Special Issue: *Constitutional Reasoning*

Constitutional Reasoning and Political Deliberation

By Cesare Pinelli[*]

A. On Constitutional Reasoning

In the recent Anglo-American scholarly debate, contrary to that of continental Europe, judicial review of legislation raises strong criticism for various aspects.[1] Among these, I will examine the claim that legislators are better equipped than courts in constitutional reasoning, on the ground that the institutional settings and procedures affecting the former ensures a better protection of rights than those that characterize the judicial function.[2] The following questions will be posed: Do legislators primarily deal with rights as such? Do they reason about rights, and in that case for which purposes? Are these purposes sufficiently similar to those affecting the judicial reasoning about rights? Why in most legal orders courts are bound to reason-giving? While answering these questions, I will outline the different meaning that consequentialist reasoning is likely to acquire, respectively, in representative assemblies and on the bench. I will then classify the kinds of juridical consequences, and of the corresponding premises, that might affect constitutional reasoning according to the different weight of judicial construction. Finally, I will attempt to demonstrate why the indeterminacy of principles on which constitutional reasoning is expected to rely should be viewed as enhancing, rather than as distorting, the insight of courts on the right at stake.

B. Whether Legislators Deal with Rights in the Same Sense as Courts

First, a brief account is needed of the assumption that courts are less suited than legislators in dealing with rights. According to Bellamy, "more often than not, what gets weighed and traded in the political process are not mere preferences or selfish interests but different arguments about rights. Talk of courts employing rights consideration to 'trump' legislative decisions seems misconceived if we consider that rights considerations have already figured in the legislature."[3] Waldron concedes that issues of rights

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[1] *See*, *e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

[2] Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1360 (2006); *see also* RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY 48 (2007).

[3] BELLAMY, *supra* note 2, at 37.

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> May not be facially prominent in the legislation. The legislation may be on marriage formalities, minimum working hours, campaign finance reform, or the historic preservation of city centers, but what happens is that somebody notices that its application happens to raise an issue of rights and it is in connection with that issue—is the legislation to be applied according to its terms or not?—that the need for settlement arises.[4]

Elsewhere Waldron specifies that what is at stake is whether judges are better than legislators at deciding rights issues on moral grounds, and attempts to demonstrate that this is not the case: While legislators "address the issues afresh, as though for the first time,"[5] courts address the same issues in light of texts and precedents, and it is important for issues on rights "to be debated, from time to time, freshly, on their merits, and in a way that is relatively uncontaminated by interpretive disputes regarding the Bill of Rights."[6]

I will first consider the premise that legislators deal with rights as well as courts,[7] and then the following assumption that parliament's performances on that respect are better than those of courts. Unsurprisingly, an objection has been raised from a continental European scholar, arguing that Waldron's thesis "fails to understand that the law is also like a phenomenon of objective law. It is not only the law as applied to individuals but also the law produced by the state to regulate society and reconcile different interests and to produce a kind of social harmony."[8]

But is such an objection correct only with respect to the civil law system, or should it be raised in general terms? Dworkin distinguishes policies, as referred to as "some conception of the general welfare or public interest," from principles, as referred as the rights of citizens, with the aim of demonstrating that judges rely and should rely on arguments of principle.[9] Conversely, legislators are expected to rely on arguments of policy, or on

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[4] Waldron, *supra* note 2, at 1370.

[5] Jeremy Waldron, *Judges as Moral Reasoners*, 7 INT'L J. CONST. L. 2, 19 (2007).

[6] *Id.* at 23.

[7] The premise is shared even by some opponents of the thesis. *See*, *e.g.*, Richard H. Fallon Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1695 (2008).

[8] Oliver Beaud, *Reframing a Debate Among Americans: Contextualizing a Moral Philosophy of Law*, 7 INT'L J. CONST. L. 53, 63 (2009).

[9] RONALD M. DWORKIN, A MATTER OF PRINCIPLE 11 (1985).

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conflicting visions of the general welfare.[10] Although raising various objections to Dworkin's theory,[11] Waldron concedes that issues of rights "may not be facially prominent in the legislation."[12] There must be a reason for that. It is the fact that laws are discussed and approved on the ground of the policy that they are expected to pursue.

