Giorgio Bongiovanni
Giovanni Sartor
Chiara Valentini
Editors

Law and Philosophy Library 86

Reasonableness and Law

Springer

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

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

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

entrusted with the political task of conducting the act of weighing and balancing, and striking compromises between those competing values, interests and preferences. In contrast, the judicial function which fundamentally does not rely, and is not supposed to rely, upon the electoral pedigree for its legitimacy, seems incompatible with the task of an authoritative weighing and balancing of diverse societal interests and values.

This is the main disadvantage of judicial proportionality analysis, and just as before, I must add a clause that the preceding paragraph is an account of the public perception of such an analysis rather than my own assessment of it. Nevertheless, such a perception, justified or not, is in itself an important fact, and must in itself be factored into our evaluation of costs and benefits of alternative methods of adjudication on restrictions of constitutional rights.

Nevertheless, and notwithstanding this disadvantage, proportionality analysis based on reasonableness approach has also some very important advantages, compared to an absolutist method. First of all, it is much more "transparent." A judge engaged in the act of weighing and balancing of competing constitutional goods discloses the elements of his reasoning to the public. It is, to use an admittedly imperfect analogy, as if a cook in an elegant restaurant first revealed to the customers all the ingredients, and then showed the guests, step by step all the stages of the preparation of the dish before it lands on their tables. By showing all the "ingredients" of his/her reasoning, a judge conducting the proportionality analysis indicates that the final conclusion is not a result of a mechanical calculus: a syllogism in which the conclusion necessarily follows from the premises, but rather the outcome results from a complex, *practical* reasoning, in which significant but often mutually competing values have to be considered in their actual social context. This practical reasoning, a judge implies, calls for making controversial, difficult choices regarding the comparative significance of those competing values in a given set of circumstances. As a result, even if some—even many—members of the audience disagree with the outcome, they know *why* it has occurred. (And by the audience I mean mainly the parties to a given constitutional litigation but also the judicial and legal milieu, the political class, the media and public opinion in general). Of course, from the fact that they *understand* it does not follow that they *accept* it, but the understanding of the reasons for a decision is a very important factor in the legitimacy of a constitutional judge—legitimacy which is always vulnerable, unstable and challengeable, for obvious reasons having to do with the dominant conception of democratic legitimacy based on electoral results. So the legitimacy dividend resulting from the transparency just described is an important asset for judges always facing the notorious, and unavoidable, legitimacy deficit.

I should also add that the contrast between the "absolutist" and the proportionality-based methods has been sharpened here deliberately, for argumentative purposes, and that in reality the opposition is not so stark. On the one hand, one may show a number of "absolutist" judgments which have exemplary clarity and which are perfectly intelligible to the non-legal audience, and on the other hand, many proportionality-oriented judgments which are unduly complex, written in arcane and difficult language, and unintelligible to non-lawyers (and often to lawyers as

well). But when I talk about "transparency" I mean not so much intelligibility, in terms of accessibility to a large number of reasonable intelligent people, but rather the fact that a good proportionality-oriented reasoning should contain a list of all the "ingredients" (in terms of mutually competing values)—while the absolutist reasoning, not necessarily. As such, proportionality analysis is more conducive to critical analysis and to dissection of its elements than the "absolutist" analysis which focuses on one constitutional right and on a thorough examination of its meaning.

But the primary advantage of proportionality analysis is its capacity for consensus building. Note that it is inherent to this method of reasoning that a judge must admit that both parties to the controversy have prima facie good constitutional arguments, and that no party is beyond the constitutional pale. When we conduct the weighing and balancing of competing constitutional value, we recognize the value of them all, including to the "losing" ones. If I have lost in this exercise, i.e. if my value has been recognized as less weighty in this particular constellation of values, it does not follow that it has been denied any value: it has just had to give way to another value or set of values. Constitutionality of all these values is preserved. More specifically: under the analysis of proportionality of means (rights restrictions) to legislative aims, a judge who ends up by striking down a given regulation is saying that those means are not sufficiently proportional (relevant) to the attainment of the aim, which may mean either that (1) the aim is not sufficiently weighty in order to justify such a rights restriction, or that (2) the cost of trying to find some other means to attain the end may be lower than the costs adopted by the legislator in the regulation under scrutiny (the costs consisting in the rights restrictions). In both these conclusions, the aims (in conclusion #1) and the means adopted (in conclusion #2) maintain *some* constitutional value—but not sufficiently high in order to justify a given restriction, i.e. lower than the value of avoiding this rights restriction. The upshot is that the arguments invoked in the litigation by an eventually "losing" party maintain their value, though in this constellation, a lower one than the values invoked by the "winning" party. (And, mutatis mutandis, the same would be the upshot of a judgment *upholding* a given regulation: the complaining party will not be told that it was mistaken as to the constitutional values which it invoked against the regulation but only that, in this particular context, the value of attaining the goal through the means adopted by the legislator outweighs the costs resulting from the rights restriction).

