

Reasonableness

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Abstract

Reasonableness is a popular notion in the current European legal thinking and jurisprudence. As is well known, its uses are widespread in all subjects though its real meaning is still open to debate. Many different interpretations and uses coexist in common parlance. In particular, its boundaries in private law with good faith, fairness, due care, proportionality, rationality, equity and similar evaluative notions have still to be clarified. According to the circumstances, legal scholars and courts construe and apply the notion as a general principle/standard/clause. A cluster of arguments in legal reasoning is also based on the notion of reasonableness, like the argument of the economic legislator as well as that against absurdity. Besides, with some theories of law reasonableness plays a broader role and is deemed an inner feature of law in general and a criterion of legal validity for all laws. The present entry illustrates the state of the art and offers a clarification of reasonableness from a semiotic perspective.

I. Introduction

It is a commonplace to talk of the notion of reasonableness as present everywhere in European law, especially in case law at upper court level. It is generally thought that references to it in national legislations including continental Civil Codes have increased over the past few decades and have spread into the fields of contract and commercial law, where mention was rare in the original civil law tradition. Moreover, this extension of the reasonable especially in private and contract law is said to depend on the increasing influence of American and English common law,¹ as well as the effect of international treaties and general customs such as the well-

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¹ A classical reference is G.P. Fletcher, 'The Right and the Reasonable' 5

known *lex mercatoria*, where reasonableness is a long-standing notion.²

The implementation of European directives and the projects of academics for unifying European private law and contract law are held to further the importance of reasonableness within the legal systems of member states. Such opinions tend to be partial, and contribute little to clarifying the issue.³

It is of course true that the reasonable is a buzz concept in continental private law and in particular in the law of obligations (both contracts and torts). The Italian context is a good example inasmuch as the reasonable has progressively extended its range of application from constitutional and administrative law to become popular in private law too. In the field of contracts it is currently applied both by the parties and the officials – judges, arbitrators and administrations – in many respects as for drafting and interpreting agreements, evaluating undertakings and performance, and checking the validity of contracts. Then, in the law of torts reasonableness is a criterion for evaluating risks and liabilities and contributes towards defining what precaution and care are due in all situations. In company law it is also applied in drafting the financial accounts which need to be based on reasonable evaluations of the corporate assets and associated with the business judgment rule as a parameter of the liability of company boards. In addition, proceedings in private matters as in criminal and administrative law are guided by principles based on reasonableness as a result of the recent reforms of the Italian Code of Civil Procedure.

However, it must be noted that the reasonable is far from being

Harvard Law Review, 949-982 (1985); Id, 'Fair and Reasonable. A Linguistic Glimpse into the American Legal Mind', in R. Sacco and L. Castellani eds, *Les multiples langues du droit européen uniforme* (Torino: L'Harmattan, 1999), 57-70.

² For further references see the detailed analyses of G. Weiszberg, '*Le Raisonnable en Droit du Commerce International*' available at <http://cisgw3.law.pace.edu/cisg/biblio/Reasonableness.html> (last visited 1 April 2014); and S. Fortier, '*Le contract du commerce international à l'aune du raisonnable*' *Journal du droit international*, 315-379 (1996).

³ For an updated general introduction see S. Troiano, '*Ragionevolezza*', *Enciclopedia del diritto* (Milano: Giuffrè, 2013) Ann. VI, 763-808.

alien to the civil law tradition.⁴ Both canon law⁵ and the mediaeval *ius commune*⁶ indicate that reasonableness (in Latin *rationalibilitas*) is deeply embedded in continental legal thinking and practice from ancient Rome onwards. Although few references to the term are expressed in the Italian, French, German and Spanish civil codes, many principles and rules as well as argumentative and interpretative techniques are somehow related to the reasonable and consequently are all very familiar to European jurists. It seems indeed reductive to consider reasonableness a concept which is simply implicit in numerous provisions of statutory law. In actual fact, the impact of the reasonable is far more substantial. As many legal scholars have remarked, both the concept of law itself and the sources of law are shaped by the reasonable according to significant doctrines and theories. And the creation of the law as well as its application are affected by the reasonable quite independently of written provisions.

Another general misunderstanding about the reasonable regards its identity in relation to legal semiotics and lexicon. As is well known, it is often lined up with a great variety of similarities conveying current evaluative notions like fairness, good faith, due care, diligence, equity, equality, rationality, proportionality, transparency, loyalty, adequacy, suitability and so forth.

Obviously the overlapping of so many notions cannot be denied, but to draw a one-by-one correspondence between each of them and the reasonable is impossible. As a concept, reasonableness is neither technical nor legal, but ordinary, linked essentially to natural languages and common sense. But, most important, it has some distinctive semiotic features that render it unique.⁷

⁴ For a panorama of the uses of reasonableness in Italian law see the three volumes edited by A. Cerri, *La ragionevolezza nella ricerca scientifica ed il suo ruolo specifico nel sapere giuridico* (Roma: Aracne, 2007).

⁵ Codex Iuris Canonici 1983 Canon 24 § 2 '*Nec vim legis obtinere potest consuetudo contra aut praeter ius canonicum, nisi sit rationalis; consuetudo autem quae in iure expresse reprobatur, non est rationalis*'. See eg E.G. Saraceni, *L'autorità ragionevole. Premesse per uno studio del diritto canonico amministrativo secondo il principio di ragionevolezza* (Milano: Giuffrè, 2004).

⁶ For further references see eg M. Perini, 'Reminiscenze tardo-imperiali nelle consuetudini costituzionali italiane contemporanee', in *Studi in onore di Remo Martini* (Milano: Giuffrè, 2009) III, 106-107.

⁷ For an inquiry into this topic see S. Zorzetto, *La ragionevolezza dei privati. Saggio di metagiurisprudenza esplicativa* (Milano: Franco Angeli, 2008).

First, defining an action as reasonable entails offering practical justification; in other words, reasonableness serves to justify human actions, choices, decisions, etc. From this point of view it is a normative concept related to the practice of reasoning. Moreover, what is reasonable or unreasonable depends on both facts and values that are not predetermined. This means that abstract criteria of reasonableness do not exist at all and the reasonable is porous and context-dependent. Furthermore, the criteria to use the concept are evaluative and always open and defeasible in all instances. In other words, the special character of the reasonable is that according to the circumstances and in the light of a value to be chosen, it can also be reasonable to be unreasonable, unfair, insincere, false, inconsistent, irresponsible, etc. On these bases, the on-going tendency to confuse the reasonable with other similar notions needs to be halted. In particular, both the proposal to include good faith in an all-embracing notion of reasonableness and vice versa consider the reasonable as part of good faith are equally erroneous.

Such semiotic aspects are often misinterpreted and give rise to very ferocious criticisms. Sceptics accuse it of being just a meaningless *passe-partout* good for all seasons, used by legal operators and judges to mask personal opinions. Such accusations of ideology (false conscience) are in fact gratuitous and miss the real target, which is not the reasonable, but the incorrect deployment of the notion.

To sum up, the success of the reasonable in the continental system – especially in the law of obligations and contracts and initially in business matters – does not depend either on the dominance of the Anglo-American mainstream or the influence of international trade practices. Rather it is beholden to its specific semiotic features. The popular appeal of the reasonable resides in its capacity to absorb factual circumstances and be open to different values.

II. Reasonableness and rationality: the philosophical and the political views

The debate about the relation between the reasonable and the rational is extremely old and venerable. Nevertheless, most current

discussion seems pointless and never-ending as proposals operate on different concepts of rationality. However, the basic idea prevailing in contemporary philosophical thinking is that the reasonable cannot be identified with the rational. Between the former and the latter no logical or necessary connections exist. Of course, many actions and choices can be rational and reasonable at the same time. But this is only a casual correspondence since to say that doing A would be rational but unreasonable makes perfect sense. In the same way, a choice irrational in the abstract might instead be reasonable in the circumstances.⁸

In practical spheres, such as law, politics and morals, the reasonable is linked to the rational since it involves practical reasons for action. This connection with reasoning is very deep: to be reasonable means capable of ratiocination. Accordingly, it is often said that the reasonable is a human capacity or virtue. However reasonableness does not simply entail pure logical reasoning. In other words, the sole deduction is neither a sufficient or necessary condition for reasonableness.⁹

What makes an action or a decision reasonable rather than merely rational or even irrational is much disputed. For some, the reasonable lies in human nature and intuitions; for others, it involves conformity to common sense; for others again, it depends on argumentation and corresponds to the outcome that persuades interlocutors, who accept it.¹⁰ It is also held that reasonableness is a special kind of morally oriented rationality which also involves an epistemic dimension and is persuasive.¹¹

It is frequently said that the reasonable is a weaker but richer

⁸ A main reference see W.M. Sibley, 'The Rational versus the Reasonable' 62 *The Philosophical Review*, 554-560 (1953).

