

DWORKIN

Hart's Positivism

He recognizes that that rules are of different logical kinds: "primary" and "secondary" rules. Primary rules are those that grant rights or impose obligations upon members of the community. Secondary rules are those that stipulate how, and by whom, such primary rules may be formed, recognized, modified or extinguished.

+ distinction between being obliged to do something and being obligated to do it. If one is bound by a rule he is obligated, not merely obliged, to do what it provides, and therefore being bound by a rule must be different from being subject to an injury if one disobeys an order. A rule differs from an order, among other ways, by being normative, by setting a standard of behaviour that has a call on its subject beyond the threat that may enforce it. A rule can never be binding just because some person with physical power wants it to be so. He must have authority to issue the rule or it is no rule, and such authority can only come from another rule which is already binding on those to whom he speaks.

two possible sources of a rule's authority. (a) A rule may become binding upon a group of people because that group through its practices accepts the rule as a standard for its conduct. (b) A rule may also become binding by being enacted in conformity with some secondary rule that stipulates that rules so enacted shall be binding.

rules are binding because they have been created in a manner stipulated by some secondary rule are called "valid" rules. a rule may be binding (a) because it is accepted or (b) because it is valid.

Primitive communities have only primary rules. But when a particular community has developed a fundamental secondary rule that stipulates how legal rules are to be identified, the idea of a distinct set of legal rules, and thus of law, is born. --- "rule of recognition"--- The rule of recognition is the sole rule in a legal system whose binding force depends upon its acceptance.

Dworkin's argument

when lawyers reason or dispute about legal rights and obligations they make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards. "policy" = that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community. "principle" = a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.

The difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision. The rule might have exceptions, but if it does then it is inaccurate and incomplete to state the rule so simply, without enumerating the exceptions.

Principles have a dimension that rules do not, the dimension of weight or importance. We can speak of rules as being functionally important or unimportant.

It is not always clear from the form of a standard whether it is a rule or a principle. Sometimes a rule and a principle can play much the same role, and the difference between them is almost a matter of form alone. Words like "reasonable," "negligent," "unjust," and "significant" often perform just this function. Each of these terms makes the application of the rule which contains it depend to some extent upon principles or policies lying beyond the rule, and in this way makes that rule itself more like a principle. But they do not quite turn the rule into a principle.

In difficult lawsuits principles play an essential part in arguments supporting judgments about particular legal rights and obligations. Two very different tacks: (a) We might treat legal principles the way we treat legal rules and say that some principles are binding as law and must be taken into account by judges and lawyers who make decisions of legal obligation. (b) We might, on the other hand, deny that principles can be binding the way some rules are. It is a choice between two concepts of a legal principle, a choice we can clarify by comparing it to a choice we might make between two concepts of a legal rule.

PRINCIPLE OF DISCRETION?

RULE OF RECOGNITION?

In legal theory and legal philosophy the identification of legal sources is related to what is called the 'rule of recognition' which determines what can be considered as valid law in a particular legal system.

ALEXY

Reasonableness and Rationality

Georg Henrik von Wright: rationality is “goal-oriented”, whereas reasonableness, by contrast, is “value-oriented”. Rationality when contrasted with reasonableness has to do, primarily, with formal correctness of reasoning, efficiency of means to an end, the confirmation and testing of beliefs. Rationality comprises three elements: logic, means/end-reasoning and empirical truth or reliability. Reasonableness is said to be “concerned with the right way of living, with what is thought good or bad for man.

The inclusive interpretation of the relation between reasonableness and rationality: “The reasonable, is, of course, also rational—but the ‘merely rational’ is not always reasonable”. Only reasonableness is comprehensive and complete.

John Rawls: the decisive point of the reasonableness is its moral nature.

the essential difference for both thinkers: the reasonable contains moral elements, the rational does not.

Another interpretation: reasonableness and rationality are the same or at least more or less the same. --- Practical rationality = The only difference is that the concept of reasonableness invites one’s attention more directly to some special features of practical rationality than the broad concept of rationality does.

Concept, Idea, and Criteria

- The concept of reasonableness is a concept used for the assessment of such matters as actions, decisions, and persons, rules and institutions, also arguments and judgments, and it is in this respect a normative concept. In the case of reasonableness, the judgments at the object-level are value judgments and judgments of obligation (to describe the function of this concept). Judgments appear to be the central issue of reasonableness.
 - With respect to its content, the idea and the criteria of reasonableness are to be distinguished. The idea of reasonableness requires, first, that all factors that might be relevant in answering a practical question be considered and, second, that they be assembled in a correct relation to each other in order to justify the judgment that provides the answer. it points to the course that one has to pursue in developing and applying the criteria of reasonableness.
 - Diverse criteria are triggered by the concept of reasonableness. the criteria of instrumental rationality, that is, the requirements of logic or consistency, empirical truth or reliability, and efficiency or means/end-rationality. three kinds of requirements: (1) those that concern coherence, (2) those that concern the interpretation and criticism of interests, and (3) those that give expression to the idea of generalizability or impartiality.
- A formal structure that explicates the idea of reasonableness is the structure of balancing.

Balancing

The connection between balancing and reasonableness has been elucidated by Neil MacCormick. the reason for “resort[ing] to the requirement of reasonableness is the existence of a plurality of factors requiring [evaluation] in respect of their relevance to a common focus of concern”. The idea of reasonableness requires, first, that all reasons that might be relevant be considered and, second, that “a balance” be struck according to their “relative weight or importance” in “a context-dependent way”.

A scale is necessary for balancing. If all weights were equal, that balancing would become impossible.

+ Incommensurability in the sense of a lack of any common unit of measurement does not, however, imply incomparability. Comparability only requires a common point of comparison. In legal questions, it is the legal point of view.

The legal point of view can be explicated by means of a procedure: that of legal discourse. Legal discourse is a procedure defined by a set of rules and forms of rational argumentation. In this way, the reasonableness of assigning weights is proceduralized. the discourse cannot actually be performed; it can only be performed virtually, that is, in the mind of one person. The monological and the dialogical approach both consider role exchange as a crucial procedure for achieving impartiality.

Objectivity

Neither role exchange as such nor as embedded in discourse excludes the possibility that different persons will arrive at different answers to the practical question under discussion. --- disagreement objection --- several results will be stringently required or flatly excluded from the point of view of discourse. There remain, however, numerous incompatible normative judgments that can be justified without violating any of the rules of discourse. discursively possible judgments may contradict judgements. At the same time, these incompatible judgments may be backed by reasons that are defensible without violating any rules of discourse. It means that the judgment is reasonable.

Objective: In a case of reasonable disagreement, the competing judgments are objective in so far as they are compatible with the discourse rules as rules of reason, and subjective in so far as they depend on the persons who argue on their behalf.

Law

To describe the fact of reasonable disagreement, however, is to describe a problem. The reasonableness of persons as such or of discourse as such does not suffice to establish social co-ordination and co-operation. Under this condition the application of reason to its own weakness leads to the necessity of law. two ways: first interpretation, the transition is conceived of as a substitution of reasonableness by the authority of legal decision-making in parliament, courts, and offices. The alternative to this substitution of decision for reason is the institutionalization of reason. second interpretation leads to an enhancement of reasonableness by connecting reason with the form of law. dialectical structure. Reason requires law in order to become real, and law requires reason in order to be legitimate. This fusion of the real and the ideal is the essence of the idea of the reasonableness of law. The interdependence of law and reason manifests itself in two dimensions of law: a procedural and a substantive dimension.