So if we were to articulate a message sent by the court which has just conducted a proportionality analysis and ended up with a determinate judgment, it would go roughly like that: "Both parties to the controversy had some constitutionally valid arguments but we, the court, must choose a lesser evil and in this case we believe that the arguments of one party constitutionally prevail over the arguments invoked by the other party." This is a conciliatory argument, consensus-seeking and "wounds healing"—the wounds inevitably resulting from the unavoidable fact that one of the parties will lose. This argument implies, as Alec Stone puts it, "ritual bows to the losing party" (ibid.). In addition, the message resulting from such an argument may well contain an implicit promise that, in future, the presently losing party may prevail, if only the actual context will slightly change, thus affecting the reconfiguration

of all relevant constitutional values at stake. The weighing and balancing, resulting from complex practical judgments rather from a mechanical syllogism, may bring about a different outcome, because the judge may well assess that the cost/benefit calculus will be only slightly different—and this slight change may make all the difference. So there is a consolation for the losing party: it is a hope that it may win in the future, and that today's decision does not entrench its loss forever. In such a way, by building the grounds for consensus and by immediately healing the wounds resulting from the decision, a proportionality-oriented judge additionally enhances his/her legitimacy, damaged as it has been by a legislative-like way of proceeding.

2 Reasonableness in Political Philosophy

In liberal political philosophy, the category of "reasonableness" plays a crucial role, especially in relation to the question of political legitimacy, i.e. the question of the grounds for using state coercion towards those who do not necessarily agree with the content of the authoritative directive which is being applied to them. The most elaborate discussion of reasonableness in the context of political legitimacy has been provided by John Rawls, and it his theory which serves here as the basis of my short discussion of reasonableness in politics.

Rawls distinguishes between two contiguous concepts: rationality and reasonableness, as two separate moral powers which jointly constitute a full moral physiognomy of a human self (Rawls 1993, 48–54). To say it very briefly, Rawls's "reasonableness" is about those moral capacities which allow us to "propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so" (ibid., 49); "rationality" in contrast applies to a single agent and is about forming, shaping, modifying and following our conception of the good. So to put it very simplistically, rationality is about the moral good for an individual person while reasonableness is about the moral bases of collaboration of an individual with the others, on the grounds which are acceptable to others.

This last statement leads to the central category in Rawls's political philosophy, namely Public Reason (PR) which is tied up with the liberal principle of legitimacy which postulates that only laws that are based upon arguments and reasons to which no members of the society have a rational reason to object can boast political legitimacy, and as such be applied coercively even to those who actually disagree with them. In Rawls's words: "Our exercise of political power is fully proper only when it is exercised in accordance with the constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason" (ibid., 137). This is based on a simple point: a law cannot claim any legitimacy towards me if it is based upon arguments and reasons that I have no reason to accept. The denial of legitimacy to such a law is based on the view that there must be some connection between the law and myself *qua* subject of the law—a connection that establishes some rational reasons to identify the good for myself in the law. The connection must be between

the substance of the law and the preferences, desires, convictions or interests of each individual subjected to it. If, under rational examination, no such connection can be detected, then I have no reasons to accept the law as legitimate. If, however, I disagree with the wisdom of a given law but would agree that it is based upon arguments that I can recognize as valid, then a *necessary* condition for its legitimacy has been met. This point has been expressed well by Jeremy Waldron (1993, 44): "If there is some individual to whom a justification cannot be given, then so far as *he* is concerned the social order had better be replaced by other arrangements, for the status quo has made out no claim to *his* allegiance." As is clear, the category of PR serves to limit the range of rationales—of reasons—which can be invoked to justify (hence, legitimize) the proposed uses of coercion towards individuals.