⁹ See M. Jori, 'Razionalità e ragionevolezza del diritto' *Sociologia del diritto*, 438-442 (1975), and F. Modugno, *Ragione e ragionevolezza* (Napoli: Edizioni Scientifiche Italiane, 2009).

¹⁰ For a general introduction see eg C. Perelman, 'The Rational and the Reasonable', in *The New Rhetoric and the Humanities. Essays on Rhetoric and its Applications* (Dordrecht: Reidel Publishing Company, 1979), 117-123; A. Aarnio, *The Rational as Reasonable. A Treatise on Legal Justification* (Dordrecht: Reidel, 1987).

¹¹ G. Sartor, 'A Sufficentist Approach to Reasonableness in Legal Decision-making and Judicial Review', in G. Bongiovanni, G. Sartor and C. Valentini eds, *Reasonableness and Law* (Dordrecht: Springer, 2009), 17-68.

form of rationality in comparison with logical calculus and deduction. In short, it takes place naturally in the public sphere and requires both Aristotelian *phronesis* and *prudentia*; moreover, it takes the circumstances into consideration and is defeasible by nature.¹²

In this perspective a main reference is the idea of the reasonable originally developed by John Rawls in his theory of justice and then revised for his doctrine of political liberalism. For Rawls, the reasonable is the outcome of public discussions justified in light of the criterion of reciprocity and carried on from the point of view of an impartial spectator. This view has been applied to law and in particular to the constitutional courts operating in Western democratic systems.¹³ According to Rawls and his followers, constitutional courts are generally the main institutions mandated to protect constitutional rights and declare on issues of political justice. Therefore such courts must address public reason, ie their adjudication must be rendered on the sole basis of the political values offering the most reasonable understanding of the public conception of justice. So that values and principles should be balanced via a reflexive equilibrium procedure.¹⁴

Rawls' view has been criticised by many philosophers. For instance Jurgen Habermas proposes a radically different concept of reasonableness. He holds that the reasonable cannot be a criterion to balance values or goods since there are no rational standards for this sort of balancing. Moreover, he feels that the reasonable has epistemic connotations and is intrinsically dependent on what is morally just. This means that it plays in ethics and the practical

¹² M. La Torre, 'Sullo spirito mite delle leggi. Ragione, razionalità, ragionevolezza (seconda parte)' *Materiali per una storia della cultura giuridica*, 123-154 (2012); see also Id, 'Sullo spirito mite delle leggi. Ragione, razionalità, ragionevolezza (prima parte)' *Materiali per una storia della cultura giuridica*, 495-515 (2011).

¹³ J. Rawls, 'The Idea of Public Reason Revisited' 64 *The University of Chicago Law Review*, 765-807 (1997). On this topic see the comment of G. Bongiovanni and C. Valentini, 'Reciprocity, Balancing and Proportionality: Rawls and Habermas on Moral and Political Reasonableness', in G. Bongiovanni, G. Sartor and C. Valentini eds, n 11 above, 79-107.

¹⁴ See G. Maniaci, *Razionalità ed equilibrio riflessivo nell'argomentazione giudiziale* (Torino: Giappichelli, 2008).

domain including the law, the same fundamental role that truth plays in the theoretical sphere and descriptive discourses.¹⁵

These different conceptions are related to the modern background of reasonableness. It has been rightly observed that the reasonable is bound up with *Zeitgeist* of every historical period. In particular, for many philosophers and linguists the modern sense of reasonable in law emerged from the Enlightenment – going back to sixteenth and seventeenth century England – when the reasonable and the rational are held to have taken root in legal thinking.¹⁶ A telling emblem is the English doctrine of ‘beyond reasonable doubt’ in criminal law.¹⁷ While the rational is related to an ideal perfectly informed agent and is conceivable from a solipsistic point of view, the reasonable takes place in interaction and embodies the modern awareness of the uncertainty of the future, human cognitive fallibilities as well as the possibility of errors.¹⁸

III. Reasonableness and the Rule of Law

What is reasonable is not only determined by culture but is also deeply influenced by its philosophical and political background. As has been pointed out ‘reasonableness in law and reasonableness in political theory have some obvious commonalities at the level of their deep justifications’, since they both continuously refer to ‘liberal,

¹⁵ J. Habermas, ‘Reasonable’ versus ‘True’, or the Morality of Worldviews’, in J.G. Finlayson and F. Freyenhagen eds, *Habermas and Rawls: Disputing the Political* (New York: Routledge, 2011), 92-116.

¹⁶ See in particular A. Wierzbicka, *English: Meaning and Culture* (Oxford: Oxford University Press, 2006), 106-107 and C. Hill, ‘Reason and Reasonableness in Seventeenth-Century England’ 20 *The British Journal of Sociology*, III, 235-252 (1969).

¹⁷ Main references are T. Waldman, ‘Origins of the legal doctrine of reasonable doubt’ 20 *Journal of the History of Ideas*, 299-316 (1959); B.J. Shapiro, “Beyond Reasonable Doubt” and “Probable Cause”: *Historical Perspectives on the Anglo-American Law of Evidence* (Berkeley: University of California Press, 1991).

¹⁸ For a general introduction see L. Laudan, ‘Is Reasonable Doubt Reasonable?’ 9 *Legal Theory*, 295-331 (2003); G. Canzio, ‘L’“oltre ogni ragionevole dubbio” come regola probatoria e di giudizio nel processo penale’ *Rivista italiana di diritto e procedura penale*, 303-308 (2004).

egalitarian and consensus-oriented values'.¹⁹ This view tends to be partisan though it is a fair description of the mainstream of contemporary political theory where the reasonable is frequently presented as an antidote to coercive decisions and an important guarantee of liberty and equality.

A good starting point for clarifying the uses of reasonableness in the theory of politics and law is to identify what is *not* reasonable according to some common models of government. In particular, it is useful to identify 'negatively, five possible meanings of the reasonableness of the actions of authorities starting from as many types of government who uphold the dictates of reason voluntarily'. In brief, to give a list unreasonableness may correspond to: (i) senseless, (ii) unfairness (ie the opposite of *epieikeia/aequitas*), (iii) discrimination (conflicting with the principle of equality), (iv) immorality (contrary to the precepts of *rectae rationis*), (v) inflexibility (ie a lack of sympathy).²⁰

Following from this, the reasonable is indubitably a component of the Rule of Law doctrine, whenever used for avoiding the arbitrary (ie unjustified, abusive) exercise of public powers by subordinating it to well-defined and established procedures based on the reciprocity principle. As a matter of fact, the most fundamental issues of political legitimacy and decisions about the common values and principles that need to govern the community represent a very fertile ground for reasonableness.²¹ According to some, the reasonable takes root mostly in constitutional systems where from an internal point of view upper courts and especially

¹⁹ W. Sadurski, '“Reasonableness” and Value Pluralism in Law and Politics', in G. Bongiovanni, G. Sartor and C. Valentini eds, n 11 above, 129-146.

²⁰ Original quotation: 'ex negativo, cinco posibles significados de 'razonabilidad' de los actos del poder a partir de otros tantos tipos de gobernantes que sustituyen el dictado de la razón por su propia voluntad', M. Cuono, 'Entre arbitrariedad y razonabilidad. Hacia una teoría crítica del neoconstitucionalismo' 3 *Eunomía. Revista en Cultura de la Legalidad*, 44-60 (2012-13).

²¹ With reference to Italian legal system see C. Lavagna, 'Ragionevolezza e legittimità costituzionale', in *Studi in memoria di Carlo Esposito* (Milano: Giuffrè, 1973), 1573-1578; R. Bin, 'Ragionevolezza e divisione dei poteri' *Diritto e questioni pubbliche*, 115-131 (2002); L. D'Andrea, *Ragionevolezza e legittimazione del sistema* (Milano: Giuffrè, 2005).

supreme courts act as guardians of constitutions precisely on the grounds of reasonableness.²²

The Canadian Charter of Rights and Freedoms is a good example of this very close link of reasonableness with the Rule of Law doctrine, providing in Art 1 that the rights are guaranteed by the Charter 'subject only to such reasonable limits prescribed by law as can be reasonably justified in a free and democratic society'. Similar formulas are present in other legal systems, like Art 36 of the South African Constitution according to which any limits on constitutional rights must be 'reasonable and justifiable in an open and democratic society'.²³ The application of clauses as such is very significant also for private subjects and may have an impact on the enforcement of contract terms whenever they deal with public policies or interests.²⁴ Striking applications of such reasonable clauses regard the use of public or common good like natural resources, their exploitation by private companies and health services as well.

In the legal and political systems based on checks and balances the reasonable is an overarching idea also because it is required to guarantee loyal cooperation within the diverse institutions and draw boundaries among their respective competences and powers. A significant context is the distribution of powers between legislators and administrative bodies, and primarily agencies.²⁵

²² E. Cheli, *Stato costituzionale e ragionevolezza* (Napoli: Edizioni Scientifiche Italiane, 2011).

