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Reasonableness and Law

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or plaintiff rather than the subjective perspective of this or that individual (see Ranney 1997).

The "reasonable woman" standard has received a great deal of attention since its use in the 1991 majority opinion in *Ellison v. Brady*. The court held in *Ellison* (drawing on the dissent to the 1986 case *Rabidue v. Osceola Refining Co.*) that the reasonable-woman standard was more appropriate than the "reasonable person" standard derived from tort law (itself a replacement of the traditional "reasonable man" standard) in determining whether behaviour directed toward women creates a hostile working environment and thereby constitutes harassment. Courts that use the reasonable-woman standard recognize a difference between men and women when it comes to the effect of unwanted sexual advances. And, considering that women have historically been more vulnerable to rape and sex-related violence than men, these courts take the view that the proper perspective for evaluating a sexual-harassment claim is that of the reasonable woman (see Goldberg 1995; Heller 1998; Perry et al. 2004).

What is important here, where we are concerned, is not the contentious issue itself of what the most appropriate standard is for what it means to be a reasonable child, man, woman, or person: it is rather that when we invoke such a child, man, woman, or person, we do so relying on some background assumptions and ideas that lie in concealment until a discussion brings them to light. Some of these assumptions and ideas are based on biological characteristics and accordingly pertain to the biological entity that rights and liberties belong to. The question, however, is not *what* but *who* this biological entity is. And so, it is not by a natural nexus that a human being (an individual) comes to be a holder of rights and liberties: such an ascription of rights and liberties does not inhere in humans owing to their natural characteristics, of course, but rather depends on historical context—it is the outcome of a historical process.

The question of who the holders of rights and liberties are is, needless to say, a fundamental one, so it is not surprising to see it turn up regularly on the constitutional docket. To be sure, after the demise of patriarchal legal systems and the gradual recognition of individual rights—such as racial, sexual, religious, and anti-discrimination rights, along with so many others—we might have thought we had settled once and for all the vexed question of *who* the (biological) entity is that these rights and liberties belong to. But in recent decades the question has come back with renewed intensity owing to the impact the life sciences and the biotechnologies are having on our societies. Even as the same concept of a person (an individual) continues to be a subject of debate and discussion, new groups, species, and entities have appeared on the horizon that are now filtering into society. They therefore need to be explored and understood.

Furthermore, the engineering of creatures that are part-human, part-nonhuman makes it necessary to redefine the distinctive properties of humanity as well as to rethink our relation to nonhuman animals. In-vitro fertilization has inspired many opportunities for the use of gametes, fertilized eggs, embryos, and the like, and the production of human/nonhuman hybrids is but one among these many opportunities. Another such opportunity or possibility is, notably, the *cloning* of human beings—which goes to show just how broad and multifaceted this whole issue is. To be sure, we do not yet have the science to create such *new entities* (hybrids, clones, and the like), but it is likely that if we persist we will sooner or later overcome the technological obstacles we now face, and then we will have gotten to the point where we *can* create these new entities. In fact, it seems that somewhere down the line we will be able to introduce into the human body such nonbiological material as *cyborgs* and other forms of artificial intelligence, and this will pose an even greater challenge for the concept of a human individual such as we presently understand it. Even as we speak, for the first time ever the issue of the freedoms and the right to life of the great apes is being considered by a legislature: this is happening in Spain, whose parliamentary environmental committee has approved resolutions urging Spain to comply with the Great Apes Project, framed by scientists and philosophers who say the great apes, our closest genetic relatives, should on that account be accorded rights hitherto reserved to humans.

In short, the question is: To what extent are changes in the human (and possibly even the nonhuman) biological entity affecting our idea of reasonableness in what concerns the rights traditionally recognized for such entities?

8 Conclusion

That reasonableness owes no special debt to reason should not be taken to mean that is impossible to find some threads of consistency in the use of reasonableness.