Waldron treats as "nonsense" the objection that structures of democratic participation within parliamentary assemblies "just blindly empower the majority," on the ground that all democracies limit the franchise in various ways—e.g. excluding children—in order to secure a modicum of mature judgment at the polls, ensure information about the tolerability of various options to different sections of the society to feed into the decision-process, and usually provide that decisions are made in the context of bicameral institutions.[13] It is his reply that does not make sense. Ministers of Parliament are elected because of their capacity of representing a certain political vision of the general welfare, rather than the rights of citizens. Parliamentary procedures are not structured with a view to give voice to claims regarding rights, but for the sake of granting a fair debate between the majority and the opposition. Governments, and majorities endorsing governments in parliamentary systems, are called to account before the electors for how they exerted political power, not for how they composed disagreements about rights. In spite of Waldron's and Bellamy's intention of defending democracy vis-à-vis judicial review, the idea that parliaments deal with rights as well as courts thus appears at odds with the democracy's functioning.

C. Whether Constitutional Reasoning Might Consist in Predicting the Social or Economic Outcomes of Judicial Decisions

To deny that legislators deal with rights in the same sense—and with the same ends—as courts does not mean, of course, that legislators have nothing to do with rights. For the purposes of this contribution, the examples of how and when rights may be directly at stake in political deliberation might be summarized as follows.

Rights are at stake in political deliberation whenever the constitution, be it written or conventionally made, requires that laws shape in advance, and in general terms, the discretionary powers of the executive regarding certain rights, or entrust parliament with the exclusive power of providing the financial resources that may be required for funding

[10] *Id.*

[11] Waldron, *supra* note 2, at 1375.

[12] *Id.* at 1370.

[13] *Id.* at 1378.

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rights pertaining to certain categories.[14] These examples demonstrate that legislative rules affecting rights are expected to achieve purposes that are clearly distinguished from those guiding the judicial function. The idea that the power of dictating the rules concerning the executive's action vis-à-vis individual rights should rest with parliament not only reflects the need for certainty and predictability of the state's interventions in the realm of individuals. It also tends to limit as far as possible the subjectivity of judges that, particularly in this field, may amount to arbitrariness. It should appear clear, at any rate, that here, courts are prevented from "re-considering" legislative settlements. The same occurs, *a fortiori*, for what concerns the power of the purse, a power given exclusively to parliament.

Examples are, however, afforded on issues of rights that were directly treated from the legislator and/or from courts. In the case of abortion, Waldron finds that the key difference between the British legislative debate (1966) and the American judicial reasoning as occurred in *Roe v. Wade* (1973) is the fact "that the latter is mostly concerned with interpretation and doctrine, while in the former, decision makers are able to focus steadfastly on the issue of abortion itself and what it entails."[15] Furthermore, after having recalled the highly participated debate, including pro-life MPs, that took place at the House of Commons, he asks whether somebody on the pro-life side has ever been heard paying tribute to the attention with which the Supreme Court discussed their position.[16]

In this respect, however, Waldron reminds us that, in such occasion, the House of Commons suspended one of its distinguishing features—strong party discipline—for the purpose of this issue of rights.[17] But to the extent that party discipline is believed to usually affect parliamentary debates, as it does in some parliamentary systems, the assumption appears fallacious that, contrary to courts, legislative assemblies usually treat rights issues in highly participated and carefully considered debates. Waldron's idealized view of these debates, being referred to the sole case of abortion, is inadequately compared to his depiction of the court's reason-giving as "attempt[ing] to construct desperate analogies and disanalogies between the present decision they face and other decisions that happen to have come before them," with the effect that "the real issues at stake in the good faith disagreement about rights get pushed to the margins."[18]

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[14] *See* STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 41 (1999) (explaining how this not only, and not necessarily, includes social rights).

[15] Waldron, *supra* note 2, at 1385; *but see* BELLAMY, *supra* note 2, at 124.

[16] *Id.* at 1385.

[17] *Id.* at 1385.

[18] *Id.* at 1383.

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But let us take for granted that, unlike the Supreme Court, the House of Commons was able to "focus steadfastly on the issue of abortion itself and what it entails."[19] What does this exactly mean? On which grounds do parliaments, in the rare occasions in which they decide on rights issues in light of a thorough and true debate, demonstrate themselves to be better equipped than courts? Parliaments, we have assumed, rely on arguments of policy even when rights issues are at stake. In these cases, the discussion is thus centered on the social (or economic, or whatever else might be relevant at this respect) consequences of the decision. This orientation does not necessarily mean that MPs are guided by utilitarian or selfish considerations. To the contrary, attention to the consequences might reveal a principled approach to the right at stake. Usually, parliaments will face the challenge of choosing between diverse solutions or policies, none of which are costless. They will face a dilemma. Here lies, in my opinion, the noble art of legislation, or political deliberation.

