituting it. Therefore, we can draw two indications. The first is that cognition and rationality can (and should) also govern comparative evaluations. The second is that, in most contexts, the quantitative methods proposed by decision theory should be used to check intuitive choices, analyse their compatibility with similar choices, and fit them into a background theoretical framework rather than to provide a self-sufficient alternative to human intuition (to implicit cognition).

## 12 Simplifying Evaluations

For some purposes, and under certain conditions, some simplifications may help by providing workable ways of evaluating legal decisions. For example, Alexy (2002a) proposes a method of numerically characterising the impacts on relevant values. He observes that the German Constitutional Court frequently justifies its judgments on the legitimacy of certain laws by examining the impacts these laws have on legal values, and by characterising these impacts as *light*, *medium*, or *serious*. Correspondingly, he recommends that we should qualify legal values according to their low, medium, or high importance, and that we link this qualification to numerical weights (for instance, **1** for values having low importance, **2** for medium importance, and **4** for high importance); we should also qualify gains and losses in the achievement of legal values (gains being positive and losses being negative) as light, moderate, or serious, and should link such qualifications to simple numerical quantities (for instance, **1** for light, **2** for medium, and **4** for serious).

A much rougher simplification than that proposed by Alexy can be had by assuming that there is a *lexicographic order* of values: values (or sets of them) can be listed in order of importance, and no gain, however big, in a lower-ranked value can outweigh a loss, however small, in a higher-ranked one. For example, it is frequently said that personality rights always prevail upon economic rights. Clearly, such an extreme view cannot be taken literally, or rather, it can only be maintained by sensible persons at the price of hypocrisy and self-deceit (masquerading economic rights as personality rights whenever one feels that they ought to prevail, and vice versa). For instance, it seems undeniable that the modest loss in privacy involved in a vendor's practice of keeping a record of the sale, for a limited time, is outweighed by the possibility of monitoring the performance of the contract. On the other hand, the idea that personality rights normally (defeasibly) prevail upon economic rights, and that this defeasible presumption can only be defeated when there is a clear and specific reason to the contrary, seems quite sensible.

Lawyers may use further techniques to simplify teleological evaluation. First, we may limit ourselves to considering “the types of decision which should have to be given in hypothetical cases which might occur and which would come within the terms of the ruling,” and one may evaluate those consequences by asking about “the acceptability of such consequences” (MacCormick 1978). This means that, rather than examining the social and economic consequences produced by decisions taken in keeping with certain rules, we could simply consider what legal decisions would be taken in certain classes of cases if certain rules were adopted (for a discussion of this idea, see also Luhmann 1974, Chapter 4, Section 5).

A different way of simplifying teleological reasoning is provided by reasoning *per-absurdum*. This consists in focusing on just one negative implication of a certain choice, and on the values that are undermined through such an implication. This very crude way of cutting away at the complexity of teleological reasoning is appropriate when a single consequence of a decision is so detrimental that it will very unlikely be outweighed by any advantageous impacts of the same decision. Often, a vivid impression of the negative impact of a certain choice can be had without even having to specify what values are going to be undermined.<sup>7</sup>

Some criteria of reasonableness used in constitutional or administrative review also give clues for detecting irrationality. For instance, a choice to allocate a certain advantage or burden to certain persons, while not allocating it to others who are in an equal situation (in all relevant respects), does not just violate the principle of equality: is it also an index of irrationality. In fact, where such a choice is concerned, there must usually be a better alternative, which may consist either in allocating the same advantage or burden to these other persons too (if this advantage or burden has a positive impact on the achievement of the values at issue) or in eliminating it completely for everybody (if it has a negative impact). A decision as to whether to extend or eliminate an advantage (or a burden) is a difficult one, but refusing to address it in a reasonable way may lead to very negative consequences. For instance, the Italian Constitutional Court has long been adopting, in the name of the principle of equality, a policy under which every benefit conferred on any person or category (as concerns salary or pension, for example) must also be conferred on every person in the same situation as those already enjoying the benefit. This policy had a very bad impact on public finances, and so the judges had to reconsider it: they now admit that a privilege may have to be eliminated rather than extended, and they usually prefer to stimulate a legislative adjustment rather than act directly.

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<sup>7</sup> Here is how, in *Donoghue v. Stevenson*, Lord MacMillan refuted the thesis that producers owe no duty of care to customers: “Suppose that a baker through carelessness allows a large quantity of arsenic to be mixed with a batch of his bread, with the result that those who subsequently eat it are poisoned. Could he be heard to say that he owed no duty to the consumers of his bread to take care that it was free from poison, and that, as he did not know that any poison had fallen into it, his only liability was for the breach of warranty under his contract of sale to those who actually bought the poisoned bread from him?” (House of Lords [1932] A.C. at 620).