²³ For South African Supreme Court the limitation of constitutional rights within what is 'reasonable and necessary in a democratic society' involves weighing some values against others and, finally, an assessment based on proportionality: see N. Petersen, 'Proportionality and the Incommensurability Challenge – Some Lessons from the South African Constitutional Court' (2013) *New York University Public Law and Legal Theory Working Papers* no 384, available at http://lsr.nellco.org/nyu_plltwp/384 (last visited 1 April 2014).

²⁴ I. Rautenbach, 'Constitution and contracts: the application of the bill of rights to contractual clauses and their enforcement. *Bredenkamp v. Standard Bank of SA Ltd* 2010 (9) BCLR 892 (SCA)' 74 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, 510-524, especially 516 (2011).

²⁵ See J.A. Pojanowski, 'Reason and Reasonableness in Review of Agency Decisions' 104 *Northwestern University Law Review*, 799-852 (2010); D. Zaring, 'Reasonable Agencies' 96 *Vanderbilt Law Review*, 135-197 (2010); J.W. Boettcher, 'What is reasonableness?' 30 *Philosophy Social Criticism*, 597-621 (2004); C. Tobler, 'The Standard of Judicial Review of Administrative Agencies in the US and

An exemplary case is that of the 1984 Chevron case, where the US supreme court emphasized the authority delegated from Congress to the Environmental Protection Agency (EPA) to implement the Clean Air Act and EPA's expertise and political accountability in reaching a reasonable balance of the competing interests at stake, explaining that judges cannot reverse agency decisions unless manifestly unreasonable.²⁶

A similar principle has been present in British administrative law since the 1948 Wednesbury case, where the court declared it had the power to review administrative decisions only when they are so unreasonable that no reasonable authority would ever have taken them.²⁷

This idea that agency decisions and administrative policies must use their powers reasonably is very common, and is sometimes justified on the strength of distributive justice purposes. For instance, according to many, the Fair Fund provisions of Sarbanes-Oxley Act (US) provides the Security and Exchange Commission with discretion for distributing funds and the 'fair and reasonable' is the standard due to be applied; this means that reasonable categories have to be drawn among differently affected parties and in doing so it is accepted that some dividing lines might bar viable claims by investors or creditors.²⁸

In conclusion, it is noteworthy that the Rule of Law doctrine along with all its corollaries, albeit devoted to the development of a fairer and more egalitarian and free society, are neither absolute nor incompatible with the persistent existence of privileges for some.²⁹

EU: Accountability and Reasonable Agency Action' 22 *Boston College International & Comparative Law Review*, 213-228 (1999).

²⁶ *Chevron U.S.A., Inc. v Natural Resources Defence Council, Inc* 467 US 837 (1984).

²⁷ J. Wouters and S. Duquet, 'The Principle of Reasonableness in Global Administrative Law', *Jean Monnet Working Paper* no 12, available at www.jeanmonnetprogram.org/papers/13/documents/WoutersDuquet.pdf (last visited 1 April 2014).

²⁸ See S.M. Levy, *Regulation of Securities: SEC Answer Book*, (New York: Aspen Publishers, 2011); V. Winship, 'Fair Funds and the SEC's Compensation of Injured Investors' 60 *Florida Law Review*, 1103-1144 (2008), where is quoted *inter alia* the case *Official Comm. of Unsecured Creditors of WorldCom, Inc. v SEC*, 467 F.3d 73, 83 (2d Cir. 2006) (approving fair and reasonable review of distribution plan in aggregate, even though plan excluded some claimants).

The specific virtue of reasonableness consists precisely in justifying the exceptions too.

IV. The Reasonable Person

It is very frequent to try and explain what is reasonable by referring to a human stereotype: the well-known reasonable person. Despite much attention, the features of this figure are not yet clear-cut.³⁰ A leitmotiv in legal thinking is the judicial tendency belonging to the British common law tradition to evaluate in every field whether people's behaviour is reasonable according to the circumstances: to find 'a criterion, a measuring rod [...] the English judge more often than not appeals to the notion of reasonableness, the notion of a reasonable man, the notion of the right reason'.³¹ This reference to the 'right reason' – in Latin, the *'recta ratio'* – must be correctly interpreted given that in most cases it does not involve any superior ideals of rationality but indicates common sense. For instance, a version of this figure in Anglo-American law is the man on the Clapham Omnibus who represents everyone and anyone in everyday situations.

Of course, like all models the reasonable person is only an ideal or – we can say – a legal fiction. For its supporters it is 'a useful fiction for evaluating human conduct according to the law', while for its critics it covers mostly cultural stereotypes.³²

²⁹ Eg Corte costituzionale 19 July 2013 no 219, *Foro italiano*, I, 386 (2014).

³⁰ Some classical references are M. Moran, *Rethinking the Reasonable Person. An Egalitarian Reconstruction of the Objective Standard* (Oxford: Oxford University Press, 2003); J.R. Lucas, 'The Philosophy of Reasonable Man' 13 *The Philosophical Quarterly* 51, 97-106 (1963); E. Green, 'The Reasonable Man: Legal Fiction or Psychosocial Reality?' 2 *Law & Society Review*, 241-258 (1968).

³¹ Original quotation: 'un critère, un measuring rod [...] le juge anglais fait, le plus souvent, appel à la notion de *reasonableness*, à la notion du *reasonable man*, à la notion de *right reason*' in H.A. Schwarz-Liebermann von Wahlendorf, *Introduction à l'esprit et à l'histoire du droit anglais* (Paris: Librairie générale de droit et de jurisprudence, 1977), 10; Id, 'Les notions de right reason et de reasonable man en droit anglais' 23 *Archive de Philosophie du droit*, 43-57 (1978).

³² Original quotation: 'une fiction utile à l'évaluation de la conduite juridique humaine', W.E. Joachim, 'The 'Reasonable Man' in United States and German Commercial Law' 15 *Comparative Law Yearbook of International Business*, 341-365 (1992).

Furthermore, there are different ways of conceiving this figure. Sometimes it is construed as an anthropomorphic vision of justice, in others is a symbol of prudence and sympathy opposed to hubris and passions. It can also be an ideal model of socially acceptable conduct inspired by common sense and moderation.³³

A communal basis of these conceptions is the intuition reflected in ordinary language that the reasonable implies in some way equilibrium. In this view a reasonable person is fundamentally capable of approaching any situation involving relationships with the others maintaining a state of equilibrium. This intuitive idea is significant since it evokes another association between reasonableness and *aequitas* or equity (ie justice as fairness). Along this line reasonableness is often conceived of as both an intellectual and a practical virtue of all humans capable of a sensible and sensitive reasoning.³⁴

The reasonable person is usually compared to the rational man. While the latter is the perfect maximiser and measures all his courses of action from an economic point of view, balancing benefits and costs (a disputed application of this model is the Learned Hand Test), the former is frequently seen as a person interacting with others and interested in pursuing fair terms of cooperation.³⁵

Therefore, reasonable persons are typically aware of the pros and cons of all choices. They are also conscious that beliefs might be wrong and desires cannot be satisfied at all costs. Moreover they are aware that in real society neither the liberty nor the security of people can be absolute: 'Instead of either of these extremes, legal institutions protect people equally from each other when they require each to sacrifice some liberty for the sake of the security of other'.³⁶

This general idea is applied in constitutional law as well as in tort and criminal law, where the reasonable marks the dividing line between risks and chance/responsibility and luck.

³³ R. Boustia, *Essai sur la notion de bonne administration en droit public* (Paris: L'Harmattan, 2010), 195.

³⁴ S. Chiarloni, 'Ragionevolezza costituzionale e garanzie del processo' *Rivista di diritto processuale*, 521-539 (2013).

³⁵ A. Ripstein, 'Reasonable Persons in Private Law', in G. Bongiovanni, G. Sartor and C. Valentini eds, n 11 above, 253-281.

³⁶ *Ibid.*

Of course, the reasonable level of precautions is also an economic issue. Nevertheless, the distinctive feature of reasonable persons is to justify outcomes not exclusively by vested beneficial consequences, but also by the side effects of their activities on others. Besides, for reasonable persons there is no fixed scale of priority for values and interests: judgement is based on the conviction that ‘in the crowded conditions of modern life even the most careful person cannot avoid creating some risks and accepting others’ and ‘some genuine and avoidable risks may be disregarded [...] not because they are mere possibilities or cost-justified’, but because an important interest like liberty is at stake.³⁷

Though the proposal has a general character, a significant distinction has been drawn in criminal law. To decide whether an act is reasonable or unreasonable two situations need to be considered: ‘(1) where reasonableness concerns events and states, including risks of which an actor is conscious, that can be justly assessed without regard to the actor’s individual traits, and (2) where reasonableness concerns culpable mental states and emotions that cannot justly be assessed without reference to the actor’s capacities’.³⁸ As the *distinguo* shows, the reasonable person can be a disembodied and impersonal ideal incorporating the prevalent values of a society and its system of adjudication or, otherwise, it can take into consideration the physical, psychological and emotional traits of individuals. Accordingly, the reasonable person can be, at the same time, the symbol of justice as equality and of subjectivity and equity.