Contrary to legislators, courts, including constitutional courts, are not suited for examining the consequences of their decisions on economic or social grounds. While the former "can commission or carry out the kind of studies and surveys that would be required even to construct crude and approximate but defensible predictions about the outcome of policy choices made by them," litigation involving individuals or corporations is rarely "adapted to constructing or evaluating evidence of the kind required."[20] "The tenets of procedural fairness," it is further noted, "are not . . . based upon policy evaluations best suited to elected officials or their agents in a democracy."[21]

The superiority of legislators over courts in evaluating the economic or social outcomes of their respective decisions further demonstrates the different aim guiding political deliberation, including those affecting rights, vis-à-vis a judicial decision. So far, whatever comparison between these appears ill founded, as well as the connected hypothesis that courts are just called to "re-consider" legislative settlements on rights.

Furthermore, the idea that, to use Bellamy's words, "rights considerations have already figured in the legislature," does not fit in a series of cases.[22] In particular, parliaments purposely recur to general standards of reasonableness whenever the features of individual cases are likely to "vary so much in socially important but unpredictable

[19] *Id.* at 1385.

[20] NEIL MACCORMICK, RHETORIC AND THE RULE OF LA: A THEORY OF LEGAL REASONING 104 (2005).

[21] Jeffrey Jowell, *Of Vires and Vacuums: The Constitutional Context of Judicial Review*, *in* JUDICIAL REVIEW AND THE CONSTITUTION 331 (Christopher F. Forsyth ed., 2000).

[22] BELLAMY, *supra* note 2, at 37.

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respects, that uniform rules to be applied from case to case without further official direction cannot usefully be framed by the legislature in advance."[23]

Since Hart's seminal essay, legislators do adhere increasingly to the standards of reasonableness, in correspondence with the growing level of unpredictability affecting individual cases in our societies. But what does this imply for courts? They might themselves be engaged in a kind of legislating, to the extent that these standards appear vague; conversely, the more specific these appear, the more judges are likely to adapt them to individual cases.[24] What is clear is that no room is left to courts for "re-considering" this kind of legislation. However, what about constitutional courts? Aren't they called to ascertain the reasonableness of legislative standards (of reasonableness), and thus to "re-consider" how legislators settled the issue? The answer depends on whether constitutional adjudication is guided from criteria of reasonableness resembling those of legislators. Having excluded that constitutional reasoning might consist in predicting the social and economic outcomes of the judicial decision, it remains to be seen on which criteria such reasoning should rely.

D. On Reason-Giving

Before answering the question, it is worth examining Waldron's further objection against the frequent assumption that the great advantage of judicial decision-making on issues of rights is the explicit reasoning and reason giving associated with it. In his view, to the contrary, "[l]egislators give reasons for their votes just as judges do. The reasons are given in what we call debate and are published in *Hansard* or in the *Congressional Record*. The difference is that lawyers are trained to close study of the reasons that judges give; they are not trained to close study of legislative reasoning."[25] If instead, continues Waldron, the argument is about the quality of reason-giving, rather than about its presence or absence, then it should bear in mind that judicial reasoning is heavily conditioned on the concern of courts about the legitimacy of their decision-making, with the effect that they tend to concentrate on the text or precedent that may authorize the decision; it is instead "striking how rich the reasoning is in legislative debates on important issues of rights in countries without judicial review."[26]

Unfortunately, the afforded example concerns once again the House of Common's debate on abortion compared with that of the U.S. Supreme Court. Again, I am afraid that a single case is absolutely inadequate for demonstrating a point of such importance. Accordingly,

[23] HERBERT L.A. HART, THE CONCEPT OF LAW 127 (1961).

[24] S*ee* MACCORMICK, *supra* note 20, at 170.

[25] Waldron, *supra* note 2, at 1382.

[26] *Id.* at 1384.

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Waldron fails to consider that the arguments usually emerging from parliamentary reports, including those concerning rights, aim at showing the MPs commitment towards the interests of his electors and/or towards his party's political choices on the issue at stake. Nothing is wrong with that: These attitudes simply reflect the real functioning of democracy. What is striking is rather Waldron's naive depiction of legislative reason-giving vis-à-vis his crude account of judicial reasoning, as if he were biased towards the latter.