- Procedural Dimension: The problem of the procedural dimension of the reasonableness of law. . The description is, however, highly abstract. It says nothing about what the postulate of optimizing the discursive quality of institutionalized legal procedures requires. In any case, the criteria of arranging the institutions are always the same: the enhancement of the role of argument on the one hand, and efficiency on the other.
- Substantive Dimension: Discourse theory is a procedural theory. t there can be, for the rules of discourse express the ideas of freedom and equality. Discourse theory implies human rights - law cannot be reasonable in a full sense without incorporating human rights either as constitutional rights or in some other form that guarantees their priority. , constitutional rights not only concern legislation. Adjudication and administration, too, have to consider the demands of constitutional rights when they apply and execute the law. Reasonable application of constitutional rights requires proportionality analysis. Proportionality analysis includes balancing. Abolishing subsumption would be unreasonable, for it would give voice to an unbalanced disregard of the principles of legal certainty, democratic parliamentarism, and equal treatment. to make no room for balancing, even in hard cases, would also be unbalanced. in a reasonable legal system, balancing appears not only at the object-level of the application of law but also at a meta-level where problems concerning the proper method of law's application are to be resolved. Balancing, however, is intrinsically connected with the possibility of reasonable disagreement - the reasonableness of law requires that proper scope be given to reasonable disagreement.

PERONA REASONABLENESS

Reasonableness is used as a legal standard to assess different phenomena under the law, including, in constitutional law, legislation. As such, it requires compliance with criteria of logical and teleological coherence, as well as ponderation of principles and circumstances. reasonableness complies with the aspirations to a moderate enlightenment of practical reason, especially within the constitutional state. reasonableness might be referred to as a general legal principle or an interpretative criterion; also, it can be understood in substantive or procedural terms. the use of reasonableness is not limited to constitutional law but permeates all legal areas. within the specific domain of constitutional law, reasonableness is mainly used as a standard for the → judicial review of legislation. As such, reasonableness is normally understood to require that the legislature seek equilibrate and justifiable solutions in addressing and responding to the situations it regulates, by different means and forms depending on the context and the peculiarities of each domestic legal order.

The relevance of the case law in grounding and justifying the resort to reasonableness partially explains why the standard is often employed by the courts in strict relation with other standards of adjudication.

reasonableness is related to rationality. Reasonableness has also been described as value-oriented, while rationality would be goal-oriented, it appears to entail some willingness to accept fair terms of cooperation, when rationality does not. reasonableness would reflect the role played in the legal field by practical reason rather than theoretical reason.

reasonableness is related, on one hand, to the requirements of consistency and certainty of the normative order and, on the other, to the ideas of justice, equity, and fairness in responding to particular cases and situations. It is linked to the concept of arbitrariness that, in fact, has been defined as lack of constraint and deviation from the 'reason of the law'. reasonableness shows strict connections with → equality and its use as a constitutional standard in the control on the justification of legislative classifications.

reasonableness is treated almost as a synonym of → proportionality. reasonableness and proportionality frequently overlap when it comes to principles balancing.

Historical Roots

the concern that the legislation should be somehow reasonable is ancient. Greek thinkers and philosophers considered reasonableness to be a necessary attribute of the wise legislator and defined fairness as the due correction of the abstract law in particular cases.

natural law - rational for the Stoics, the 'true law' coincided with the 'right reason'.

British common law tradition - the government's discretion should be limited by the 'Rule of Reason and law' + the Acts of Parliament should not be 'against common right and reason'.

Contemporary Jurisdictions Relevant to the Analysis

reasonableness as a standard of constitutional adjudication in several contemporary legal systems.

Comparative Description

- US: reasonableness comes into consideration as a standard for the judicial review of legislative classifications and limitations to constitutional rights. different levels of intensity: the less intense level of control is known as the rational-basis test applied by the → Supreme Court of the United States to the limitations to economic freedoms and to non-suspect classifications. the application of some kind of deferential approach based on the concept of reasonableness can be found in the case law of the Supreme Court that resorts to the balancing test. The Supreme Court also resorts to other tests. The most intense level of control is represented by the strict scrutiny, applied to assess suspect classifications and the limitations to preferred positions such as → freedom of expression, religious liberty, suspect class discrimination, → fundamental rights / substantive due process, and → freedom of association, for which it is required that the legislation is supported by some compelling public interest. the Supreme Court also applies an intermediate scrutiny that is typically applied to quasi-suspect classifications, like those implied in cases of → gender discrimination.
- UK: the experience of the United Kingdom has to be mentioned for the 'Wednesbury unreasonableness' standard. the claimant has to demonstrate that officials have made a decision 'so absurd that no sensible person could ever dream that it lay within the powers of the authority'. In relatively recent times, however, the resort to stronger reviews based on proportionality has been advocated for, at least for rights-based cases. reasonableness has been recently evoked by the Supreme Court of the United Kingdom in the appeals concerning the lawfulness of the advice given by the Prime Minister to the Queen.
- CANADA: Canadian Charter of Rights and Freedom, Constitution Act 1982 'guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. On this basis, the Supreme Court developed a proportionality control, used in the judicial review of legislation.
- INDIA: The Constitution of India: 26 January 1950 admits the possibility of reasonable restrictions on the exercise of the rights of freedom.
- NEW ZEALAND: New Zealand Bill of Rights Act 1990 states that the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. The reasonableness limitation clause has been interpreted in proportionality terms.
- SOUTH AFRICA: the Bill of Rights noticeably states that, in order to guarantee and promote many of the rights there enshrined, the state is obliged to adopt 'reasonable legislative and other measures'.
- GERMANY: The standard of equality of the Grundgesetz interpreted according to the arbitrariness formula unconstitutionality of the law when no 'reasonable ground', consequent to the nature of things or otherwise evident, could be found for the legislative differentiation or equal treatment. new interpretation – new formula - a violation of equality occurs when two compared groups of norm addressees are treated in a different way with no justification based on differences of adequate kind and weight. the case law started to take into account aspects such as the administrative complexity of the measure and the number of persons it affects to assess the legitimacy of a classification. options that ranges from the traditional control on 'comparison groups' to more articulated kinds of scrutiny based on proportionality and balancing. Proportionality to assess the margin of appreciation and discretion of public powers, it became a fundamental component of the rule of law and the system of the protection of fundamental rights and especially freedoms in the country. three sub-tests: (i) the suitability of the legislative provision to pursue its aim; (ii) its necessity in light of the protection of fundamental rights, as the less restrictive means has to be chosen; and (iii) principles balancing, that requires a global weighting between the measure of the legislative intervention and the importance and urgency of the reasons that justify it.

proportionality also presupposes the respect of the 'essential' content of fundamental rights. proportionality has been held to require that the legislation offer sufficiently sophisticated and well-defined provisions with regard to → data protection.