The very idea of "public reason", as expounded by Rawls, is not self-explanatory, and not without its difficulties. Rawls operates with two understandings of public reason which are not necessarily equivalent. The first one is revealed in the "equal endorseability by all" criterion; the second, in his extended distinction between political and comprehensive conceptions, with the proviso that public reason must safely place itself within the former. As to the first understanding, Ronald Dworkin has expressed doubts as to whether public reason, so understood (in Dworkin's interpretation it is characterized as the "doctrine of reciprocity"), *excludes* anything at all. As Dworkin argues: "If I believe that a particular controversial moral position is plainly right . . . then how can I not believe that other people in my community can reasonably accept the same view, whether or not it is likely that they will accept it?" (Dworkin 2005, 252). The second formulation of public reason in Rawls is even more problematic. This is the requirement of locating public reason within the arguments that can be properly considered "political" (hence, positioned within an overlapping consensus) as opposed to comprehensive ones. This, in turn, seems to be a much too rigorous requirement, compared to intuitively acceptable common practices: to consistently purge public debate of all the political proposals made on (controversial) moral or religious grounds would lead to an undue erosion of public discourse, and would carry obvious discriminatory implications.

So we have a dilemma: we may identify two alternative readings of PR but under the first reading, it is much too lenient while under the second reading—much too rigorous, compared to our commonsensical understandings of the reasonableness in public discourse. Does it fully disqualify the very idea of PR to play a role in a test for the legitimacy of law? I do not think so. The contrast between two readings, just provided, has been excessively sharpened, and I hope that a more sensitive reading of PR need not lead to such unwholesome consequences. As to the first horn of the dilemma—that PR is a much too lenient test which will not be capable of disqualifying virtually any regulations—it should be noted that the very fact that someone sincerely considers his or her publicly provided rationale as reasonable, hence universalizable, does not necessarily mean that this view is justified from the point of view of an external observer. Some types of rationales for legal regulations may be viewed as not universalizable by their very nature, and so not lending themselves for figuring in the justifications of legal coercive rules. Perhaps all religious justifications are by their very nature not "endorseable by all", because those who are

not adherents to a given faith have no reason whatsoever to endorse a rationale which crucially is based on that faith. It may well be the case that every believer is confident that his/her beliefs are truly reasonable, and that they are so self-evidently reasonable that every reasonable person must accept them. But this is not necessarily the only conviction accompanying religious beliefs: if, for example, someone believes in revelation as a source of religious faith then naturally that person cannot maintain that every reasonable person has good reasons to accept the views based on that faith. So these religious beliefs cannot become part of PR—and so the very conception of PR is not as toothless as this horn of the dilemma would imply.

We can extend this type of argument upon the second horn of the dilemma as well; it was, you will remember, that PR is much too rigorous a test because it would disqualify many more justifications, compared to our intuitions or common sense. This second reading of PR was based on hostility towards admitting "comprehensive", philosophical-religious arguments into the domain of public discourse, in order to be able to construct an "overlapping consensus." At the same time it is intuitively feasible that participants to the public discourse about law should be able—indeed, even encouraged—to cite and appeal to their deep philosophical conceptions, based on certain views of the universe, society and individual self. This suggests that the concept of "overlapping consensus", if it is to inform a plausible model of PR, must undergo some modifications and refinements in order to make it compatible with widespread liberal-democratic intuitions. It seems to me that the very fact of citing or appealing to a deep philosophical rationale cannot disqualify a given argument from figuring in the PR—that would border on the absurd. Rather what matters is that we put forward only such proposals for a coercive law which may be accepted even by people who do not share our deep philosophical views—which in practice means that these proposals must be able of being defended *also* on some other grounds. This seems realistic and feasible; after all, most legal rules seem to be able to benefit from different philosophical (and other) rationales. Consequently, the second horn of our dilemma appears to be less damaging to the idea of PR than it might seem at first blush.