Moreover, the assumption that judicial reason-giving is due to the concern of courts about the legitimacy of their decision-making fails to consider that, contrary to legislators, courts are constitutionally bound to give reasons for their own decisions. It has been observed, "[i]n a democratic state [that] judges are accountable for their decisions. This is one reason why they have to publicly justify their rulings."[27] It is rather the legal constraint posed upon judges to justify their rulings that demonstrates that they are accountable. More precisely, judicial reason-giving, particularly in the civil law system, is mandatory exactly because judges, being non-elected authorities, ought to justify before the public opinion why they reached a certain decision. Constitutional adjudication renders more acute the need for a satisfactory reason-giving, since constitutional courts are empowered to strike down legislation, namely the product of democratically elected authorities. These well known elements suffice to deny that, from the perspective of constitutional democracies, legislators or courts might be viewed as "moral reasoners." The functions and powers with which these authorities are respectively entrusted reflect the different, although related, goals of democracy and constitutionalism, and are thus likely to be exerted and evaluated on the grounds, respectively, of political deliberation and of constitutional reasoning. Moral reasons that might lie behind the choices of these authorities, should rather be viewed within the framework of the dialectical tension between democracy and constitutionalism. The issue of the consequences of judicial decisions is likely to shed light on such a point.

E. On Juridical Consequences: A Classification

I have already reported the generally acknowledged notion that courts are not suited for examining the economic and social outcomes of their own decisions. But while referred to "juridical consequences," or logical implications, consequentialist reasoning becomes crucial for justifying judicial decisions: According to MacCormick,

> Because of the institutional nature and setting of the practice of adjudication and because such a practice is governed at least by the principle of formal justice, to treat like cases alike, justified judicial decisions

[27] Péter Cserne, *Policy Arguments Before Courts: Identifying and Evaluating Consequence-Based Judicial Reasoning*, 3 HUMAN. J. EUR. STUD. 9, 13 (2009), *available at* http://works.bepress.com/peter_cserne/53/.

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> presuppose universalizable reasons or rulings in law that 'cover' the particular decision justified. And only well-justified rulings can in turn justify decisions.[28]

This is however just the first hypothesis of juridical consequences. If we assume that like cases are recognized as such, and that the principle of formal justice governs the practice of adjudication, it follows the juridical consequence of treating like cases alike.

But things might not be so simple. Further examples are afforded from MacCormick, with a view to demonstrate that, even while dealing with hard cases, judicial scrutiny focuses on "juridical," rather than "behavioral" consequences.[29] Interestingly, he mentions at this respect leading constitutional controversies such as *Marbury v. Madison* and *Costa v. ENEL*. It could have been, he observes,

> [T]hat the federal legislature was left to be self-policing about its powers and their exercise, rather than that the judges acquired oversight of legislative constitutionality. It could have been that the Community Treaty was left to function simply on a basis of international law, rather than being 'constitutionalized,' and it is an open question what the upshot of that would have been. But within the legal order that emerges from *Marbury* or from *Costa*, the original decision is in a way self-authenticating. The legal order that would have been subverted by the alternative approach becomes the legal order that exists as a result of the relevant decision and of its acceptance and (sometimes grudging) respect by other political and constitutional actors. From within the emergent legal order, the subversive implications of the alternative are obvious, and unacceptable.[30]

Contrary to the previous group of cases, premises are not given, but need to be constructed. The question of whether premises appear convincing becomes thus far more important than that of whether the following reasoning appears consistent with them.

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[28] MACCORMICK, *supra* note 20, at 104.

[29] *Id.* at 105.

[30] *Id.* at 109.

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A third group of cases needs to be singled out. In the last decades constitutional courts have interpreted the principle of formal justice, as enshrined in the constitutional texts, in the sense that, while like cases should be treated alike, unlike cases (or group or categories of cases) should accordingly be treated dissimilarly. Legislators are empowered from constitutional courts to differentiate such treatment, provided that it does not exceed the standard of reasonableness. Judicial rulings rely increasingly on it, even beyond its reference to the principle of formal justice. When this occurs, scrutiny of reasonableness function as tests of proportionality. Even then, however, a legal regulation might be deemed unreasonable not because of its proved incapability in reaching certain levels of efficiency, namely of their presumable economic or social outcomes, but because of the inadequacy of the means that it affords for pursuing the ends that are provided by the legislation. Courts are thus in the condition of proving that their scrutiny is grounded in the law, rather than in external elements. The same occurs in constitutional balancing. While political deliberation deals with rights in terms of policy's dilemmas, and of the consequences of the diverse solutions on economic or social grounds, constitutional reasoning deals with them in terms of balancing among principles that may be involved in rights issues, and of the consequences that might derive on constitutional grounds from preferring the one over the other.