- ITALY: The principle of reasonableness is so frequently used by the → Constitutional Court of Italy that it has been said to express the specific character of constitutional adjudication within that domestic legal order. such a principle is violated when the law, with no reasonable justification, establishes some different treatment for citizens who are in equal situations. standard test to assess whether the law provides for an equal treatment of reasonably equal situations. a test is carried out by comparing the norm subject to scrutiny with a tertium comparationis, constituted by the legislative treatment of a different but comparable case. In other cases the Court directly scrutinizes the 'intrinsic' or 'inherent' reasonableness of a single norm. reasonableness is used to assess the legislative balancing between different constitutional interests. the reasonableness test is based on weightings that concern the proportionality between the provided means and the legislative ends or the objective needs that are to be satisfied, in light of the concrete circumstances and limitations.
- SPAIN: the Constitution refers to equality as a superior value, a principle, and a fundamental right and the → Constitutional Court of Spain applies it in terms of reasonableness and proportionality, stating that any difference in the legislative treatments of situations must rely upon an objective and reasonable justification and a reasonable relation of proportionality between the means and aim of the provision. the Spanish Constitution explicitly guarantees the prohibition of arbitrariness of public powers. , the Constitutional Court has developed the principle of proportionality, understood as an 'interpretative criterion' and applied in cases of 'evident and excessive or unreasonable imbalance' between the means and the ends of the legislative measures.
- ARGENTINA: The → Supreme Court of Argentina has been using the standard of reasonableness in constitutional adjudication. the Court has shaped a deeper reading of reasonableness as a requirement for legislative provisions. the unreasonableness of the legislative provision must be demonstrated by the part claiming its unconstitutionality.
- COLOMBIA: The → Constitutional Court of Colombia reviews the alleged violations of the principle of equality by the legislation resorting to a reasonableness test. three subsequent phases that respectively concern: (i) the existence of an end justifying the difference of treatment; (ii) the constitutionality of such end; and (iii) the reasonableness of the difference of treatment. the concept of reasonableness can be satisfactorily applied only within that of proportionality.
Recently: three kinds of tests of diverse intensity: (i) The test leve (soft test) is used to establish the constitutional legitimacy of the aim and means of the legislative provision and the suitability of the latter to achieve the former. The test intermedio (intermediate test) is used to assess whether the legislative aim is legitimate and important in light of the promotion of some → public interest protected by the Constitution or the relevance of the problem that the legislator seeks to solve, and whether the medium is not only adequate but also effective to achieving said end. The test estricto (strict test) is used to assess whether the purpose is legitimate, important, and compelling, and the means is legitimate, adequate, and necessary; it also requires verification that the measures do not excessively affect others principles and values.
- EU: reasonableness has been said to constitute a manifold principle. EU case law experience has developed a 'rule of reason' in monitoring national law. exemptions to the principle of mutual recognition are admissible when necessary to satisfy 'mandatory requirements'.
- EUROPEAN COURT OF HUMAN RIGHTS: reasonableness control over the measure of interference with the rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms by the states. test is carried out applying the doctrine of the margin of appreciation, so that, when a wide margin of appreciation is granted, the Court resorts to a test of manifest unreasonableness or arbitrariness, while, when a narrow margin of appreciation is conceded, it requires a stricter justification for the governmental measures.

Comparative Assessment

the resort to reasonableness as a standard of constitutional adjudication is very diverse depending on the country and normally overlaps with the reference to many other criteria and principles.

Common traits: reasonableness appears to be used by the courts as a synonym of 'rationality'. As such, reasonableness fundamentally entails two requirements for the legislation, both expressing the need for the law to be somehow 'coherent'. One requirement is that of a general coherence in the 'logical' sense, meaning that contradictions and antinomies within the legal order shall be avoided and resolved. This also includes 'improper antinomies'. reasonableness is connected to the principle of equality and provides a basis for the control on legislative classifications. coherence in the 'teleological' sense: this implies that legislative provisions shall provide means necessary and adequate to their own purpose, in light of the circumstances and the situations to be regulated.

reasonableness appears to be used by the courts, in some cases, according to a second and more complex meaning. two requirements for the legislation: One requirement concerns a general ponderation 'of principles', legislative measures shall adequately weight between all the constitutionally relevant reasons and interests. The other requirement concerns a more specific ponderation 'of circumstances'. As such, reasonableness demands that every legislative measure, when it comes to apply it, can effectively provide for an 'adequate', 'just', 'equitable', or 'fair' solution for each and every specific case it might regulate, in light of all the interests concretely involved.

reasonableness as rationality offers the basis for judicial tests that are basically deferential and, therefore, quite common and not particularly controversial in very diverse constitutional systems. Reasonableness in the strict sense, instead, opens the way to far more intense and potentially discretionary tests by the judiciary. most of the controversial issues regarding reasonableness are considered dangerously close to the domain of morality rather than law – DEBATES - however, reasonableness appears to offer, at least, an interesting meta-concept that might be helpful for the sake of synthesizing and conceptualizing, under one complex but unitary label, the resort by the courts to very diverse standards of legal adjudication.

UNIVERSALISM AND PARTICULARISM

three sets of contemporary issues on how to understand international order: common interests, individual rights, and authority. The first concerns the relationships between polities. The second set concerns the treatment of individual. The third set of issues concerns the organization of power.

The systematization occurs by a distinction between two fundamental approaches to these questions: particularism and universalism. universalists tend to assume the idea of global common goods meaningful, advocate individual rights no matter what, and support international institutions to advance those ends. Particularists, by contrast, tends to be skeptical and even negative on all these issues.

Three ontological assertions are important for theories to be classified as particularistic: that any polity exists in a primarily conflictual relation to other polities; that any normative order beyond polities is irremediably precarious; that a viable polity needs to be strongly integrated. By contrast, universalistic positions assert common principles among all humans and are more positive about the possibility of public order on a transnational and eventually global scale.

two understandings as paradigms = a set of foundational concepts which shape the use of theoretical and practical reason when applied, within a specific historical context, to a particular matter of knowledge and field of action.

particularism as the paradigm which assumes the inherent limitation of the extension of order; and universalism as the paradigm which posits the idea of a global well-ordered society as a principle of understanding and action.

particularism and universalism are kinds of 'limited' paradigms of order, in the sense that they are conceptually derived from restraining the analysis of the paradigms of order to only one of their features.

The dichotomy universalism and particularism is not to be applied directly to international law, but to academic texts on international order. Tough the basic orientations of universalism and particularism are worlds apart, they depend on each other, which is why they form a dichotomy.

dividing point: the possibility of a cosmopolitan order, and the source of the legitimacy of social, political and legal order.

BODIN:

relevance of natural and divine law - the interpretation of that law lies only in the hands of the individual sovereign. The particularistic power of the sovereign is the unique source for the legitimacy of social, political and legal order.

acknowledge the individuality of the single polities, the reason for the legitimacy of order is located either in the law of God and nature, or in the general sociability of humans. cosmopolitan order is the only legitimate order per se.

special case, HOBBS, ROUSSEAU, KANT: the contract theory of state was created in order to identify a new source of legitimacy for the public power of the single political community. However, since this source has been located in the individuals no convincing justification could be found why the legitimate order should stop at the borders of the single polity.

HEGEL: new paradigm beyond the dichotomy.

CARL SCHMITT: posits the readiness to sustain a war with another state as the vanishing point for its conceptual construction. it requests all law to be framed and practiced in this light. the concept of the state presupposes the concept of the political. State = an institution that only frames political relationships, rather than enabling them. political relationship = is the relationship in which the other is either friend or enemy in a confrontation which

includes his or her legal and legitimate annihilation. The state is the institution that Inside, it succeeds in overcoming a possibly deadly conflict by creating political unity, outside, the institutional form of the state is grand because it channels and civilizes it. The state provides the most civilized form of inevitable, and even desirable violence. Schmitt's concept of the state presupposes a plurality of states. The very possibility of a state is predicated on the conflictual relationship with another state.