It is time to aim at some conclusions regarding the functions of the notion of reasonableness in political philosophy. As mentioned earlier, it has a special role in the context of the issue of legitimacy of political power, i.e. of the use of coercion towards individuals. Let me elaborate on this connection now. The issue of legitimacy arises in political philosophy, from the individual citizen's perspective, when she asks herself a question why she should comply with a directive issued by an authority if she disagrees with the content of this directive. More specifically, this question arises in the context of legitimacy when a persons contemplates her *moral* duty to comply: if all that she wondered about was a *legal* duty, the question would be uninteresting, because tautological. Similarly, if she inquired only about practical, in particular about the prudential reasons for compliance, the question would not amount to the matter of legitimacy but rather would collapse into practical guidelines regarding avoidance of sanctions for non-compliance. But the moral question is different from the legal and from the practical one: it is a grand question (perhaps, *the* grand question) of political philosophy going back to Jean

Jacques Rousseau: how can we reconcile our individual freedom with subjection to the "general will" (however defined, as long as the "general will" does not necessarily translate fully our individual preferences into the collective choice)? So it is a question about the sources of the public authority, and of its dominance over the individual; it is a question of the grounds of the duty of obedience to law by the citizens. Liberals admit, of course, that this duty to obey is not unlimited—hence the acceptance of some room for civil disobedience—but they cannot go as far as to say that the duty to obey should be confined only to those authoritative directives with which we agree, on merits. It would be an anarchistic position, and the very fact of the lawfulness of a given directive would not add any weight to the argument in favor of compliance.

From this point of view, the concept of "legitimacy" serves as a marker to identify the point on a continuum between two extremes: the authoritarian position under which the very fact of authoritative enactment of a directive is a sufficient moral reason for compliance with it, and on the other side of the spectrum, an anarchistic position under which the very fact of legal enactment does not add any weight to moral arguments for compliance. Under a liberal approach, the fact of legal enactment is an argument for compliance (and in this, it is aligned to the authoritarian position), but is its not a sufficient reason and the duty of compliance is not absolute (and in this, it is aligned with an anarchistic position). The intermediate space which is occupied by a liberal position implies that there is a duty to comply with at least some authoritative rules which are not substantively accepted by a given person—and it is precisely the task of this idea of legitimacy to determine what are the criteria, grounds and scope of a moral duty to comply with those rules.

As we all know, political philosophy has in store a large number of theories trying to provide such criteria and grounds for the duty to comply with the rules we do not necessarily endorse substantively. Two recently most influential theories are by appeals to the idea of social contract and to deliberative democracy. The conception of Public Reason, as described above, attempts to reconcile both these argumentative strategies. From the idea of social contract it borrows a centrality of consensus which seems to be a foundation of authoritative social arrangements: we owe respect to authoritative decisions insofar as, and because, we can be seen to be their co-authors. This is only a hypothetical consensus, though, and a very thin one, based on the alleged common normative presuppositions implicit in the political culture. In turn, deliberative democracy also informs the idea of PR by insisting that the authoritative decisions, in order to be legitimate, must be justified (in both senses of the word: both actually justified and justifiable) to those who are bound by them. Just as with the consensus (social contract), this is a very *thin* notion of deliberation in which *justifiability* is pretty much a sufficient condition even though a liberal, of course, will hope that the authoritative decisions will be not only *capable* of being justified but also actually argued, discussed and justified in public dialogue. Nevertheless PR, per se, is reducible to justifiability of authoritative decisions. To sum up: reasonableness of political decisions, understood through the category of Public Reason, means a search for a consensus about those decisions by making sure that they are based on the rationales which are justifiable to everyone, including to those who disagree with those decisions on merits.

3 Conclusions

In the Introduction to this chapter I have flagged up a possibility that reasonableness in legal reasoning and reasonableness in politics are two completely distinct categories, and the only commonality they have is the word. If that were the case, any search for a common denominator would be a result of a simple nominalist error. I hope that this chapter has given some reasons to believe that it is not the case, and that the identity of the word may be a helpful indication of a functional similarity of the functions played by the category of reasonableness in these two contexts; the functional similarity which is underwritten by some common value-judgments on which this category is based. So it all boils down to a normative rationale provided for reasonableness in a legal and in a political context.