While corresponding to the daily activity of constitutional courts, scrutiny of that sort is likely to shape the identity of courts to a far greater extent than those related to the plain application of the formal justice principle, or the hard cases, such as those that put forth the premises for the emergence of the U.S. and of the EU legal order. On the other hand, scrutiny of the reasonableness of the laws are partly given from the formal justice principle, and partly constructed, and might thus be viewed as standing between the hypothesis of plainly accepted premises and the cases in which premises need to be almost entirely constructed by courts.

Juridical consequences should be distinguished according to the kind of premises upon which they are expected to rely. But the more these are grounded on judicial construction, the more uncertain might appear their juridical status. It might thus be objected that, while attempting to demonstrate such status, together with the consistency of the consequences vis-à-vis those premises, courts tend to distort their insights into the right at stake. This objection deserves specific attention, since it might be raised irrespective of whatever bias against judicial review.

F. The Open Texture of Constitutional Principles and the "Operational Closure" of Legal Systems

The notion is shared by scholars of diverse orientations that legal reasoning tends to construct a world of its own. According to Luhmann,

> [I]n what judicial knowledge of the world diagnoses as 'interest,' it will be possible to find much of the judge's own conceptual baggage. And the need to distinguish between interests which deserve protection and those which do not, combined with the need to 'balance' such interests, leads to considerable prestructuring of what the legal system perceives as interests.[31]

Although reflecting a different approach to law, Postema's account appears similar to that of Luhmann: Litigated cases, he observes, are people's stories told in the special language of the law, stories "where the law sets the standard of meaningfulness which will often seem artificial and distorting to lay hearers."[32]

The indeterminacy of constitutional formulas vis-à-vis those of statutes or administrative regulations is *prima facie* likely to exacerbate the complexity of legal reasoning, and, first and foremost, to leave further room to judicial construction. Shouldn't then constitutional reasoning afford the clearest demonstration that courts tend to build a world of their own, namely disconnected from the right at stake?

The issue needs to be viewed in light of the distinction between principles and rules. While framing principles, constitutional formulas do exhibit a higher degree of uncertainty than that of rules, usually provided in non-constitutional texts. But are principles to be distinguished from rules simply because of the greater uncertainty that the former are likely to entail? According to Alexy,

> Principles are optimization requirements, characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible. The scope of the legally possible is determined by opposing principles and rules. By contrast rules are norms that are always either fulfilled or not. If a rule validly

[31] Niklas Luhmann, *Legal Argumentation: An Analysis of its Form*, 58 MOD. L. REV. 285, 297 (1995).

[32] Gerald J. Postema, *Melody and Law's Mindfulness of Time*, 17 RATIO JURIS 203, 213 (2004).

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> applies, then the requirement is to do exactly what it says, neither more or less. In this way rules contain fixed points in the field of the factually possible. This means that the distinction between rules and principles is a qualitative one and not one of degree. Every norm is either a rule or a principle.[33]

If principles are to be distinguished from rules on qualitative, rather than on quantitative, grounds, it remains to be seen why, contrary to rules, principles are open-textured. Alexy's answer is that these require that some value be realized to the greater extent possible, since "statements of . . . value can be reformulated in terms of principles and vice-versa."[34] And, since values might be designed as different moral convictions and ideals emerging from a certain society, principles amount to their translation into constitutional formulas. It is therefore through the mediation of principles that constitutions mirror pluralistic societies, and at the same time establish the premises for their free development. Such account is echoed in Michelman's words: "The legal form of plurality is indeterminacy—the susceptibility of the received body of normative material to a plurality of interpretive distillations, pointing toward different differing resolutions of pending cases and, through them, toward differing normative resolutions."[35]

So far, the open texture of principles serves both to adapt the constitutional reasoning's premises to the single right that is at stake before the court—and more generally to "the real world"—and to compose on such basis disagreements about rights. Accordingly principles appear in permanent tension with, rather than complementing, the "operational closure" of the legal system.[36]

These elements do not prevent courts from exerting their role as if they were oracles of the law. They do prevent us, however, from thinking that such hypothesis is legitimized from the open texture of principles.

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[33] ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 47–48 (2002) (emphasis omitted).

[34] *Id.* at 86.

[35] Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1528 (1988).

[36] Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 CARDOZO L. REV. 1419 *passim* (1992).

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