V. Some contemporary public issues in international and European debates

For the mainstream reasonableness has been rapidly gaining worldwide acceptance in many fields of law and politics. Its success is evident especially in the most contested areas where differing values and cultures or the whole *Weltanschauung* of people seem at

³⁷ Ibid.

³⁸ P.K. Westen, ‘Individualizing the Reasonable Person in Criminal Law’ 2 *Criminal Law and Philosophy*, 137-162 (2008).

³⁹ See P. Perlingieri, “‘Dittatura del relativismo’ e “‘Tirannia dei valori’”, in T.

odds.³⁹ Bioethical issues as well as health policies are good examples of the extended use of reasonableness nowadays for solving legal and moral disagreements.⁴⁰

The reasonable is also a central concept in the contemporary debate about human rights and their contested universal character.⁴¹ Many philosophers have attempted to provide a theoretical foundation for the universality of human rights in a presumed natural law or on the bases of transcendental assumptions on reasonableness.⁴² Despite the differing general framework it is much discussed if the reasonable is able to fill the gaps between peoples and cultures and therefore is a positive and even essential component of a multicultural society, or if it conceals the Western point of view and therefore is a surreptitious political instrument of domination. Sometimes, as in the Canadian Province of Alberta, the relevance of reasonableness in protecting human rights is recognized in specific acts collecting judicial precedents that apply for instance the concepts of ‘reasonable and justifiable discrimination and accommodation’.⁴³

The principle that differential treatment is discriminatory if it has ‘no objective and reasonable justification’ is part of the case law of the European Court of Human Rights (ECHR) in the application of Art 14 of the Convention.

Tasso ed, *Fatto e diritto: l'ordinamento tra realtà e norma* (Napoli: Edizioni Scientifiche Italiane, 2011), 127-166.

⁴⁰ A. Friedman, ‘Beyond Accountability for Reasonableness’ 22 *Bioethics*, 101-112 (2008); C. Faralli, ‘Reasonableness, Bioethics, and Biolaw’, in G. Bongiovanni, G. Sartor and C. Valentini eds, n 11 above, 329-336; A. Santosuosso, ‘Reasonableness in Biolaw: is it necessary?’ *ibid*, 337-350; S. Hennette-Vauchez, ‘Reasonableness and Biolaw’ *ibid*, 351-362.

⁴¹ For a first introduction see the collected papers edited by A. Sajó, *Human Rights with Modesty: The Problem of Universalism* (Leiden: Koninklijke Brill NV, 2004) and in addition the study of A. Fleras, *The Politics of Multiculturalism: Multicultural Governance in Comparative Perspective* (New York: Palgrave Macmillan, 2009).

⁴² See in particular D. Boucher, *The Limits of Ethics in International Relations. Natural Law, Natural Rights, and Human Rights in Transition* (Oxford: Oxford University Press, 2009); see also M.J. Clark, ‘Reasoned Agreement Versus Practical Reasonableness: Grounding Human Rights in Maritain and Rawls’ 53 *Heythrop Journal*, 637-648 (2009).

⁴³ See *Alberta Human Rights Act* revised Statutes of Alberta 2000 Chapter A-25.5, current as of May 27, 2013, and Appendix 2, available at www.albertahumanrights.com (last visited April 9, 2014).

Perhaps one of the uppermost uses of reasonableness related to fundamental rights is the reasonable time principle stated in Art 6 of the ECHR. It is important to note that this is a corollary of the more fundamental principle of fair trial. And the Court interprets this as a general principle applicable to all proceedings, both judicial and administrative. As case law shows, what is a reasonable duration depends on the circumstances: the same time can be justified in light of the complexity of the case or instead considered overlong.

Another expression of the principle of fairness in judicial matters is provided by Art 5 of the ECHR according to which any restriction of the 'right to liberty and security' must be based on 'reasonable suspicion of having committed an offence or when it can be reasonably considered necessary to prevent him committing an offence or fleeing after having done so'.

The governance of the global economy is also a primary field where reasonableness is applied and endorsed. As has been said above, the concept is generally accepted in international trade and largely used by multinational corporations in their commercial contracts. It is also present in many treaty regulations and is a common parameter applied by international arbitral tribunals and settlement boards of international institutions. The organization of World Trade Organization and North American Free Trade Agreement are two good examples. Here the reasonable is considered a fruitful alternative to an approach openly sustaining non-discrimination rules and exceptions based on public policy interests. An approach based on reasonableness alone would not lead to explicit contrapositions of values (such as business profits versus environment protection and labour safety) which could damage the legitimacy of such institutions.⁴⁴

Furthermore the reasonable is brought forward to solve the conflicts of laws dividing national jurisdictions. The aim is to find some common grounds for enforcing the law around the world balancing the diverse internal concerns of public order.⁴⁵

⁴⁴ F. Ortino, 'From 'non-discrimination' to 'reasonableness': a paradigm shift in international economic law?', *Jean Monnet Working Paper* n. 01/05, available at <http://www.jeanmonnetprogram.org/archive/papers/05/050101.pdf> (last visited 1 April 2014).

⁴⁵ A.F. Lowenfeld, *International Litigation and the Quest for Reasonableness: Essays in Private International Law* (Oxford: Clarendon, 1996).

In European legal system both legislation and jurists are familiar with reasonableness. Nevertheless, for some, in European case law it would be used less often rather than in national jurisdictions. Despite of that, its impact is significant especially from a political point of view.⁴⁶ Firstly, it is conceived for preserving subsidiarity and proportionality in the exercise of powers both by European and national institutions and authorities. This means that it plays a crucial role in defining the competences of political institutions and in the check and balances approach of European institutions where it contributes in improving the principle of loyal cooperation. Then, European Court of Justice (ECJ) applied it for checking the exercise of powers balancing the interests of European Union and those of member states. In addition, for European institutions (Commission and Court of Justice) the reasonable is a standard for assessing whether member states are in compliance with their obligations and for evaluating the legitimacy of national laws that derogate to European legislation. Some fields of significant applications are free trade and market competition as well as intellectual property.⁴⁷

Moreover reasonableness is used in relation to the fundamental rights and for protecting the rights of European citizens from arbitrary exercises of powers both of national and European institutions. Good examples can be found in immigration and labour law and in the legislation about persons with disabilities.⁴⁸ In this

⁴⁶ G. Tesauro, 'Reasonableness in the European Court of Justice Case-Law', in A. Rosas, E. Evit and Y. Bot eds, *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law – La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* (The Hague: Asser, 2013) 307-327; A. Adinolfi, 'The Principle of Reasonableness in European Union Law', in G. Bongiovanni, G. Sartor and C. Valentini eds, n 11 above, 385-406.

⁴⁷ Two leading cases are the Case 8/74 *Procureur du Roi v Dassonville*, [1974] ECR 837 where reasonableness was used to assess the legitimacy of national rules derogating to the free trade principle; and the Case C-309/99 *J.C.J. Wouters et al. v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577 where reasonableness was used to measure whether a derogating national rule was necessary to pursue the aim of market competition. About intellectual property see Case C-479/12 *H. Gautzsch Großhandel GmbH & Co. KG v Münchener Boulevard Möbel Joseph Duna GmbH* (European Court of Justice 13 February 2014) available at www.eur-lex.europa.eu.

⁴⁸ For instance, see Case C-335/11 *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab* and Case C-337/11 *HK Danmark, acting on*

context reasonableness is bound up with the overarching principle of equality and therefore mostly used to avoid whatever unreasonable discrimination.⁴⁹

Besides, as in case law of ECHR so in the view of ECJ the principle of reasonable time of judicial and administrative proceedings is a corollary of the rule of law doctrine, that is to say a general principle of European law which 'constitutes a principle of good government'.⁵⁰

Many judicial principles and rules of procedure have been introduced for implementing such principle both in European and national legislations. In the well-known *Cilfit* case ECJ stated the *acte clair* doctrine according to which no duty of preliminary reference arises where the correct application of European law 'may be so obvious as to leave no scope for any reasonable doubt'.⁵¹ In Italian Code of Civil Procedure two filters have been recently introduced for limiting ungrounded challenges of judicial decisions of lower courts (Arts 360-*bis* and 348-*bis* of such Code).⁵² According to the aforesaid Art 348-*bis* the challenge of the first decision is inadmissible whenever no reasonable probabilities exist that will be accepted by the judges of appeal. It is very significant that though how to measure such reasonable probabilities is very disputed among legal scholars the provision has been already applied in many cases.⁵³

behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation (European Court of Justice 11 April 2013) available at www.eur-lex.europa.eu. In Court's opinion, a curable or incurable illness entailing a physical, mental or psychological limitation may be assimilated to a disability. A reduction in working hours may be regarded as an accommodation measure which the employer has to take in order to enable a person with a disability to work. The directive requires the employer to take appropriate and reasonable accommodation measures in particular to enable a person with a disability to have access to, participate in, or advance in employment.