A sampling of the varied use of reasonableness was taken with the different legal cases previously considered: reasonableness as way of changing things without really changing them, in the reasonable-person standard for informed consent; as a limitation on the state's power to punish, in the Forzatti case; as a way of justifying sacrificing the rights of dying people for the sake of traditional moral values, in *Pretty*; and as a way of "rewriting" the right to life without explaining how that comes about, in *Pretty* again.

It is hard to say how consistent the use of reasonableness in biolaw can be made. In fact, it may well be that we will never be able to avoid undeclared uses of *reasonableness* or declared ones where the word finds an ostensible use that is simply stated without any comment or clarification. If we compare, on one side, the need for a rational approach to new challenges that biological sciences bring to rights and liberties and if we consider, at the same time, how ambiguous our use of reasonableness is in biolaw, then we must, as I see it, necessarily come to the conclusion that we should altogether refrain from using reasonableness in biolaw. And when someone speaks of reasonableness we should ask them, "Could you please try and use a different word?" Or we should ask them, "What do you mean by reasonableness?"

In this way we could avoid some harmful uses of reasonableness, such as its use as a wildcard against research in biology and law, or a way of saying, "Let's stop being rational."

My conclusion is that we have to be reasonably unreasonable if we are to make progress in the life sciences and in working out the related question of fundamental rights.

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Reasonableness and Biolaw

Stephanie Hennette-Vauchez

1 Introduction

There can undoubtedly be a procedural approach to reasonableness. Alexy argues that conditions such as taking "all relevant factors" into account or "putting all relevant factors together in a correct way" (see Alexy 2009) are necessary for reasonableness to be pursued—and *a fortiori* achieved. In the particular field of biolaw, Faralli argues somehow similarly that reasonableness can only be reached when norms proceed from a "shared method of discussion" (rather than from an "antecedent doctrine") and if they are based on the assumption that dilemmas faced by biolaw can not be expressed nor analyzed in terms of truth and/or falseness but only pretend to be "adequately argued and justified" (see Faralli 2009). At any rate, a non-procedural (eg., substantial) approach of reasonableness may well be said to be quite unlikely in early 21st century European academic settings, for natural law theories articulated around substantial standards of validity are readily said to be out of—scientific—fashion. Indeed, it would have been surprising to hear speakers and the *Reasonableness and the Law* conference argue that the concept of reasonableness was a promising ground for validating certain conducts and norms as "reasonable," and invalidating others as "unreasonable." However, the frontier between a procedural and a substantial approach of reasonableness is not easy to draw. Consequently, and despite the above recalled procedural approach to reasonableness, the concept sets the legal theorist on a slippery slope towards axiological assessments of legal cases—a reason for which it will be argued it is best relinquished.

Indeed, reasonableness rings a little bit like a variety of concepts that regularly attract legal theorists' attention because of their everlasting hope that the satisfying answer to the question of how hard cases really are determined will eventually be found. For legal theory has never accepted Jerome Frank's breakfast theory; in fact,

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it has mostly deemed it inadmissible.[1] Instead, it has relentlessly devoted time and efforts at looking for concepts that would convey less arbitrariness but still be able to account for the fact that in many cases, since there is no "one good legal answer" to a given situation, something else and more than positive law does play a part in the manufacture of legal norms. Common sense, *ordre public*, justice, fairness, rationality, human dignity . . . all these concepts have been or still are regularly called upon in positive law and theoretical inquiries in the name of their ability to bring together the description of what lawmaking is and that of what it ought to be. They succeed in fulfilling that mission because they formally are presented as "legal" categories (hence they avert the spectrum of arbitrariness) and substantially have no precise or definite definition (hence they can accommodate many different or even contradictory interpretations).