1. for Schmitt international law is a misleading terminology as international suggests some independence from states. Such authority is impossible.
2. the conventional international law focus is too narrow to understand order between states. to establish order: He envisaged a large-scale order for Europe under German rule.

Four distinctive characteristics of (modern) particularism:

- sovereignty: the unity of the law is intrinsically related to a sovereign public power. public law has to maintain an incontestable primacy over all other legal domains in order to guarantee the hierarchical coherence of the whole legal system.
- national rootedness of political identity: only the unity of the legal system, grounded on the primacy of the national constitution, can guarantee the rule of law and a high standard of legitimacy. the unity of the law is based on the unity of public power.
- egoistic behaviour can be regarded as rational: individuals will act rationally if the polity does not bind itself to strict supra-state rules, or if it does so just in the case that these rules are evidently at the service of its immediate interests.
- contraposition to some kind of 'otherness': the definition of the essential principles of the social and political life of the community are largely depending on the identification of a counterpart, or even of an enemy.

KELSEN: universalism is built on his analysis of the contraposition between dualism and monism. Starting point = paradox: the claim put forward by the supporters of nationalism, according to which a nation state pretends to be sovereign though acknowledging the validity of international law. either the nation state is not sovereign, or international law has little, if any, normative quality.

three possible ways for resolving the paradox:

- The dualistic solution assumes that two different legal systems coexist, the first one providing rules for the domestic realm, the second for the relations between states. each system has its own basis of legitimacy and is unchallenged in its area of competence. Problem: two diverging norms, derived from two different legal systems, both effective and legitimate, which simultaneously apply to the same matter. the existence of a plurality of norms is completely unacceptable.

The second and the third solution are both grounded on a monistic conception of the legal system, i.e. on the assumption that domestic and international law have one and the same foundation for validity and legitimacy. The difference is that in the first case domestic public law prevails over international law, whilst in the second international law is placed at the top of the pyramid of legal norms.

- with the first definition of monism if international law is depending for the specification of its normative range on sovereign decisions taken by each of those single states, we will also have as many different international law orders as we have sovereign states. no binding international law would exist.
- Only solution: the monistic structure with international law at the apex of the pyramid and domestic public law as the executor of the fundamental principles and norms of international law within a limited territory, towards a specific group of individuals and within the range of competences attributed to the state by international norms. Kelsen's radicalization of universalism consists in: first, the limitation of the role of individual states to mere executors of what is allowed by international law, and second, his exclusively legal conception of cosmopolitan order. The conviction that world order will be essentially a legal one.

global constitutionalists rather presuppose that an essentially multifaceted international legal community frames and directs political power in the light of common values and a common good.

both particularism and universalism—if understood as a dichotomy—show a mirror-inverted deficit. In fact, universalistic theories shape the framework for the creation of a legal and political order that include the whole humankind, but at the cost of a certain indifference towards the precious identities of the individual communities; and, vice versa, particularistic authors made a strong case for singular identities, but often forgot that these can thrive only within a broader context of peaceful interaction and inclusion. in order to conceive of an alternative in which the advantages of both the universalistic and the particularistic position could be adequately integrated, a deep-going paradigmatic revolution was needed. --- the unitary or non-unitary character of a well-ordered society.

order can be universal and particular at the same time, insofar as it extends far beyond the borders of the single community, but recognizes the inescapability and value of the sub-universal institutionalizations of order.

Three approaches:

- Systems theory - maintains that many rationalities can be observed by the social scientist, each of them characterizing the specific way of functioning of one social subsystem. there are no extra-systemic rational processes. the legal system is characterized by its specific rationality. the existence of a plurality of social subsystems corresponds to a fragmentation of the legal system. Systems theory can be read as considering the fragmentation of society into subsystems and the fragmentation of the law into legal regimes not only as facts but also as developments to be welcomed insofar as they enhance the functional efficiency of social performances.
- Postmodernism - no social structure or legal regime can claim to embody the principles of a superior rationality. every form of social interaction and every legal order, and system, are products of narrations that have their purpose in the historical conditions in which they happen to occur. Legal pluralism = acknowledges the multifaceted dimension of the social and legal phenomenon as it has developed in the contemporary world, without trying to impose on it an overarching system of rules either at the national or at the international level.
- Discourse theory - the communicative rationality has always a normative core. It consists in the assumption that discursive communication can achieve its goal only if all those involved mutually presuppose that: a) from an objective perspective, the assertions are true; b) from a subjective perspective, the speakers act truthfully; and c) from an intersubjective perspective, the speakers interact according to the principles of rightness. this normative essence, based on the general principle of mutual recognition, is what makes communicative rationality universal and justifies the claim that the communicative paradigm represents a sort of renewal of universalism.

+ first the communicative understanding of legal order overcomes the hierarchical notion of the legal order but maintains a normative ranking between the different levels. Second the recognition of legal differentiation and diversity as a matter of fact and as a desirable outlook does not correspond to a value-free, horizontal pluralism like in the perspective of postmodern criticism.

As a result, the normative centre of the legal order is held by the principle of democratic legitimation and definition of common interests and values. the communicative paradigm supports a robust epistemological foundation of a multilevel understanding of public law.

FROM "LEGAL REASONING AND ARGUMENTATION" (Walton)

Forms of Reasoning by Applying Rules to Cases:

- Major Premise: If carrying out types of actions including the state of affairs A is the established rule for a, then (unless the case is an exception), a must carry out A.
- Minor Premise: Carrying out types of actions including state of affairs A is the established topic rule a.
- Conclusion: Therefore a must carry out A.

In this form of reasoning, a is a rational agent that is capable of carrying out goal-directed actions and recognizing the consequences of its actions. This form of reasoning also contains the assumption that the agent has a knowledge base containing a set of established rules.

forms of reasoning like argument from an established rule and argument from a verbal classification can be used to form a chain of reasoning in a legal case that has the claim at issue in the case as its ultimate conclusion to be proved.

Reasoning from a precedent depends on an underlying form of reasoning from analogy based on the similarity of the source case to the target case. On this model, rules are continually being modified as they are applied over and over again to a series of cases.

LEVI: contrast between "logic and actual legal method". particular entities are classified as falling under general terms that occur in rules that are applied to cases and then modified when the new case is decided on in a different way. this process of legal reasoning has three stages:

1. The first stage is the creation of a legal concept built up from cases.
2. The second stage continues this process of reasoning by example by fixing the concept.
3. The third stage is the breakdown of the concept.

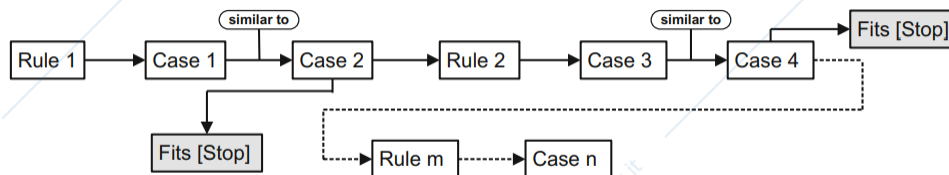
Case-Based Reasoning from Analogy:

- Similarity Premise: Generally, the source case is similar to the target case.
- Base Premise: A is true (false) in the source case.
- Conclusion: A is true (false) in the target case.

there exists a similarity between two cases where A holds in the source case and can shift a weight of evidence to make it plausible that A holds in both cases.

legal reasoning is a sequence of steps based on similarity between pairs of cases in which a rule applied to one case can also be applied to a second case that is taken to be similar to the first one. the sequence of reasoning is based on argument from analogy. There are two possibilities:

1. The argument from analogy may be defeated when a significant difference between the two cases is found.
 2. the argument from analogy may be successfully applied to the second case, and this in turn may have two possible outcomes. One outcome is that the rule may fit the second case, and in this instance, the same conclusion will be drawn in the second case as was drawn in the first case. The other is that the rule will be changed, by being qualified or otherwise modified, or it may even be reconfigured by a different rule that replaces the earlier rule.
- LEVI: One outcome is that the rule may fit the second case, and in this instance, the same conclusion will be drawn in the second case as was drawn in the first case. The other is that the rule will be changed, by being qualified or otherwise modified, or it may even be reconfigured by a different rule that replaces the earlier rule.