⁴⁹ Among the most recent cases see Case C-423/12 *Reyes v Migrationsverket* (European Court of Justice 16 January 2014) available at www.eur-lex.europa.eu.

⁵⁰ Case T-579/08 *Eridania Sadam v Commission* [2011] ECR II-366. For an introduction see C.H. van Rhee ed, *Within a reasonable time: the history of due and undue delay in civil litigation* (Berlin: Duncker & Humblot, 2010).

⁵¹ S. Zorzetto, 'Le Sezioni unite civili e la giurisprudenza della Cassazione' *Rivista di diritto privato*, 408 (2010).

⁵² *Ibid.*

⁵³ See Corte Appello Roma 11 January 2013, *Rivista di diritto processuale* 711

This is a clear example of how reasonableness works in concrete uses despite the lack of a common general definition.

It is also important to note that for some the reasonable time principle and the right to defence are convergent principles and no real conflicts between them can arise if they are correctly applied. In point of fact such conflicts would be just apparent because of either the length of the proceeding depends on an abuse of the latter or else supreme reasons of justice cannot be abdicated and makes by themselves reasonable the length of the proceeding.⁵⁴

VI. The reasonable and the concept of law: the jurisprudential perspective

The reasonable is very pervasive in law and not simply because it is used widespread by legislators, officials and courts and often referred to in statutory law, regulations and case law in all fields and systems in the Western legal tradition. Its importance leads beyond the experience of individual countries.

Firstly, many legal scholars hold that the reasonable is an inner feature of law in general and so by definition an essential component of the concept of law. As a result sometimes the sense of reasonable depends on previous ideas about what the law is; other times the concept of law changes in view of the way reasonableness is conceived. In many cases the influence is reciprocal and unified in a normative conception of law as a practical domain governed by the reasonable.⁵⁵

(2013); Corte Appello Napoli 30 January 2013, *Foro italiano*, I, 2630 (2013); Corte Appello Milano 8 February 2013, *Giurisprudenza italiana*, 1629 (2013); Corte Appello Milano 14 February 2013, *Foro italiano*, I, 2630 (2013); Corte Appello Bari 18 February 2013, *Foro italiano*, I, 969 (2013); Corte Appello Lecce 17 July 2013, *Foro italiano*, I, 2629 (2013); Tribunale Vasto 20 February 2013, *Giurisprudenza italiana*, 1629 (2013).

⁵⁴ P. Biavati, 'Osservazioni sulla ragionevole durata del processo di cognizione' *Rivista trimestrale di diritto e procedura civile*, 475-490 (2012).

⁵⁵ For an introduction see N. MacCormick, 'On Reasonableness', in C. Perelman and R. Van der Elst eds, *Les notions à contenu variable en droit* (Bruxelles: Émile Bruylant, 1984), 131-156; M. Atienza, 'On The Reasonable in Law' 3 *Ratio Juris*, Suppl. 1, 148-161 (1990).

In the second place it is common to talk of the law in action as reasonable when we take into account its long-term effects. The general idea is that reasonable outcomes gradually arise from the development of law in the legal process and as a consequence societies evolve in a natural way. This approach is sometimes depicted as descriptive and sociological but actually often it involves a general preference in the judicial system.⁵⁶

The legal scholars following Josef Esser's hermeneutics display a different point of view. They sustain a judgment is right when it is evidently acceptable on the strength of reasonableness, and see it as the guiding light of all the judgement from the first step of pre-comprehension for finding law to the final step of giving reasons. In this view the ideal of reasonableness provides a sort of 'golden rule' open to the 'nature of things' and therefore some consider it a universal principle or a principle of natural law.⁵⁷

From a positivist point of view, it is indisputable that reasonableness has a great impact on the sources of law in many countries, included Italy. Its effectiveness is plain as it is present in numerous statutory provisions as well as largely applied in national and international case law. In spite of that, the specific force of the reasonable is open to question in the sources of law, together with its level and range of application.⁵⁸

A significant proposal is to include reasonableness within the general principles of law recognized by civilized nations according to Art 38 of International Court of Justice Statute.⁵⁹

For other legal scholars in a constitutional system such the Italian

⁵⁶ See L.B.B. Colt, 'Law and Reasonableness' 37 *American Law Review*, 657-674 (1903); C.W. Bacon, *The reasonableness of the law: the adaptability of legal sanctions to the needs of society* (New York and London: G.P. Putnam's sons, 1924).

⁵⁷ In support of this view see F. Viola, 'Ragionevolezza, cooperazione e regola d'oro' VII *Ars interpretandi. Annuario di Ermeneutica giuridica. Ragionevolezza e interpretazione*, 109-129 (2002), and S. Patti, 'La ragionevolezza nel diritto civile' *Rivista trimestrale di diritto e procedura civile*, 1-22 (2012); Id, *Ragionevolezza e clausole generali* (Milano: Giuffrè, 2013).

⁵⁸ In addition to the reference in n. 4, see S. Pajno and G. Verde eds, *Alla ricerca del diritto ragionevole: esperienze giuridiche a confronto. Atti del seminario di Palermo, 11 febbraio 2002* (Torino: Giappichelli, 2004).

⁵⁹ G. della Cananea, 'Reasonableness in Administrative Law', in G. Bongiovanni, G. Sartor and C. Valentini eds, *Reasonableness and Law* n 11 above, 295-310.

one where equality is recognized as a general principle, reasonableness is a criterion of validity for all laws.⁶⁰

This means that a law that turns out to be unreasonable is invalid and cannot be binding. To implement this doctrine at least two general questions must be answered: first, what makes a law reasonable rather than unreasonable?; second, who decides this issue and how? And it is well known that in the current Western legal tradition the supreme courts are vested *de facto* – and, more seldom, *de iure* – of the authority to say the last word. Yet the exact limits of constitutional scrutiny in this matter are still under debate in the Italian legal system, as in many other countries.⁶¹

VII. On the sources of law: the examples of customary rules and *soft law*

“Legal history teaches that the reasonable is a general category and a primary element for the genesis of legal rules since ancient times and has always been a necessary condition for usages to become effectively binding customs. From the late Roman Empire through the Middle Ages and down to 18th and 19th century civil codes, *rationabilitas* has been an implicit but essential component of all customary rules in private as well as in public fields. Both local and general customary rules were then recognised as in force as long as they were considered reasonable according to secular or religious values. And jurists always played a primary role in evaluating if and how long a custom was *rationabilis* in the common opinion, ie ‘*communis opinio*’.⁶²

⁶⁰ See A. Morrone, *Il custode della ragionevolezza* (Milano: Giuffrè, 2001) and E. Giorgini, *Ragionevolezza e autonomia negoziale* (Napoli: Edizioni Scientifiche Italiane, 2010); in addition for a recent and critical outline see A. Vignudelli, ‘Valori fuori controllo? Per un’analisi costi/benefici d’un topos della letteratura costituzionalistica contemporanea’ *Lo Stato*, 71-118 (2013).

⁶¹ See A. Pizzorusso, ‘Ragionevolezza e razionalità nella creazione e nell’applicazione della legge’, in M. La Torre and A. Spadaro eds, *La ragionevolezza nel diritto* (Torino: Giappichelli, 2002), 45-55; A. Cerri, ‘Ragionevolezza delle leggi’, *Enciclopedia giuridica* (Roma: Treccani, 1994) XXV, 1-27; P. Craig, ‘The Nature of Reasonableness Review’ 66 *Current Legal Problems*, 131-167 (2013).

⁶² In addition to the reference in n. 6, see R. Orestano, ‘Dietro la consuetudine’,

Obviously the customary law of merchants is one of the most influential and long-standing examples of the role of reasonableness in the creation of rules, so that the *lex mercatoria* is still an eminent, albeit contested source of law in international trade.⁶³ Nowadays 2010 UNIDROIT Principles contribute particularly to its diffusion. And the concept of reasonableness here plays a pivotal role; many provisions refer to ‘reasonable commercial standards of fair dealing’ and recall the reasonable person. In addition, the reasonable serves to make prognoses about breaches in performance or unpredicted harms, to evaluate the parties’ behaviour in negotiations, and in many other respects time factors, the reliability of the parties, changing locations, etc. According to the Principles reasonableness is a source of contract law as well as of implicit obligations; it is a way of filling gaps and adapting the original terms to changes in context. Moreover, both the interpretation and validity of contracts depend on reasonableness.⁶⁴

It is important to note that the reasonable is here deemed to be the basis not only of business usage, but also of arbitration. According to the mainstream this is the form of justice par excellence. Thus, arbitral tribunals are required to act and settle disputes in the light of reasonableness for pursuing decisions ‘*le plus raisonnable possible*’.⁶⁵

Reasonableness also continues to flourish in academic projects for the harmonization of European private law and contract law. As is well known, it is a basic principle and an expression routinely used in the Principles of European Contract Law, Code Européen des Contrats, Principles of European Law, Acquis Principles and Draft Common Frame of Reference.⁶⁶

in *Diritto, incontri e scontri* (Bologna: Il Mulino, 1981), 423-438; P.A. Bonnet, ‘“*Sensus fidei*” e “*rationabilitas*” nella consuetudine canonica’’, in M. Tedeschi ed, *La consuetudine tra diritto vivente e diritto positivo* (Sovenia Mannelli: Rubettino editore, 1998), 61-91.