Fairly enough, reasonableness—unlike "common sense" (see de Sousa Santos 1995) or, "human dignity" (see Feldman 1999)—is not a purely substantial concept; hence the idea that it has to do with methods of discussion where all viewpoints are considered and balanced in the hope that something like an overlapping consensus is reached. Thanks to this procedural dimension of reasonableness, the concept is deemed susceptible of being objectively discussed. It may therefore be argued that it is less of a disguise for a particular judge's personal preferences (or breakfast menu) than other solely substantial ones may be. Indeed (the argument unfolds), whereas it is possible that no agreement would ever be reached on the substantial assessment that a particular behavior is or is not contrary to human dignity,[2] there would be a guarantee of possible common and objective grounds for discussion as to whether the decision has been reasonably reached. However, it is suggested here that Reasonableness is but another variation on a same theme of axiological modes of legal reasoning, for despite a readily procedural presentation, it always and inextricably conveys much substance. For indeed, whether one will deem the recourse to human dignity in legal reasoning in a particular case "reasonable" or not strongly reflects one's personal understanding of the principle. This is why it is considered here that the border between procedural and substantial aspects of reasonableness is not easily drawn and thus that legal usage of the concept conveys the risk of shifting from legal analysis to axiological prescription.

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[1] It would be interesting to investigate the link between the intensity of such breakfast (or raw personal preferences) theories' rejection within specific legal communities and the status therein of legal sociology. I would not be surprised for a correlation to appear, for the sociological approach's premise is so similar to that of breakfast-like theories (eg., the notion that elements exterior to law may shed an interesting light on legal processes) that it would usefully account for legal communities' often limited interest in types of investigation that threaten the very idea of the autonomy of law.

[2] Multiple examples can be referred to here, for the human dignity principle has been used by: the South African Constitutional Court to condemn prostitution (CCT31/01, 9 October 2002, *Jordan v. the State*); the German Federal Administrative Court to uphold the probation of a particular class of Peep shows (*BVerwGE* (1981) 64, 274); the French Council of State to uphold city ordinances prohibiting dwarf-throwing games to be organized in nightclubs . . . (C.E., Ass., 27 October 1995, *Commune de Morsang sur Orge*, rec., 372).

There is much to expect from the immediate "testing" of the theoretical construction of a concept in a particular field of law; and biolaw appears to be a particularly relevant field for putting theoretical approaches of "reasonableness" to the test, if only because it is one in which the idea of reasonableness has historically played a strong role. However, it is a "test-field" from which the idea of the concept's relevance to legal theory returns weakened; and there are, at least, three reasons to that. First, it all seems that the idea of reasonableness as a central concept in the process of elaborating norms in the field of biomedical issues disappeared with the shift from bioethics to biolaw; in other words, bioethics/biolaw specialists have a relatively strong case for arguing that reasonableness is a somewhat outdated concept. Second, it can be claimed that the use of reasonableness as an assessment device of legal regulation in the field of biomedical issues is difficult to justify in from a perspective of legal theory, for it can very easily be but the clumsy mask of political critique. Finally, and on a more general standpoint, it is arguable that interest paid to reasonableness by legal theory is only a (supplementary) confirmation of the contemporary pervasiveness of ethical considerations and principles in the field.

2 Reasonableness as an Outdated Concept: The Perspective of a Biolaw Specialist

What is striking in definitions of reasonableness such as the ones recalled above—and what is best seen from the point of view of biolaw—is that they rely on the kind of argumentations that used to be prominent some twenty or even thirty years ago in the then—emerging field of bioethics. It shares many a resemblance with central concepts of the time, such as that of "secular moral reasoning" developed by Engelhardt as a means of overcoming the "moral fragmentation that characterizes postmodernity" (see Engelhardt 1986, 421) and identifying "foundational" consensual values (ibid., Chapter 2), or that of "middle-level principles" that Beauchamp and Childress had put forth.[3] It also corresponds to the manner in which these theoretical views initially influenced the actual and institutional practice of bioethics. As an illustration, one only needs to look back at the creation and generalization of Ethics Committees that initiated in the early 1980s. Those committees were indeed presented as means of securing a deliberative, consensual and pluralistic model of rule-making (see Moreno 1994, 1995). Additionally, their composition and working methods generally strongly reflected "reasonableness" understood as a "shared method of discussion" in which the highest requirement is that all positions are "adequately argued and justified," so that the final outcome (the committee's opinion) is