Reasoning and Argument:

From a logical, as opposed to a psychological point of view, reasoning may be defined as a series of steps of inference in which some propositions are inferred from others. Reasoning is sequential and best visualized abstractly as an argument diagram where propositions are contained in text boxes. Some premises can lead to a particular conclusion, and this conclusion can then become a premise in the next step of inference to a different conclusion. Such a configuration is called chaining of reasoning in artificial intelligence.

Epistemic reasoning is used to determine whether a proposition is true or false, or whether it is unknown to be either true or false, based on the knowledge of an agent. Practical reasoning can move forward, from a goal to an action, as part of agent-based deliberation, but it can also be used backward by inference to the best explanation to reconstruct an agent's internal mental states such as motive or intent, based on an agent's known actions and words. Practical reasoning can be undercut by citing possible negative consequences of the proposed action. Such a form of attack is a species of reasoning in its own right. By its use of the word "bad," this form of reasoning is seen to be based on values that the agent may be presumed to have and hence it is a species of value-based reasoning. In the value-based scheme, the notion of a goal is separated into three elements: the state of affairs brought about by the action, the goal (the desired features in that state of affairs), and the value. The value is defined as the reason why those features are desirable. The structure is based on an Action-based Alternating Transition System in which an agent performs an action by moving from a current state of affairs to a new one with many differences that may make the new state of affairs better with respect to some value of the agent. Practical reasoning is used in a situation of uncertainty and incomplete knowledge where an agent has to make a decision in a given situation that is constantly changing, based on its goals and its knowledge of that situation.

Reasoning by Drawing Inferences from Sources:

Drawing an inference from perception clearly represents a kind of reasoning we utilize all the time, not only in law but also in scientific reasoning and in everyday conversational reasoning. As skeptics have often noted, this kind of reasoning is defeasible. Source-based reasoning is vitally important in law, because many of the supposed facts happened in the past. One of the most important forms of source-based reasoning and law is inference from witness testimony.

- Position to Know Premise: Witness W is in a position to know whether A is true or not.
- Truth-Telling Premise: Witness W is telling the truth (as W knows it).
- Statement Premise: Witness W states that A is true (false).
- Conclusion: Therefore (defeasibly) A is true (false).

It needs to be assumed that the account the witness has presented is internally consistent, and is consistent with known facts of the case that can be verified by independent objective evidence. These matters can be tested by using critical questions.

Another form of argument that is important in legal reasoning is that of argument from expert opinion. Epistemic reasoning to a conclusion based on expert opinion testimony as an admissible form of evidence requires that the source be qualifiable as an expert. there are two kinds of critical questions. When the first kind of critical question is

asked, any failure to answer inappropriately will defeat the argument. When the second kind of critical question is asked, the burden shifts from the arguer to the questioner to support the critical question with further argument.

Defeasible logic: is a logical system that models reasoning used to derive provisional conclusions from partial and sometimes conflicting information. Using this kind of reasoning, a conclusion can be tentatively accepted, subject to new evidence that may come to be known at some point in the future of an investigation. The basic units of defeasible logic are called facts and rules. Facts are statements that are accepted as true within the confines of a discussion. Statements, also called propositions, are denoted by letters, A, B, C, ..., using subscripts if necessary. There are two kinds of rules in defeasible logic, called strict rules and defeasible rules. Strict rules are absolutely universal in the sense that they do not admit of exceptions. Defeasible rules are rules that are subject to exceptions, and that may fail if an exception is shown to exist in a given case.

Reasoning, Argument, and Proof:

Reasoning is included in argument, but argument is a wider notion. Argument is reasoning used to try to resolve some central issue that is unsettled. An argument is only appropriate if the proposition at issue is not taken as an accepted fact by all parties, so that there is some doubt about whether it is true or not.

One of the best examples of argumentation that can be given is a common law trial in which one side has made a claim that the other side disputes. The claim made by the first party is the ultimate probandum, the ultimate conclusion to be proved, while the other party has the job of casting doubt on the first party's argument. In this setting, there are three parties involved, the two primary parties and a third-party trier, who may be a judge or jury. Procedural rules determine what sort of evidence is admissible, and the two primary parties are supposed to use this evidence to try to prove their own contentions and cast doubt on the contentions of the other side.

A proof may be defined as an argument in which the premises furnish sufficient evidence to reasonably accept the conclusion. A burden of proof is a requirement set on one side or the other to meet a standard of proof in order for the argument of that side to be judged successful as a proof. At the opening stage, when a person makes a claim at the first point in the sequence described above, he has a right to a legal remedy if he can bring forward facts that are sufficient to prove that he is entitled to some remedy. This is called the burden of claiming. The second type of onus is the burden of questioning. If one party makes an allegation by claiming that some proposition is true during the process of the argumentation, and the other party fails to present a counterargument, or even to deny the claim, then that claim is taken to be implicitly conceded. This type of burden of proof is called the burden of questioning because it puts an obligation on the other party to question or contest a claim made by the other side, by asking the other side to produce arguments to support its claim. The third burden is called the burden of production or the burden of producing evidence. It is the burden to respond to a questioning of one's claim by producing evidence to support it. The fourth type of burden of proof is called the burden of persuasion in law. It is set by law at the opening stage of the trial and determines which side has won or lost the case at the end of the trial once all the arguments have been examined. The fifth type of burden is called the tactical burden of proof. It applies during the argumentation stage of the trial, when a lawyer pleading a case has to make strategic decisions on whether it is better to present an argument or not.

FROM "A SURVEY OF APPROACHES AND STUDIES OF LEGAL ARGUMENTATION IN THE CONTEXT OF LEGAL JUSTIFICATION IN DIFFERENT LEGAL SYSTEMS AND COUNTRIES" (Feteris)

Studies of Legal Argumentation in the Civil Law Tradition:

- FRANCE. different research traditions can be distinguished. The first tradition is the logical approach in which the specific characteristics of legal reasoning and legal argumentation as a specific form of normative reasoning are studied from a logical perspective. The second tradition is the rhetorical approach in which the specific characteristics of legal argumentation are analysed in terms of the different aspects of a legal rhetoric such as specific legal starting points, legal means of argumentation and the legal audience that is addressed by the speaker, and in terms of concepts from classical rhetoric such as the status theory. The third tradition is the legal-philosophical approach represented by authors who study various aspects of legal argumentation in the justification of legal decisions from the perspective of legal philosophy.
- ITALY. Broadly speaking, the two main trends in these developments were the analytical-philosophical approach and the rhetorical-philosophical approach. Scholars working in an analytical-philosophical tradition base their views on developments in the analytical philosophy of language and the law in the Anglo-Saxon and Scandinavian tradition. Scholars working in a rhetorical-philosophical tradition base their views on classical rhetoric, topics, and the ideas developed by Perelman. They conceive the law as a process of interpretation and reasoning based on a rhetorical

procedure in which a lawyer takes into account possible objections by the audience that have to be taken away in order to convince this audience of the correctness of the interpretation.