⁶³ See K.P. Berger, *The Creeping Codification of the Lex Mercatoria* (The Hague: Kluwer Law International, 2nd ed., 2010). For a critical view see E. Kadens, ‘The Myth of the Customary Law Merchant’ 90 *Texas Law Review*, 1153-1206 (2012).

⁶⁴ See S. Zorzetto, ‘Reasonableness within the Unidroit Principles: A Device to Harmonize Legal Traditions in International Commercial Contracts’ *Notizie di Politeia*, 79-98 (2012).

⁶⁵ See G. Weiszberg, n. 2 above; S. Fortier, n. 2 above, 315-379.

⁶⁶ S. Troiano, ‘To What Extent Can the Notion of ‘Reasonableness’ Help to

In these works reasonableness is closely linked to the principle of good faith and fair dealing. But it seems to have an autonomous sphere of application as a general standard for evaluating the parties' undertakings and conduct whenever a specific legal provision or a contractual term lacks. Its supporters observe that it is very flexible and consequently adaptable to all cases. For example, it allows both social and private interests to be taken into consideration, as well as general usages and the parties' practises, material circumstances and the values prevalent in the legal system according to general point of view.⁶⁷

Finally, reasonableness is a key concept in the Common European Sales Law (CESL) approved by European Parliament on February 26, 2014. It is by nature optional, and parties can choose as it to govern their contract. Its application depends therefore on an *electio iuris*. And within the CESL the reasonable occurs in general provisions along with the general clauses of good faith and fairness and in many mandatory rules concerning the full life cycle of contracts.

VIII. Argumentation and reasonableness

Roughly speaking, the reasonable is taken for a form of practical, value-oriented rationality. Of course, this is a minimal and somewhat generic definition, but it contains a grain of truth. It is in fact a leitmotiv that reasonableness is a regulative idea for assessing actions, decisions and judgements in light of some values. And criteria and all the relevant circumstances need to be identified for a concrete application of reasonableness to be made.

One of the most influential theories of reasonableness comes from Robert Alexy, who sees the reasonable as the overarching principle of legal argumentation whenever demonstration is impossible and

Harmonize European Contract Law? Problems and Prospects from a Civil Law Perspective' 15 *European Review of Private Law*, 749-787 (2009).

⁶⁷ See L. Antonioli, 'General Provisions' sub Ch. 1, in L. Antonioli and A. Veneziano eds, *Principles of European Contract Law and Italian Law. A Commentary* (The Hague: Kluwer Law International, 2005), 69-71; E. Navarretta, 'Buona fede e ragionevolezza nel diritto contrattuale europeo' *Europa e diritto privato*, 953-980 (2012).

subjectivity (arbitrariness) needs to be avoided. For him it fulfils coherence, works towards criticism of interests, generalizability and impartiality, as well as a right balance of reasons.⁶⁸

Then, the reasonable is the guiding principle of argumentation in the pragma-dialectical theory invented by Frans H. Van Eemeren and Robert Grootendorst. Against what they call the ‘geometrical’ and ‘anthropological’ approaches to reasonableness, they propose a conception based on critical discussion and dialectics, so that the reasonable is a problem-solving device with a procedural dimension and achieves inter-subjective acceptable solutions from the starting points of different conflicting opinions.⁶⁹

Legal argumentation is the realm of reasonableness also in the new rhetorical approach of Chaïm Perelman.⁷⁰ He views legal argumentation as having its own logic, which is the reasonable. Thus logic/reasonable is what is persuasive for a universal audience sharing generally held beliefs and convictions. For Perelman the reasonable has an objective rather than subjective dimension in view of what he sees as its close relation to common sense.

The above mentioned theories show that the reasonable is the core of legal argumentation for pragmatic reasons, precisely because the law is a public, normative, evaluative, conflicting arena whose existence depends on general acceptance. Moreover, they show that when a legal system becomes unreasonable in the common perception, it is destined to collapse.

For this reason one of the positive features of reasonableness that is usually emphasised is its tendency to avoid legal rigidity (ie to make general rules defeasible). In this respect the dividing line with equity, namely justice as fairness, is very difficult to ascertain.

On that account many accuse reasonableness of increasing

⁶⁸ R. Alexy, ‘The Reasonableness of the Law’ in G. Bongiovanni, G. Sartor and C. Valentini eds, n 11 above, 3-15.

⁶⁹ F.H. van Eemeren and R. Grootendorst, *A systematic theory of argumentation: The pragma-dialectical approach* (Cambridge: Cambridge University Press, 2004) 131-132. For a critical comment see H. Siegel and J. Biro, ‘Rationality, Reasonableness, and Critical Rationalism: Problems with the Pragma-dialectical View’ 22 *Argumentation*, 191-203 (2008).

⁷⁰ In addition to C. Perelman, n. 10 above, see Id, *Droit, morale et philosophie* (Paris: Librairie Generale de Droit et de Jurisprudence, 1968) and Id, *L’empire rhétorique: rhétorique et argumentation* (Paris: Librairie philosophique J. Vrin, 1977).

uncertainty. It is in fact quite common to see a trade-off between justice as reasonable fairness and as legal certainty. As it has been rightly observed in the traditional definitions, certainty and reasonableness are colliding ideals or principles: 'to achieve a great degree of certainty within a legal system is to relinquish some of its reasonableness; conversely, a gain in reasonableness carries a loss in certainty'.⁷¹ But this view should be emended because the reasonable can increase legal certainty rather than reduce it. In point of fact, reasonableness has this direct aim since its uses cover situations where general predetermined rules are impossible or defective because of a lack of knowledge or whatever. Besides, there is a deep bond between reasonableness and legal certainty especially when legal rules give relevance to expectations. And reasonable expectations contribute to increasing legal certainty, as many cases show.⁷² In addition, it must be noted that although the general concept of reasonableness is typically depicted as vague and indefinite, ambiguities and indeterminacies disappear in its concrete application.

IX. Legal arguments related to reasonableness

The immense variety of the uses of reasonableness in law cannot be contained within a complete report, just as Italian law or any of its branches show. However, it is useful to outline some of these uses to illustrate their structure and functions as well as relationships with other common argumentative or interpretative techniques.

The original application of the principle of reasonableness in Italian law is the judicial review based on the principle of equality (Art 3 of Italian Constitution). Since meting out an equal treatment may be reasonable or unreasonable, reasonableness is not the same as equality. The problem is indeed to define when equality is reasonable and when is not.

⁷¹ S. Berteà, 'Certainty, Reasonableness and Argumentation in Law' 18 *Argumentation*, 465-478 (2004). Against the traditional view the Author construes reasonableness and certainty as compatible ideals of legal reasoning.

⁷² Eg Corte di Cassazione-Sezione lavoro 15 January 2014 no 687, *Repertorio del Foro italiano*, v. *Danni civili* 15 (2014); Consiglio di Stato-Sezione V 3 August 2012 no 4440, *Rivista giuridica dell'edilizia*, 1191 (2012).

Legal scholars explain that the reasonable/equality test is triadic giving that to evaluate whether a rule is in compliance with the equality principle a *tertium comparationis* is necessary.⁷³

In this context reasonableness is used first of all to scrutinise the right extension of legal provisions. The equality principle is satisfied when similar situations are ruled in the same way and the rule under scrutiny does not cover materially different situations.

When general and special rules co-exist within a same matter, reasonableness can be used to evaluate the reciprocal over- or under-inclusiveness. Here judicial control regards mainly the reasonableness of the *ratio derogandi*.⁷⁴ Such control has various possible outcomes. For example, a special rule is normally reasonable as long as it provides an alternative treatment for situations characterized by a relevant specific difference. It might however also be unreasonable to include sub-species that should be ruled differently. On the contrary, it might prove unreasonable because its extension is too narrow and excludes species that are materially similar. In addition, a general rule can be unreasonable because covers a too heterogeneous class of situations where each case should be ruled individually, each by a special rule. As a consequence, possessing some special rules and not others could be unreasonable, too.

Thus, reasonableness as equality has two functions: it is reasonable (ie justified) to treat in an equal similar situations, as well as differentiate what is different. A specific role of reasonableness is to justify both equal and differing treatment since neither equality nor discrimination can find in themselves their justification.⁷⁵

The reasonable/equality test is routinely applied to retrospective rules for evaluating whether it is reasonable to rule *ex post* in a new or different way situations belonging to the past. In truth, the test is here being simply applied, only that a chronological rather than

⁷³ L. Paladin, 'Ragionevolezza (principio di)', *Enciclopedia del diritto* (Milano: Giuffrè, 1997) Agg. I, 899-911; A.M. Sandulli, 'Il principio di ragionevolezza nella giurisprudenza costituzionale' *Diritto e società*, 561-577 (1975).