[3] See Beauchamp and Childress (1979). They argued that such principles could be used and generate common grounds between people and groups from different moral backgrounds, such as deontologists and consequentialists. They identified principles such as those of autonomy, beneficience, non maleficience and justice to be such middle-level principles.

in a position to pretend to authoritativeness (see Bayertz 1994). One could also observe that such concepts (secular morality, middle-level principles . . .), and such practices (the institutionalization of ethics) were typical of times during which both the capacity and the legitimacy of *legal* regulation in the field of biomedical questions were under question—if not denied. The French example is very telling in that respect. The *Comité Consultatif National d'Ethique* was created in 1983. Typically during the early 1980s (see Flis-Trèves et al. 1991), there was a strong and quite dominant notion that law was an inadequate tool for regulating biomedicine because it was both too general to satisfactorily apply to cases that were ever particular and specific and too slow in its elaboration to ever catch up with science's pace.[4] In this context, it is hard not to see the institutionalization of ethics as an attempt to find and develop an alternative source of normativity.

However, things have changed and the 1990s could be said to have favored a shift from the "bio*ethics*" paradigm to the "bio*law*". It is indeed a decade during which there was a growing sense that the consensus strategy typical of the first "ethical" phase had failed and that it was therefore necessary to acknowledge its chimerical dimension and return to majoritarian law-making processes. Core common principles had not emerged (and they were not going to); nor had regulating become an easier task (and it would not any time soon). Consensus no longer appeared to be the method nor the purpose; mere compromise was left (see Franklin 1995). This accounts for the global movement of legislative action in the field of biomedical issues[5] that gradually took over "soft" ethical regulation.

The British example nicely illustrates that the bio*ethical* approach had not watered down the depth or strength of axiological controversies. The emblematic 1984 Warnock report (see Department of Health 1984; Jasanoff 2005, 149) did not avert (it may even have stimulated) forceful opposition to its key propositions, such as that of legalizing research on human embryos up to the 14th day. Hence the tight votes that followed all legislative initiatives on the topic up to the 1990 Human Fertilization and Embryology Act of 1990 (see Mulkay 1997). To be sure, what occurred at the international scale is somewhat different, if only because of the inapplicability of the majoritarian rule. Similar acknowledgements that consensus was out of reach have characterized the recent years nonetheless. First, the hopes generated by the international method of identifying the minimal basis of common values have been somewhat overshadowed by the empirical finding of the relative pointlessness of the whole undertaking. The Oviedo Convention of 1997 has

[4] Emblematically in that respect, see the very official and institutionally prominent 1985 conference that brought together scientists, politicians, lawyers, moral philosophers, etc. See Nyssen, ed. (1985).

[5] For a few yardsticks: Spain enacted a law on medically assisted reproduction as early as 1988 (ley 35 del 1988). The famous British Human Fertilization and Embryology Act was passed in 1990. France voted its first Bioethics Law in 1994 and recently adopted a new one (2004). Now, most countries have legislative regulations in the field of biomedicine: Germany, the Netherlands, Italy, Switzerland, Portugal . . .