- GERMANY. In the research, broadly speaking, four different approaches can be distinguished: the hermeneutical approach in which the specific characteristics of the interpretation of the law and legal texts form the object of investigation, the logical approach in which the specific characteristics of the logic of legal reasoning are investigated, the topical-rhetorical approach in which the types of arguments for and against a legal standpoint are investigated, and the analytical approach in which the rules for legal argumentation are investigated and legal discourse is considered as a form of rational discourse.
- SPAIN. An important centre of research on legal argumentation in Spain is the Universidad de Alicante where Atienza and a group of legal philosophers such as Aguiló Regla, González Lagier, Lifante, Pérez-Lledó, Ródenas and Ruiz Manero carry out research in the field of legal argumentation, legal interpretation and legal reasoning. Atienza has published several books on legal argumentation (1986, 1991, 1997, 2006, 2013) and a number of articles.
- LATIN AMERICA. In Latin America, the study of legal argumentation is based on two pillars. The first pillar is formed by the European tradition of civil law and European theories of legal interpretation and legal reasoning. The second pillar is formed by the North-American tradition of common law and precedent and theories of legal interpretation and legal reasoning that belong to this tradition.
- UK. In research of legal argumentation in the United Kingdom the most influential research traditions are the legal-philosophical tradition and the tradition that concentrates on applications of AI and Law in research of legal argumentation. The most important theory of legal argumentation in the UK, that has also been influential in the development of studies of legal argumentation in other countries, is the theory of MacCormick, a Scottish scholar of legal philosophy who worked at the University of Edinburgh (Scotland).
- USA. In the United States, research of legal argumentation takes place in the tradition of legal reasoning and legal interpretation of precedents and statutory law in the common law system. For this reason, the research concentrates on topics such as argumentation on the basis of precedents, analogical arguments, and argumentation in the context of constitutional law. An influential modern thinker in the field of legal philosophy of the second part of the twentieth century is Dworkin. A second tradition in research of legal reasoning and argumentation is represented by authors who study the application of legal rules and legal justification from the perspective of the obligation of public officials to account for their discretionary power. An author such as Cohen concentrates on the relation between the Rule of Law and the obligation for courts to give reasons for their decisions. A third tradition of research in legal reasoning can be found in studies by authors belonging to the Critical Legal Studies movement. In the view of Critical Legal Studies, a legal text is considered as a social, cultural and political phenomenon and the analysis of legal texts is aimed at reconstructing the way in which linguistic and textual techniques are used to express (or hide) a particular ideology.
- CHINA. In China, the study of legal argumentation is based on international developments in the field of logic and argumentation theory. Like in most other countries, traditionally the most influential approach to legal argumentation is the logical approach. The second approach that has been developed recently is more informal and based on insights from (legal) argumentation theory.
- JAPAN. In Japan, various authors apply insights from legal theory in the modelling of reasoning patterns in the field of AI and Law.

Research of legal argumentation concentrates on the justification of judicial decisions. The central question is how legal decisions can be justified in a rational way and what the soundness conditions are that such a rational justification should meet. In the period 1970–2015 research of legal argumentation has developed into an independent field of study with an interdisciplinary and international character. a common starting point is that legal argumentation is a communicative and social activity that forms a contribution to a rational practical discussion. Such a discussion is considered as an institutionalization of the ideal of practical rationality in a legal context. To establish whether the argumentation can be considered as an acceptable contribution to such a discussion, in light of the rules, models for a rational reconstruction are developed in which the theoretical concepts and distinctions are specified to analyse and evaluate legal argumentation in an adequate way.

Until 1970 research of legal argumentation took place within legal science, concentrating on the methodology of legal reasoning in the context of the interpretation of legal rules and legal interpretation methods. starting in the 1970s scholars started to integrate ideas from analytical language philosophy, modern logic, informal logic (Toulmin), modern rhetoric (Perelman) and theories from ethics about the rationality of practical discussion in their research of legal argumentation. also scholars from other disciplines, in their turn, became interested in legal argumentation. From the 1970s, contacts between researchers and research groups from different countries developed. authors from different countries started discussions about the foundations of a theory of legal argumentation. authors started applying each other's ideas. --- convergence of ideas that represent the main trends:

The first trend concerns the idea that the justification of a legal decision can be considered as a communicative and social activity, as a specific form of a practical discussion. The second trend is that such a discussion must be conducted in accordance with certain general and specific legal discussion rules. The third trend is that the analysis and evaluation of legal argumentation should take place on the basis of a rational reconstruction of the argumentation with the aid of models that specify the theoretical concepts and distinctions necessary for such a reconstruction.

- the justification of a judicial decision is considered as a communicative and social activity that takes place in the form of a dialogue. The communicative aspect implies that the justification is a form of verbal interaction. consists of a constellation of statements/propositions that can be conceived as a constellation of speech acts. Legal argumentation as a form of verbal interaction is a social activity. The social activity consists in putting forward arguments with the aim of making the decision acceptable to the intended audience. The verbal interaction is considered as a dialogue or discussion between a protagonist/proponent and an antagonist/opponent who put forward pro- and contra arguments. In the discussion the participants react critically to each others arguments with the aim of submitting the arguments to a critical test and assessing their acceptability in accordance with certain evaluation criteria.
 - Legal justification forms a contribution to a discussion that can be considered as a specific form of a practical discussion. In a practical discussion, the object of the discussion is a certain course of action. the action concerns a judicial decision which, when it has become final, has certain legal consequences for the parties involved in the specific case and for similar future cases. The institutionalized nature of legal discussions has to do with the fact that the law is an institutional normative order in which a separation is made between those who create rules of law (the legislator) and those who apply the rules of law (the courts). In a legal context the institutionalization is a means of guaranteeing that the discussion meets such requirements as the Rule of Law, legal certainty and equality. The institutionalization thus implies that the discussion takes place under certain conditions and constraints. These conditions and constraints concern the claims that can be made the object of discussion. They also concern the discussion procedure, the discussion rules, the division of roles, the common starting points, the soundness criteria for the argumentation, and the final result of the discussion.
 - The general conditions of practical rationality in a legal context are based on what is called the 'ideal speech situation'. Such conditions are that participants are not influenced by external factors such as power or force, that the participants treat each other as equal, and that they do not hinder each other in bringing forward standpoints, arguments and criticism.
- In the various theories of legal argumentation the ideal of practical rationality for legal discussions is developed further in terms of rules for legal discussions that have a function in light of this ideal.
1. The first kind of rules concerns the procedural rights and duties of the participants in light of the general requirements of a rational discussion and practical rationality. These rules are based on insights about general rules for rational practical discussions developed in logic, argumentation theory and ethics and lay down the rights and duties of the participants. they specify the rights and duties to put forward standpoints and to criticize standpoints that have been put forward by others, the willingness of the participants to commit themselves to common discussion rules and starting points and to behave themselves in accordance with these commitments, the obligation to defend standpoints and arguments that have been put forward against relevant criticism in accordance with these rules and starting points, the right to criticize standpoints and arguments in accordance with certain criteria of relevant critique and to defend standpoints and arguments that have been criticized in accordance with certain criteria of relevant critique and the duty to accept a standpoint that has been defended in accordance with the rules and the duty to retract a standpoint that has been attacked in accordance with the rules.
 2. A second kind of rules concerns the common starting points that play a role in a legal discussion as an institutionalized argumentative practice. are constituted by the rules of substantive law and general legal principles in a particular legal system and field of law, as well as the methods for the identification and interpretation of those rules and principles.
 3. A third kind of rules concerns the argument schemes and argumentative patterns that can be used in legal argumentation. The legal argument schemes are distinguished on the basis of the content of the arguments that are put forward and the type of relation between the arguments and the decision. The first approach is based on insights from legal topics and legal method in which a distinction is made between schemes that are based on a particular interpretation method and schemes that are based on a particular legal form of reasoning. The second approach is based on an application of insights from ethics in the context of legal argumentation. The third approach is based on insights from argumentation theory and distinguishes argument schemes that differ with regard to the specific relation between the arguments and the decision.
 4. The fourth kind of rules concern the requirements for the legal decision that forms the result of the discussion. Some of these requirements concern the content of the decision, other requirements concern the form. The requirements

are considered as a specific legal implementation of the application of the principles of universalizability of moral judgements.