Let me recapitulate. I have established that in the context of legal theory, the category of reasonableness informs this factor of legal reasoning which may have either a weak meaning, of a "security valve" which allows judges to get rid of manifestly irrational or absurd decisions, which is of lesser importance to us, or—in its "strong" meaning—triggers a proportionality analysis, i.e. the proportionality of means to ends, where the "means" consist in restrictions of constitutional rights, and the "ends" are about constitutionally permissible aims pursued by the legislator. "Strong" reasonableness is therefore inherently lied up with proportionality, and also with the test of necessity, and thus is a guarantee of a minimal restriction of constitutional rights compatible with the attainment of a given purpose. This approach is one among many judicial approaches to the scrutiny of restrictions of constitutional rights; not the only one, and not necessarily the most libertarian one. It carries certain disadvantages because of an unfortunate alignment of the judicial role with the role of legislator whose classical and generally recognized role is to conduct a complex weighing and balancing of competing social values, interests and preferences. But the proportionality approach also has some great advantages when compared with alternative approaches: it is more transparent when it comes to revealing to the public all the ingredients of the judicial calculus, and most importantly, it reduces the sense of defeat for the losing party. As such, it is consensus-oriented because it acknowledges explicitly that there are valid constitutional arguments on both sides, and that the arguments outweighed by the opposing ones do not lose thereby their constitutional weight.

In turn in political philosophy the notion of reasonableness registers primarily in the liberal theory and applies to the determination of the standards of justification for authoritative decisions so that they can be considered legitimate, i.e. calling for respect even from those subjected to them who do not agree with them on merits.[10] Such justifications can be seen to reflect the reciprocity principle which can be viewed as a version (albeit a weak one) of hypothetical social contract: it demands that only such rationales be provided for authoritative directives which can

[10] I am deliberately using the careful language of "respect" rather than "compliance" because there is a plausible theory that legitimate authoritative decisions do not necessarily generate a moral duty to comply with them but rather to "respect" them; more on it see Sadurski (2006).

be endorsed by everyone to whom they are addressed. The attractiveness of this idea results from the fact that it combines two enormously popular traditions in democratic theory: those of social contract and of deliberative democracy. In general, the idea of political legitimacy based on reasonableness is an important guarantee of liberty (because, treated seriously, it limits the scope of possible rationales for legitimate coercive decisions) and also of equality (because, by resting on the reciprocity principle it requires that everyone should be registered in the rationale provided for this authoritative decision).

So it can be seen that both these conceptions: reasonableness in law and reasonableness in political theory have some obvious commonalities at the level of their deep justifications; both appeal (in the ways I depicted) to liberal, egalitarian and consensus-oriented values. This is not to say that there are no important differences between the two conceptions. But my aspiration in this chapter is to reveal the similarities which, in my view, have been overlooked in the conventional discourse on reasonableness, both in legal and in political theory. This aspiration, if accomplished, may be a confirmation of the hypothesis, flagged at the outset, that the similar word may be a helpful indication of the functional similarity. This hypothesis may, in turn, be conducive to interesting normative considerations: it may help us defend the use of proportionality analysis in law by appealing to the, antecedently accepted, political legitimacy based on reasonableness. Or vice versa: it may help us exploit the attractiveness of proportionality analysis in law in order to defend the idea of political legitimacy based on reasonableness. Either way, the category of reasonableness may be a helpful tool for consensus-seeking in the society marked by a deep disagreement as to fundamental moral values.

References

Craig, P. 2006. *EU Administrative Law*. Oxford: Oxford University Press.

Dijk, P. van and G.J.H. van Hoof. 1998. *Theory and Practice of the European Convention on Human Rights*. The Hague: Kluwer.

Dworkin, R. 2005. *Justice in Robes*. Cambridge, Mass.: Harvard University Press.

Mowbray, A. 2001. *Cases and Materials on the European Convention of Human Righ*ts. London: Butterworths.

Rawls, J. 1993. *Political Liberalism*. New York, N.Y.: Columbia University Press.

Sadurski, W. 2006. Law's Legitimacy and Democracy-Plus. *Oxford Journal of Legal Studies* 26: 377–409.

Schauer, F. 1982. *Free Speech: A Philosophical Enquiry*. Cambridge, Mass.: Cambridge University Press.

Waldron, J. 1993. *Liberal Rights*. New York, N.Y.: Cambridge University Press.

Global Legitimation and Reasonableness

Sebastiano Maffettone

1 Background and Prologue

Human societies are at once confronted with a social story of cooperation and conflict and a cultural story of identity and difference. This parallel story concerns both the internal life of any society and its international relations. It is generally the rule, of course, to imagine some overlap between the socio-economic side and the cultural side of the narrative. Identity based conflicts, for example, are often sparked and exacerbated for reasons of socio-economic background.