Similarly, the fact that a choice completely disregards certain values is a strong index of its likely irrationality. Since the loss of benefit brought about by compressing a value increases more than proportionally when the value is achieved to a minor extent, it is very unlikely that the complete non-achievement of a certain value can be outweighed by an increase in the achievement of other values. For instance, an increase in security, though it may justify a reduction of freedom, cannot justify the complete elimination of freedom, and the less freedom we have, the higher the increase in security must be to justify additional restrictions on freedom.

### **13 The Rationality of Legislative Choices**

In what follows, the foregoing analysis of teleological reasoning shall be brought to bear upon legislative choices and their judicial review. As Waldron (1999) has observed, it is often too pessimistic a view that is taken of legislation, a view often coupled with an excessive optimism about judicial decision-making. In fact, jurists often develop normative theories of constitutional adjudication to suggest how judges should reason and act in order to remedy legislative mistakes: legal analyses thus tend to combine a realistic-empirical approach to legislation, focusing on the defective instances of legislation (where legislators are bow to special interests, are moved by prejudice and ideology, pursue particularistic or even sectarian goals, develop ineffective policies, fail to achieve the promised outcomes, etc.), with a normative analysis of adjudication suggesting how judges should remedy such mistakes and thus focusing on the best instances of adjudication (where judges succeeded in protecting fundamental rights or other constitutional values against wrong legislative choices). This approach often entails a reductive view of legislation, failing to take into account that, besides normative models of adjudication, there are also normative models of legislation, models to some extent adopted by the participants in the legislative process, and motivating their behaviour. Effective practice, both in legislation and in adjudication, cannot be reduced to the implementation of a normative model or to the dialectics of opportunistic interests: it instead requires the integration of both aspects, the tension towards a normative standard and the opposite (and often prevailing) pressures to depart from it. So, in analysing legislation, I shall first lay out some aspects of a normative model of legislative rationality, and shall then consider its possible failings.

Legislators (like judges and administrators) should not reason from their private perspective (pursuing their individual interest). When serving as members of a legislative body, they should instead act in the name and for the benefit (the common good) of the polity they are representing, and should make their choices integral to the decisional process of that polity. Thus, when evaluating the teleological rationality/reasonableness of the determinations adopted by a legislature, our reference point should not be the particular private objectives the individual members of a legislative body might pursue, but rather the political goals they adopt according to their vision of the public good, combined with the constitutional values the

legislature has to take into account. With this proviso, legislative decision-making can be assimilated to the model of individual rationality I described above, which integrates epistemic and practical rationality (the role for epistemic rationality in legislation is stressed by the idea of evidence-based legislation, on which see, among others, Seidman and Seidman 2001). This assimilation has to be integrated, as I shall argue in what follows, by taking into account the plurality of institutional agents involved in the public decision-making process.

Legislators (supported by their staff, communicating with their constituencies, participating in political debate inside and outside the legislative body) need to first detect a problem-situation, namely, a social arrangement that appears to be unsatisfactory, expressing an unsatisfied social need that they think should be addressed. On the basis of an empirical analysis, they should identify more precisely the issue characterising that problem-situation and the social behaviour from which it emerges. This will enable them to establish what goal (values) should be pursued through legislation in that situation. For instance, let us consider a problem now being discussed by the Italian legislature: a very high number of private telephone communications are wiretapped under police investigations, and the content of such communications often winds up being published in the media, with serious prejudice to its author. A new law designed to deal with this problem-situation should aim to better protect individual privacy, a goal achieving which would in turn also be a way of protecting individual liberty.

Putting such a goal on the legislative agenda would start teleological reasoning, in order to draft a legislative measure protecting privacy with regard to private communications wiretapped under crime investigations. For this purpose, an empirical analysis is required aimed at understanding how possible measures (plans) will impact on the values at stake: not only privacy, but also freedom of speech, freedom of the press, publicity (and the consequent public control) of judicial activities, repression and hence prevention of crimes, and limitation of the costs of judicial inquiries (by reducing wiretapping costs). For instance, an absolute and unconditional prohibition against wiretapping in crime investigations would increase privacy protection, and would leave freedom of speech untouched, but would seriously limit the possibility of identifying the authors of many crimes, especially those carried out by organised crime rings. It would reduce to 0 the costs of wiretapping, though this may require different kinds of investigations, possibly more expensive ones. By contrast, an unconditional wiretapping authority conferred on every prosecutor in investigations concerning any kind of crime, coupled with an unlimited authority to distribute and publish the wiretapped conversations, would increase the likelihood of preventing crimes (assuming that prosecutors were able to devote their resources to the most effective investigations, on the basis of a correct cost-benefit analysis) and would emphasise freedom of the press.

Such considerations need to be based on empirical analyses that will take into account the complex social connections at issue. It is not sufficient to consider only law in the books; analysis has to extend to law in action. Legislators need to evaluate the probability that legal provisions are not followed, since penalties are not enforced or fail to deter unwanted behaviour: will a fine imposed on officers and journalists succeed in deterring them from communicating and publishing