models are developed that can be used as theoretical instruments to establish whether the argumentation is in accordance with certain legal standards of acceptability that are relevant from the viewpoint of a particular theoretical perspective, based on a particular conception of rationality. In theories of legal argumentation models have been developed to distinguish the different levels in the justification to clarify which choices have been made in the application and interpretation of the law that must be accounted for. The function of the models is to provide an instrument for the analysis and evaluation of legal argumentation.

In theories of legal argumentation, generally speaking, two levels of justification can be distinguished that reflect different types of justification that must consist of different types of arguments that are to be evaluated according to different standards:

- On the first level the decision is justified by means of argumentation that specifies the legal rule and the facts that constitute the conditions for applying the legal rule. is an elaboration of what is also called the 'legal syllogism'. The justification can be reconstructed as a logically valid inference in which the decision follows logically from the legal rule and the facts.
- On the second level the arguments of the first level that are in need of further support are justified by subordinate argumentation. Such a support is necessary in 'hard cases' in which there is a difference of opinion about the choice and/or formulation of the legal rule for the specific case.

general framework specifying the nature of the different levels of justification are elaborated further in terms of argumentative patterns. Scholars who consider legal argumentation as a specific form of practical moral argumentation concentrate on patterns that are characteristic for the aspects of legal justification that make explicit the commitments in light of the requirements of practical rationality in moral discussions. Scholars working in a tradition of legal methodology, argumentation theory and artificial intelligence and law study argumentative patterns by concentrating on the argument schemes and argumentation structures that are characteristic for legal argumentation.

In various approaches and studies, different aspects of a theory of legal argumentation have been addressed:

- In the philosophical component, authors specify the criteria of rationality for legal argumentation in terms of a particular conception of rationality, formulated in terms of an ideal model of rational discussion in a legal context.
- In the theoretical component, models for the rational reconstruction of legal argumentation are developed.
- In the reconstruction component it is investigated how models for the rational reconstruction can be used in analysing and evaluating legal argumentation in an adequate way.
- In the empirical component it is investigated how the argumentative patterns come into being in actual legal practice and what strategies are used by courts to present their argumentation to convince a particular legal audience.
- In the practical component it is investigated how the philosophical, theoretical, reconstruction and empirical insights can be combined to develop methods for improving skills in legal education.

By combining ideas from various research traditions, legal argumentation theory will obtain the theoretical and practical value which is required for progress of the research and for practical applications of the theoretical ideas in legal practice and legal education.

DIALOGUE BETWEEN COURTS

cooperation and dialogue between the courts is essential in order to foster an enhanced protection for the individual and to preserve the true role of the constitutional court as guardian, counter-powers, custodian of the basic values of democracy, human rights, freedom, equality, solidarity and the rule of law.

The internationalization of fundamental rights and the corresponding proliferation of the judicial bodies called upon to protect them have generated interpretative plurality. First and foremost, these phenomena have not eliminated the role and importance of national courts. Second, the European courts' interpretative activities overlap. Nevertheless, this does not – and cannot – mean that disputes are resolved in the same way wherever they are brought. the broad converging trend characterizing abstract formulations is countered by the historical and axiological uniqueness of each legal system.

Dialectical interaction between courts can ensure that the multilevel protection of rights yields a reasonable equilibrium between legal systems and their judges. In other words, the parties involved cannot simply impose their own positions on the others, as in a unilateral conception of the situation; nor would it be acceptable for certain bodies to compel the others to surrender the positions they have adopted on the basis of their own constitutional

orders. Instead, it is reasonable to believe that the contending values could be more successfully reconciled by balancing the courts' respective positions.

dialogue between courts is necessary in light of the current state of affairs, because the same set of facts may be subject to a national judgment first, and a supranational one later, such that the former can no longer afford to overlook the latter. two types of dialogue, each of which is valuable:

- In the first type, (CULTURAL) there is no need – or way – to bring specific cases to the attention of another court, for it to provide immediate indications based on the law of which it is the qualified interpretative authority.
- decisional type of dialogue - European case law is called upon for the specific purpose of resolving a dispute or deciding a question of constitutionality that requires application of EU or ECtHR law. the Court must clearly evaluate whether the national provisions are actually incompatible with European law. it remains for the Constitutional Court to evaluate whether said meaning is compatible with the Constitution or, in the case of Union law, with the supreme principles of the Constitution. the existence of procedural mechanisms enabling reference of questions to the European courts on the meaning of provisions that are affirmed as interposed measures in constitutional proceedings is of fundamental importance. the establishment of the correct meaning of European provisions, as given by the competent court, does not also define the judgment on constitutionality. Indeed, the Constitutional Court is still mandated to evaluate national provisions. the advisory opinion is not binding. This preserves the national courts' decisional autonomy, save for the power of the parties to the dispute to apply to the ECtHR. Relationship imbued with a spirit of cooperative decisional dialogue.

Inter-court dialogue, especially between constitutional courts and European courts, is not automatically destined for success. if this dialogue is to be effective, certain conditions must be met.

- The first danger is the temptation to consider the act of listening to others' views as a formality, a step that must be taken before one's own final decision can be made. If, by the end of the interaction, the parties to the dialogue have not changed their positions in the least and have made no concessions to one another, one may certainly doubt whether they took part in the dialogue in a spirit of loyalty, with the intention to listen before reaching a decision.
- The second danger consists in the impossibility of mutual understanding because of the cultural differences and contingent fluctuations to which different legal orders may subject juridical institutions that are only apparently similar.

the preconditions for dialogue should be taken as a good starting point. particularly useful:

1. Adoption of a common language - it is necessary to carefully specify the meaning of the expressions used, because semantically similar terms may have different meanings in different legal systems.
2. Information sharing - inclusion of as many explanations as possible on the legal order and on the operation of the legal principles and institutions that must be applied to decide the issue.
3. Respect for the exclusive competences of the other parties - The discussion should not include subjects drawn within the orbit of only one of the parties.
4. Multilaterality in dialogue - approach that is not limited to a mere comparison of the positions of the parties to the dialogue, but that also considers those held by other courts.

VASAK THEORY

The rights proclaimed in the Universal Declaration fall into two categories: on the one hand, civil and political rights and, on the other hand, economic, social and cultural rights. The first generation concerns "negative" rights, in the sense that their respect requires that the state do nothing to interfere with individual liberties, and correspond roughly to the civil and political rights. The second generation, on the other hand, requires positive action by the state to be implemented, as is the case with most social, economic and cultural rights. The international community is now embarking upon a third generation of human rights which may be called "rights of solidarity".