Often, however, people in my generation (I was born in 1948) will understand these two stories—these two cleavages—as originating at different times in their lives: they see a first part of their intellectual life as dominated by the socio-economic cleavage and the second one as re-shaped by the identity cleavage. Their perception tends to reconstruct a youth period in terms of heated discussions about the vices and virtues of communism versus liberal democracy, continuing with a more mature age in which the merits of communism became increasingly more obscure to many. After 1989, one might even have come to believe, quite naively to be sure, that the demise of communism and the concurrent victory of liberal democracy had set the stage for a more or less enduring age of global peace and prosperity. But quite rapidly, as we all know, the *histoire événementielle* belied this bizarre philosophy of history.

This widely shared narrative has had its institutional outcomes. Indeed, the breakup of the Soviet Union, coupled with the previous break up of the colonial regimes in Africa and Asia, made it appear in many areas of the world that the traditional institutions of the West were obsolete and in need of urgent change. The innovative claims of many emerging "indigenous" peoples compelled many of us to question the limits of even our preferred institutional model, namely, that mixture of basic individual rights and popular sovereignty that we usually call liberal democracy. We began to have doubts, so to speak, about its intrinsic normative significance, and began pile on conditions that would make it feasible, conditions, such as

S. Maffettone (✉)
Faculty of Political Science, LUISS "Guido Carli" of Rome, Rome, Italy
e-mail: smaffettone@luiss.it

G. Bongiovanni et al. (eds.), *Reasonableness and Law*, Law and Philosophy Library 86,
DOI 10.1007/978-1-4020-8500-0_7, © Springer Science+Business Media B.V. 2009

a decent level of income (the living wage), a coherent institutional framework, some form of religious pluralism, an ethnic and sociocultural base ranging within certain bounds, and so on. It's surely an exaggeration to reconstruct all these intellectual oscillations within the rather disturbing and quite rigid framework characterized by a permanent and global clash of civilizations. Still, it became standard in political theory across the globe to issue a cultural challenge to Western institutional models.

Political theory cannot survive too long without being shaped by the historical circumstances in which it flourishes. So, the growing relevance of cultural conflicts, compounded by the pressure of gender and race movements, was such that there simply *had* to be systematic consequences in our foundational thinking about the structure of the social order. Political philosophy, in other words, cannot resist historical change. But, what was the status of political philosophy during this period I am vaguely referring to? Of course, it is difficult, if not impossible, to answer this question in a proper way. Even so, if we can content ourselves with a loose yet hopefully sensible attempt at a *Nachrekonstruktion* (or rational reconstruction), we can provisionally explain this in terms of a systematic dualism between two main streams.

On the one hand, political philosophy saw a systematic attempt to address the new global problems from within the framework of liberal democratic theory, the intellectual winner emerging from the Cold War era. In its general form, liberal democracy was powerfully reformulated by John Rawls (1971) in terms of a theory of justice seeking to make compatible the human needs and aspirations present in a regime of basic pluralism. Rawls provided the impetus for attempting a global extension of this liberal model of political philosophy, whose original configuration was the nation-state: the model was thus first extended to the global socio-economic structure, with scholars like Beitz and Pogge, and subsequently to the global cultural scenario, with scholars like Kymlicka and Kukhatas.

On the other hand, we saw a sometimes confused but nevertheless energetic attempt to overcome the traditional foundational apparatus of political philosophy, that survives from the previous model. From Asia, Africa, and the Middle East there emerged a need to break out of the mould of liberal democratic theory, which was regarded as merely a Western product, at least in part, and so as the last vestige of the colonial era. Scholars like Said, Baba, Appadurai, Spivak, and Mbembe often found their ideal Occidental counterpart in the works of so called French Thought. In this way, you wound up with this odd mixture of Western post modernism and non-Western post-colonialism, that became exceedingly popular in the in the United States in what are often referred to as area studies. The outcome of this process often consists in a framework in which alternative and competing models of globalization coexist. To be sure, I do not think this kind of intellectual tradition has acceptably captured the sense of such basic political concepts as those of human rights and liberal democracy. But it does deserve credit for having presented some models of globalization antagonistic to a past of Western cultural and political dominance, which post-colonial peoples certainly had good reasons to react against.

To sum up, I see in the post-colonial post-modern tradition of political philosophy not so much a significant option in its own right as a useful symbolic reminder: a