⁷⁴ A. Morrone, 'Constitutional Adjudication and the Principle of Reasonableness', in G. Bongiovanni, G. Sartor and C. Valentini eds, n 11 above, 215-242.

⁷⁵ Tribunale Amministrativo Regionale Sardegna-Sezione II 4 February 2013 no 84, *Repertorio del Foro italiano*, v. *Amministrazione Stato* 293 (2013) (according to the Tribunal positive actions in favour of the weaker genre are legitimate if justified on reasonable grounds).

material sphere of rules makes the difference. However, retrospective rules more often than not undergo a stricter reasonable scrutiny. That is because they endanger reasonable expectations, contradict the nature of legal rules that are reasons for actions and finally they guide *ex post* actions, which is of course impossible. It is interesting to note that the same restraint occurs in cases of overruling where courts are very careful about modifying consolidated precedents. When, *res melius perpensa*, it is unreasonable to continue to apply them, prospective overruling coordinates two opposite reasonable requirements, in order to get a fresh regulation for future cases and not frustrate the reasonable expectations of the litigants.

In many cases reasonableness is used as a constitutional principle independent from the equality principle but mingled with other unwritten principles of legal argumentation. Sometimes it overlaps the general principle of logical consistency and more frequently the principle of legal coherence.⁷⁶

When reasonableness is used together with consistency and rationality, it is usually a standard to scrutinise not the content of official choices, but how they are justified.⁷⁷ In this field it is not applied for controlling the logical consistency of justifications and therefore finding contradictions or logical gaps. Rather, it is a standard for the general acceptability of judgments and as a consequence the reasonableness of the single judgment will depend on the criteria of acceptability applied in the circumstances.⁷⁸

Reasonableness is also used as a teleological or instrumental standard. An action or a decision will be reasonable as long as it fulfils some preordained purposes.⁷⁹ In this respect reasonableness requires the identification both of the aims and means as well as the

⁷⁶ On this distinction between consistency and coherence see N. MacCormick, 'Coherence in Legal Justification', in A. Peczenik, L. Lindahl and G. van Roermund eds, *Theory of Legal Science* (Dordrecht: Reidel, 1984), 235-251.

⁷⁷ One of the most recent decisions among many others is for instance Corte di Cassazione-Sezioni unite 20 January 2014 no 1013, *Massimario del Foro Italiano* (2014).

⁷⁸ G. Maniaci ed, *Eguaglianza, ragionevolezza e logica giuridica* (Milano: Giuffrè, 2006).

⁷⁹ S. Celotto, 'Razionalità vs. ragionevolezza nel controllo di costituzionalità (a margine di un concorso dichiarato incostituzionale per la terza volta)' *Giurisprudenza costituzionale*, 3714-3720 (2012).

criteria for measuring the comparative efficiency of the means available. Sometimes the reasonable can lead to the same outcome as the cost-effective approach (ie principle of the minimum mean).

These uses of reasonableness are close to those related to the tests and/or principles of adequacy, suitability and proportionality.

It is well known that the interplay of reasonableness with these notions is a contentious issue in legal circles.⁸⁰ Despite the different constructions proposed, it is still open to debate if they are related by *genus et differentiam specificam* or otherwise.⁸¹ As a matter of fact, how far they overlap has still to be defined. Sometimes they are seen as synonymous or more or less interchangeable notions and are often used jointly or in variable combinations. However, a distinction can be drawn: sometimes necessity and impossibility are the extremes of the reasonable, while in other moments the reasonable hinges on suitability and fairness.⁸² On top of that, reasonableness and proportionality are seen as two corollaries of the general principle of equality. When reasonableness is used to measure the due proportion, the standard of reasonable proportion becomes a teleological/instrumental standard for determining the best means or the most cost-effective policies, but it can also be a standard saturated with constitutional values.

The balancing test is another primary way of applying reasonableness,⁸³ which is of course just a metaphor since no balance exists in law. However, principles, values, goods and interests are regularly balanced in light of reasonableness. Therefore, the reasonable is used as an imaginary criterion to weigh these objects. In reality the measure is obviously only a discretionary evaluation. A good example is the reasonable balancing required by the precautionary principle between the right to health and the need to

⁸⁰ P.M. Vipiana, *Introduzione allo studio del principio di ragionevolezza nel diritto pubblico* (Padova: Cedam, 1993).

⁸¹ S. Cognetti, 'Clausole generali nel diritto amministrativo. Principi di ragionevolezza e di proporzionalità' *Giurisprudenza italiana*, 1197-1213 (2012).

⁸² J. Luther, 'Ragionevolezza (delle leggi)' *Digesto delle discipline pubblicistiche* (Torino: Utet, 1997) XII, 341-362.

⁸³ G. Scaccia, *Gli 'strumenti' della ragionevolezza nel giudizio costituzionale* (Milano: Giuffrè, 2000); Id, 'Motivi teorici e significati pratici della generalizzazione del canone di ragionevolezza nella giurisprudenza costituzionale', in M. La Torre and A. Spadaro eds, *La ragionevolezza nel diritto* (Torino: Giappichelli, 2002), 404-413.

avoid any hygienic/sanitary risks determined by the limitation or suspension of the water supply.⁸⁴

In addition, reasonableness is used to avoid absurdities in interpreting the law and prevent aberrant judicial solutions.⁸⁵ It is like the argument *ad absurdum* according to which when more than one interpretation exists those that lead to absurd consequences must be rejected and interpreters have to choose solutions that give rise to reasonable outcomes. It is interesting to note that there are many versions of the argument depending on how relevant consequences/outcomes are. Moreover, the argument requires a repeated application wherever there is a range of more or less reasonable solutions. The most reasonable needs to be chosen, so that a second choice has to be made.

The same argument *ad absurdum* is also applied when evaluating human behaviour: for instance, disregarding all cautionary rules is arbitrary or absurd and in the end unlawful and judgement is made on a basis of reasonableness, so taking into account the concrete situation.⁸⁶

A particular version of this argument is related to evolutionary interpretations or dynamic law-making. This means that law is sometimes innovated because, according to the bench, traditional rules or previous interpretations are considered unreasonable by the general public.

Furthermore, reasonableness can be closely linked to the argument of the nature of things, ie what mirrors the nature of things is reasonable. Properly speaking, this becomes a cluster of arguments dependent on how the nature of things is conceived. Two main references are common sense or archetypes figures.⁸⁷

⁸⁴ Consiglio di Stato-Sezione VI 21 June 2013 no 3388, *Diritto e giurisprudenza agraria e dell'ambiente*, 718 (2013). Another application of reasonableness related to the precautionary principle was in *Monsanto* case, where the issue was the unpredictable effects on human health which may be produced by the introduction of foreign genes in foods: Case 236/01 *Monsanto Agricoltura Italia SpA v Presidenza del Consiglio dei Ministri*, [2003] ECR I-8105.

⁸⁵ M. Bobek, 'Reasonableness in Administrative Law: A Comparative Reflection on Functional Equivalence', in G. Bongiovanni, G. Sartor and C. Valentini eds, n 11 above, 311-326.

⁸⁶ Corte di Cassazione-Sezione penale VI 30 October 2012 no 23817, *Ced Cassazione rv 255715* (2013).

⁸⁷ O.P. Moréteau, 'Ragionevolezza e diritto: standards, prototipi e interpretazione

A further use is the reasonable legislator argument, which is also called the argument of the economic legislator or against redundancies. Accordingly, whenever a provision seems to be repetitive of others at a first interpretation, this needs to be re-examined in order to identify a distinct range of application for each relevant rule.⁸⁸

Moreover, many uses of reasonableness are close to the *ad impossibilia nemo tenetur* maxim. The principle is that nobody can be obliged to do what cannot be performed. But the real application is that no obligation exists whenever pretending it would be unreasonable, ie materially impossible in relation to the context and the normal course of events and actions of everybody in the same situation as the debtor.⁸⁹

In other uses the reasonable argument is equivalent to the *id quod plerumque accidit* maxim, where the reasonable does not call for any statistical comparison. Rather, it refers to normality, that is to say those attitudes and expectations which are deemed sound and adequate in the context. As said above, the criteria can take into account all individual circumstances, specific skills, deficiencies, vulnerabilities, and so on. But conversely they can reproduce general truisms⁹⁰ or represent the best practices provided by sciences, technology and arts.⁹¹

Then, many judicial presumptions are based on reasonableness. Good examples are the *homo hominis* tenets used by judges to comprehend what normal people in the same position of the claimant/the defendant would have done.⁹² These presumptions are

uniforme' VII *Ars interpretandi*. *Annuario di Ermeneutica giuridica. Ragionevolezza e interpretazione*, 241-259 (2002).