Such rights include the right to development, the right to a healthy and ecologically balanced environment, the right to peace, and the right to ownership of the common heritage of mankind.

On the international level, the Declaration has become so widely accepted as the basis for universal and regional norms in the defence of human rights that one may ask what its legal force is.

Some specialists today consider that the Universal Declaration is binding on Member States; others feel it has become part of customary law; still others see it as a kind of "common law" for all mankind. In all probability, none of these views is entirely correct. But by recognizing the Universal Declaration as a living document and leaving the jurists to argue among themselves, one can proclaim one's faith in the future of mankind.

The work of the U.N. Commission of Human Rights, which is made up of representatives of Member States, has been fairly successful as regards the definition of international norms concerning human rights. The U.N. added a new human rights body to its structure which may help it achieve one of its original goals. The Human Rights Committee.

human rights, cultural rights have a rather curious status:

- They are associated either with civil and political rights or with economic and social rights. They sometimes appear in both categories of human rights.
- They are always defined juridically as individual rights.

they should be recognized as having a specific nature, since they are at once individual and collective.

the right of everyone freely to participate in the cultural life of the community. It is only recently, however, that action has been taken to define how this right should be exercised and to give the individual the opportunity to express his cultural identity.

The protection of copyright and the preservation of the cultural heritage are indispensable if people are to participate fully in cultural life.

This brief survey of Unesco's activities in the field of human rights, placed in the legal perspective of the Universal Declaration, would be incomplete without a reference to the sensitive issue of the action which is or should be taken when private individuals or non-governmental organizations write to the Organization, claiming to be the victims of violations of human rights that fall within Unesco's competence.

the General Conference requested that this procedure should be made "more effective", and it is currently being re-examined by the Executive Board. In seeking a more effective way of safeguarding the rights of individuals and groups, Unesco intends to remain faithful to its mission to serve mankind.

VASAK CRITICS

His classification = the most practical, commonly used, and comprehensive categorization of human rights.

three generations of rights:

- The first generation regards negative rights and corresponds to civil and political liberties.
- The second generation presumes a positive action of the state and includes social, economic, and cultural rights. distinction between the two covenants lies in the parties' obligations.
- third generation of human rights is referred to as "rights of solidarity." They require collective action of individuals as well as states and other political units.

The first generation also has a long history of accenting liberty (Magna Carta, United States Bill of Rights and the Declaration of Rights of Man and of the Citizen. The second generation of equality rights was a product of the rapid nineteenth century industrialization and accompanying social and economic inequalities. Their distinct feature is the prerequisite for active state involvement. While differentiating between the first and second generations of rights, Vašák contrasted the negative character of the former and the positive of the latter. Moreover, both generations refer to individual rights and impose the corresponding duties onto the nation state. The third generation of human rights is the most recent and vague in content – collective rights - include right to self-determination, economic and social development, healthy environment, natural resources, and participation in cultural heritage. such rights are positive and collective and demand responsibility, which lies beyond the nation-state.

the third generation of rights assumes that they are positive, in terms of requiring active participation of duty-bearers; collective, in terms that focus on people or collectivities instead of individuals; and international, that they operate within the international relations erga omnes instead of the sole relationship between the state and the individual.

	Negative/positive dichotomy		Individual/collective dichotomy		National/international dichotomy	
	Negative	Positive	Individual	Collective	National	International
1st generation	x		x		x	
2nd generation		x	x		x	
3rd generation		x		x		x

CRITIQUE by Philip Alston: Concerned with the speed of the process for the promotion of the third-generation rights, Alston questioned whether the translation of the needs into specific legal norms at a relevant legislative forum was met and whether there is no practical blurring of the all three stages. criticized from semantic perspective, underlining the assumed generational exchange that could have undermined the already acknowledged human

rights. Also the extension of the human rights catalogue with new ones will move the accent from the old ones and thus weaken the whole system.

CRITIQUE by Fredman: the need for rethinking the approach to the first- and second-generation rights as strictly negative and positive correspondingly. increasingly blurred.

CRITIQUE by Kooijmans: pointed out that a good right requires (a) a holder of the right, who can bring (b) an objectified claim against (c) a duty-bearer who must honor the claim.

the third generation of rights confuses the fundamental principles for human rights protection with the demands of various groups and interests, and blends them with vaguely defined political rhetoric, thus bringing an overall negative impact to the international system of human rights protection. the existing catalogues offer substantial opportunities to further improve human rights protection.

the contemporary human rights discourse is different than forty years ago:

- the paradigmatic change which occurred in the context of the right to development and subsequently took over the whole United Nations human rights doctrine. the introduction of the right to development, the solidarity rights brought a new pattern of rights expansion through the adoption of political acts in the form of non-binding declarations. negative impact of the attempts to equalize the three generations of rights.
- it is difficult to prescribe minority rights into one of the Vašák's categories.

In addition, scholars identify various dimensions of the changing human rights environment.

+ Regional integration processes also had an impact on the human rights discourse.

+ a reverse tide of authoritarian renewal takes place.

+ terrorism, migration, poverty, and anti-western ideological resistance also leave their marks on the contemporary human rights discourse.

+ identification of the "gray zones" of the contemporary human rights discourse that contain but are not limited to the following processes: firstly there is a noticeably growing role of international organizations and international legal bodies. Secondly the limited ability of the Council of Europe to produce comprehensive mechanisms for international protection of minorities. Thirdly the human rights discourse embraces more and more dimensions and specific aspects, Human rights have been also further profiled to secure the needs of particular groups like elderly or people with disabilities. Fourthly the contemporary human rights debate attempts to reconsider the core human rights axiology. Fifthly the multicentricity.

human rights tend to be discussed within the international context more frequently than in the context of nation states. the most discussed generation of human rights is the first—civil and political liberties. it shows that even though the first generation is the most numerous, the main focus lies not on the "classical" list of rights such as the rights to life, fair trial, assembly, and religion, but on the new concepts that generally follow the logic of the basic rights while functioning in a conflict environment and entail international response.

the most frequent topics of rights of women, indigenous people, children, LGBT rights, and racial discrimination.

However, another noticeable group of topics is related to conflicts and postconflict environment.

the most discussed topic is transition with transitional justice being its most popular aspect, followed by democratization and memory-related topics.

the contemporary human rights discourse is overburdened with the topics that are too ambiguous for existing categorizations and require further reconsideration.

the topics that are too ambiguous to be categorized based on the Vašák's approach do not fit into any of the categories due to their vagueness and ambiguity. first-generation rights—the classical freedoms and liberties—still receive significant attention. However, their context is internationalized and their content shifts towards the international context. dilemma for the contemporary human rights narrative—the lack of comprehensive approach to categorization that is able to reflect the new developments of the theory.

Vašák's categorization organized human rights in terms of importance, reference to freedom, or equality and ultimately as a guideline how to understand the particular rights. regardless of the continuing dominant position of the rights belonging to Vašák's first generation, the bulk of the debate overshadow the primacy of civil and political rights. there is a burning need for a new debate on the idea and importance of human rights: firstly, because within the human rights community the accent shifts from the primacy of freedom to the primacy of equality; secondly, because the post-Cold War liberal order settled around the human rights pillar faces unprecedented attack from illiberal regimes and the temptation for democratic backsliding; thirdly, because the power of human rights stemmed from its human-centered approach.