accordingly been criticized by specialists of the field and neglected by many States[6] precisely because of its incapacity of saying anything normative[7]—the emblem of the vanity of consensus being its article 18 which instead of embodying a position on whether embryonic research should or not be made legal, limits itself to saying that be it the case, such research is to be authorized only under precise conditions. More dramatically still, the United Nations failed altogether to bring the international community to a ban on cloning. Thus the ambitious worldwide resolution on reproductive cloning eventually led to a much lower profile non-binding *declaration* calling all States to adopt "all measures necessary to prohibit all forms of human cloning inasmuch as they are incompatible with human dignity."[8] On a more conceptual standpoint, it is worth underlying that recent scholarship acknowledges this necessary departure from the mirage according to which the fact of taking all views into account would enable the elaboration of sound solutions. Engelhardt's latest volume's title is telling: *Global Bioethics: the Collapse of Consensus*[9]; and legal scholarship acknowledges the difficulty, at times impossibility, of regulatory consensus (see Brownsword 2005). Many publications draw the same statement albeit they may assess it differently (see Pellegrino 2000; Trotter 2006): biomedical issues are an area of deep moral disagreement that cannot be solved through sound methods of argumentation.

As the very notion of consensus is progressively pushed out of the picture, new understandings of the stakes of biomedical debates and the possible means of dealing with them emerge. The idea that procedures and methods were appropriate means of neutralizing the violence of moral controversy and eventually overcoming it is weaker today than it once was. Consequently, whereas the biomedical debate in the 1980s was mostly articulated around the aim of finding the proper regulatory *method* (a debate in which reasonableness as defined above did have a say), it mostly

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[6] Countries such as France, Italy, Poland (1999), the Netherlands or Sweden have signed the 1997 Convention but still not ratified it. Others, such as the United Kingdom, Ireland, Germany or Belgium have not even signed it!

[7] In this respect, the UNESCO Declarations (from the 1997 one on the Human Genome to the 2005 one on Bioethics and Human Rights) can also be read as so minimal that they actually constrain none of their signatories: see Girard (2006). Similarly the much praised Article 3 of the European Charter of Fundamental Rights can be viewed as achieving only minimal results, if only because of the manner in which it repeatedly refers (and thus yields to) national law; see Hennette-Vauchez (2005).

[8] Note that this formula remains ambiguous enough for the adoption of this watered down declaration to have been divisive still, for there were 84 votes in favor, but also 34 against and 37 abstentions. This is to be explained by the fact that the countries who opposed the idea of a global ban on all sorts of cloning (reproductive and therapeutic) argued that the final declaration's wording had not lifted the ambiguity and could still be interpreted as encompassing therapeutic cloning.

[9] See Engelhardt (2006). For a representative excerpt of the book's main idea, see: "Some levels of disagreement run so deep and so wide as to render allegations of a shared morality [. . .] meaningless [. . .] [some discussions] imply not only surface standard disagreement, but deep disagreement over fundamental principles as well. They cannot be regarded as variations of a single universal standard of patient autonomy where disagreement or difference is merely a matter of degree. Instead, their disagreement shows substantial incommensurable difference" (Tao, 2006, 155).

is in the 2000s about discussing the *substance* of regulation (thus the concept of reasonableness' relevance is much more dubious). In other words, the highly political dimension of choices in the field of biomedicine is more generally acknowledged today than it was before. Choices have to be made and they may be informed by prior ethical pluralistic discussion but they ultimately resort to law—not ethics. In that respect, biolaw increasingly appears to be nothing more than the endorsement of given options: biolegal norms are embedded in political assumptions. This evolution of the biomedical debate and the relatively new strength of the "biopolitical" paradigm actually reveal interesting features of biolaw (see Bishop and Jotterand 2006) Notably, they support the view that there are no *good—legal—answers* to the questions in presence (should embryos be created for research purposes? should physician assisted suicide be tolerated? should patents be deliverable over living material?. . .). In other words, biolaw substantially really is the result of political conventions and agreements—compromises (see Hennette-Vauchez 2009). For that reason, and because increasingly biolaw is mostly legislative law, the interrogation relative to the relevance of "reasonableness" in biolaw ultimately has to do with the very conception one has of the political legitimacy of parliamentary lawmaking.