⁸⁸ G. Tarello, *L'interpretazione della legge* (Milano: Giuffr , 1980), 369-370.

⁸⁹ Corte di Cassazione-Sezione lavoro 2 September 2013 no 20089, *Massimario del Foro Italiano*, 727 (2013).

⁹⁰ C. Alvisi, 'The Reasonable Consumer According to the European and Italian Regulations Concerning Unfair Business-To-Consumer Commercial Practices', in G. Bongiovanni, G. Sartor and C. Valentini eds, *Reasonableness and Law* n 11 above, 283-292.

⁹¹ S. Canestrari and F. Faenza, 'Reasonableness in Biolaw: The Criminal Law Perspective', in G. Bongiovanni, G. Sartor and C. Valentini eds, n 11 above, 363-379.

⁹² Corte di Cassazione 2 October 2012 no 16754, *Giurisprudenza italiana*, 796 (2013), with the comments by D. Carusi, ' "Revirement" in alto mare: il "danno da procreazione" si "propaga" al procreato?' *ibid*, 809-813 (2013); and G. Cricenti, 'Il concepito ed il diritto di non nascere' *ibid*, 813-820 (2013).

often underestimated, but the use made of reasonableness is often sophisticated, as it often requires a counterfactual judgment.

Another relevant use of reasonableness is found in trials in circumstantial evidence. It is often considered relevant on the basis of reasonableness, as happens in case law in higher courts where arguments are commonly inferred from reasonable signs of proof.⁹³ Circumstantial evidence also reveals the narrative nature of legal adjudication where the force of the defences is measured against common sense assumptions.

Furthermore, reasonableness is applied as a principle of adjudication that allows judges to ignore manifestly irrational or absurd decisions by making general rules defeasible. This means that reasonableness is used to create specific exceptions to general rules and principles. Such rules and principles may be unwritten or expressed in written provisions at any level of law: constitutional, statutory or lower. A good example is the use of reasonableness in antitrust and competition law. A subject of much discussion is if the reasonableness test of the European Court of Justice is similar to the US courts' rule of reason. The latter has been used to establish exceptions to a rigid rule dating from the leading case *re Standard Oil Co. of New Jersey v. United States*, where the Supreme Court defined the scope of the Sherman Act by stating that only mergers and agreements which unreasonably restrain trade are against antitrust laws.⁹⁴ In Europe some *per se* violations have been predetermined exactly for preventing exceptions by virtue of reasonableness.⁹⁵

It is important to note that a similar structure of reasoning is routinely applied to judicial precedents. In point of fact, in their distinctions courts identify differing rules – ie new exceptions – to the general rule followed by previous decisions. The *ratio decidendi* of the decisions is a new rule specific to the material case and justified on the grounds of the differences existing between the case at hand and those already settled.

⁹³ Consiglio di Stato-Sezione V 5 December 2012 no 6248, *Repertorio del Foro italiano*, v. Atto amministrativo 130 (2013).

⁹⁴ *Standard Oil Co. of New Jersey v United States* 221 US 1 (1911).

⁹⁵ L.S. Rossi and S.J. Curzon, 'An Evolving 'Rule of Reason' in the European Market', in G. Bongiovanni, G. Sartor and C. Valentini eds, *Reasonableness and Law* n 11 above, 405-420.

Finally, reasonableness is used to draw a distinction between actions and omissions. It is based on common sense and normative assumptions and is a heuristic and very useful classificatory device in all legal fields. As has been observed, the principle of reasonableness shows ‘the normative elements that frame the category of offences committed by way of an omission in which the omission consists in a failure to perform a duty to act imposed by the criminal law on specified classes of persons’.⁹⁶

X. Reasonableness and good faith

In contract law the relation of reasonableness with the other general clauses like good faith, fairness, equity and due care/diligence is the heart of the matter.⁹⁷ In addition, the interplay of reasonableness with the abuse of right principle is the subject of much discussion,⁹⁸ widespread in European legal thinking. In many member states such ideas are largely used in some statutory laws and jointly applied by courts.⁹⁹ Both German and Dutch case laws and their correlative provisions of civil codes are classic examples as they traditionally bring together good faith/equity and reasonableness in order to evaluate the fairness of the contractual relation and hence

⁹⁶ S. Canestrari and F. Faenza, n 92 above.

⁹⁷ In chronological order see S. Troiano, n 3 above; E. Giorgini, n 58 above; A. Ricci, *Il criterio di ragionevolezza nel diritto privato* (Padova: Cedam, 2007); S. Troiano, *La ragionevolezza nel diritto dei contratti* (Padova: Cedam, 2005); L. Nivarra, ‘Ragionevolezza e diritto privato’ VII *Ars interpretandi. Annuario di Ermeneutica giuridica. Ragionevolezza e interpretazione*, 373-386 (2002); C. Scognamiglio, ‘Clausole generali e linguaggio del legislatore: lo standard della ragionevolezza nel d.P.R. 24 maggio 1988 n. 224’ *Quadrimestre*, 70 (1992); G. Criscuoli, ‘Buona fede e ragionevolezza’ *Rivista di diritto civile*, 709-754 (1984).

⁹⁸ It is well known that the leading case *Renault* has heightened the debate: Corte di Cassazione Sezione Civile III 18 September 2009 no 20106, *Foro italiano*, I, 85 (2010), with a comment by A. Palmieri and R. Pardolesi, ‘Della serie “a volte ritornano”: l’abuso del diritto alla riscossa’ *ibid*, 95-98 (2010).

⁹⁹ See Case C-415/11 *Aziz v Caixa d’Estalvis de Catalunya* (European Court of Justice 14 March 2013) and Case C-92/11 *RWE Vertrieb A G v Verbraucherzentrale Nordrhein-Westfalen eV* (European Court of Justice 21 March 2013) both available at www.eur-lex.europa.eu. A striking example is the use of reasonableness in the Convention on the International Sale of Goods.

the opportunities and advantages/disadvantages of the parties. This generally involves considering the context rather than the personal character of the litigants, but it is not clear-cut whether and how far the specific point of view of each party or presumed purposes of the contract itself are relevant.

As is well known, the debate about good faith and reasonableness is extremely complicated and quite often affected by ideological bias. A right approach to the matter requires a semiotic clarification about the nature of such general clauses.¹⁰⁰ As a matter of fact, the on-going discussion about the nature of reasonableness, namely whether it is a principle or a standard or a general clause, tends towards conceptual naivety, since it moves in an apparent unawareness that semiotic features must be taken into account.

Reasonableness is an indeterminate concept that cannot be used without identifying criteria for its application, an evaluative nature and basic value that sheds light on the case. What the relevant circumstances are depends in fact on the nature of the value. In this sense what is reasonable in each single occurrence always depends both on values and facts.¹⁰¹ This is why reasonableness can be included among general clauses – ie evaluative indeterminate concepts – and standards too, as all standards need criteria for their concrete application. In addition, in many uses it is also a principle that is indeterminate and evaluative according to a general definition.

On this account it is mistaken to insist on drawing a dividing line between good faith and reasonableness denoting the latter as amoral, neutral and a pragmatic standard, and the former as morally oriented and related to conceptions of common good. Of course, the origin of good faith is rooted in a legal context where social, morals and religious ideas were quite unified. And it is also true that nowadays in the Italian legal system good faith is seen as an instance of the constitutional principle of solidarity. But, reasonableness is not neutral either. It is evaluative, as said above, but its specific

¹⁰⁰ On this topic see especially V. Velluzzi, *Le clausole generali. Semantica e politica del diritto* (Milano: Giuffrè, 2010).

¹⁰¹ On this aspect see G. Scaccia, 'Valori e diritto giurisprudenziale' *Diritto e società*, 135-157 (2011).

difference is that it has no determined ethical connotation and is instead open to any values.

In conclusion, Herbert L.A. Hart's ideas on the concept still hold good: reasonableness is a typical standard for giving authorities (first of all, courts and administrative officials) express or avowed discretion. Hart's original examples were the common standard of reasonable or proper cause in malicious prosecution, reasonable care in negligent cases and reasonable rates in terms of fair return on value in financial matters.¹⁰² As Hart observed, in such cases the problem is not the standard of reasonableness *per se*, but what is reasonable in each concrete situation. In other words, there are of course typical examples of conducts that look *prima facie* reasonable, but the immense variety of possible cases where reasonableness is called for cannot be foreseen. So, for instance, in the application of standards of reasonable care '[w]hat we are striving for is (1) to insure that precautions will be taken which will avert substantial harm, yet (2) that the precautions are such that the burden of proper precautions does not involve too great a sacrifice of other respectable interests', but how this aim of securing people against harm can be realized depends on experience. The need for reasonableness arises wherever a satisfactory formulation of rules *ex ante* is precluded due to the indeterminacy of aims and/or human situations.

¹⁰² H.L.A. Hart, 'Discretion' 127 *Harvard Law Review*, 652-665, especially 655 and 663-664 (2013).