3 Reasonableness and Parliamentary Lawmaking, or the Hesitant Frontier Between Legal Theory and Political Critique

It is argued here that the concept of reasonableness is a tricky tool for legal theory for it (imperceptibly?) leads to substantially evaluative stances[10] and is therefore of very limited utility. In a manner very typical of the contemporary Italian biomedical debate, Faralli has argued that the Italian statute 40/2004 (*Norme in materia di procreazione medicalmente assistita*) is to be criticized as the result of the triumph of a "conservative antecedent doctrine." In other words, according to Faralli's above-recalled definition of reasonableness, the Italian law is to be considered "unreasonable." There are several reasons for which one can find such assessments of parliamentary law-making puzzling; however, they all derive from the general consideration that such usages of the concept of reasonableness actually constitute attempts at demeaning norms for political (axiological) purposes.

The claim that a parliamentary law (here the assisted reproduction law), in a democratic political regime (here Italy), is "unreasonable" necessarily implies one of the following:

– either there is a causal relationship between the method (parliamentary lawmaking) and the outcome (the law), in which case the outcome's unreasonableness necessarily results from the method's unreasonableness

[10] It is hypothesized here that such substantial evaluative stances are per se incompatible with a posture of legal theory, and therefore that law is not to be assessed in terms of its substantial conformity to pre-existing heteronymous principles.

– either there is no causal relationship between method and outcome, and the former's reasonableness serves as no guarantee of the latter's reasonableness.

In this latter case (no causal relationship between the implementation of a reasonable—parliamentary—method and the achievement of a reasonable result), the whole point of reasoning in terms of reasonableness from the point of view of legal theory is somewhat minored altogether, unless we think procedures and methods have an interest *in themselves*. At any rate, such perspective would be at odds with some of the most critical trends of 20th century political and legal philosophy, among which the most prominent ones led by Rawls and Habermas, who are precisely based on the premise that there is something like a causal relationship between procedures and outcomes.[11] In the former case, even greater difficulties emerge for indeed, one might wonder: where does it take us (legal theorists) to describe parliamentary law-making as "unreasonable"? What is it in parliamentary confrontation of opinions that draws it away from a reasonable method of constructing biolaw? And—paramount to all—: by what should it be replaced?

It is not suggested here that all the authors and legal scholars who have opposed the Italian *legge* 40/2004 for being "unreasonable" have implied either one of these two quickly sketched premises (that there is, or that there is not, a causal relationship between the reasonableness of a method of lawmaking and its actual outcome)—although some might well have. Rather, I believe the concept of reasonableness has often be used in a much lighter fashion; more accurately, it has been used in a political (as opposed to legal) sense, as a means of opposing on political (axiological) grounds a law whose—democratic—legitimacy was out of the question. As a matter of fact, these are not uncommon mores in the world of biolaw. The Italian law is criticized as unreasonable by progressive actors of the public debate on bioethics that have the impression it is too restrictive. The EU decision to fund research on human embryos is criticized by conservative groups that accuse the EU research policy of being too utilitarian. The French law on bioethics is said to be unreasonable both by catholic groups because it allows research on human embryos, and by important parts of the scientific community because it only does so reluctantly and restrictively. All these groups who criticize biolaw have the impression that either their views were not taken into account or that they were not put together in a correct way—thus, that the biolaws they criticize are "unreasonable." Social actors may well say so much; by doing so they only exercise their freedom of opinion and aim at exerting political pressure in the law-making process. Whether it is justified for legal theory (and legal theorists) to engage in a similar assessment of politically legitimate law-making in terms of reasonableness is much more dubious, for the challenge of objectivity here seems insuperable. In that perspective, it is contended here that the role of the legal theorist in the field of biolaw is easier justified

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[11] More accurately, it should be specified here that Habermas's ideal procedure of discussion is constructed as (and justified by) enabling true democratic agreement. However his discourse theory has been criticized by many aspects. For a recent and stimulating critique from the point of view of Austinian pragmatism, refer to Cayla (2007).

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).