ARCHIWUM FILOZOFII PRAWA
I FILOZOFII SPOŁECZNEJ
2015/1

Marek Smolak
Adam Mickiewicz University in Poznań

The Method of Reflective Equilibrium in Moral Reasoning

Abstract

The paper analyses the nature of moral reasoning when balancing constitutional rights. The fundamental assumption is the idea that adequate moral reasoning based on the Weight Formula should demonstrate the reasons for adopting specific principles. This demonstration should be rational. Rationality can be achieved by applying J. Rawls's methods of reflective equilibrium. The above method consists of background theory/approach. I propose to consider two background theories/approaches, namely Dworkin's idea of integrity and the concept of the rule of law formulated by O. Raban.[1] My aim is to argue that the latter is more accurate for moral reasoning when balancing constitutional rights than the former because it helps us to rationalize the broadly understood process of taking judicial decisions.

1. Introduction

Without doubt, one of the most significant achievements of contemporary theory and philosophy of law is the formulation and development of the proportionality principle.[2] Applied by constitutional courts of many countries, it has become a greatly helpful instrument in resolving complex constitutional issues, in particular those which ensue following a conflict of constitutional rights. At the same time, as many authors underline, the application of the proportionality principle necessarily entails moral reasoning. Therefore this paper aims to analyze the nature of moral reasoning when balancing constitutional rights.[3] The fundamental assumption in this matter is the idea that adequate moral reasoning based on the Weight Formula should demonstrate the reasons for adopting specific principles, i.e. the principle of necessity and the principle of suitability, and in particular the principle of proportionality in the narrow sense and

[1] O. Raban, *Racjonalizacja rządzeniem państwem. O relacji między demokracją a państwem prawa* [Eng. *The Rationalization of Policy: On the Relation Between Democracy and the Rule of Law*], Ruch Prawniczy, Ekonomiczny i Socjologiczny, 2014/4.

[2] R. Alexy, *A Theory of Constitutional Rights*, Oxford 2002.

[3] R.C. den Otter, *The Place of Moral Judgment in Constitutional Interpretation*, Indiana Law Review 2004/37, pp. 381–384.

the second law of balancing. Demonstration of those reasons/premises should be rational.[4] In order to maintain the rationality of justification claiming that benefits afforded from the protection of a given right offset the burden and inconveniences resulting from the limitation of another right (proportionality principle in the narrow sense), one should draw on the methods of reflective equilibrium suggested by J. Rawls.[5] In this method, the process of achieving the equilibrium consists in eliminating contradictions between different judgments as well as relies on the relevant background theory/approach. I propose two basic background theories/approaches (endorsing moral choices and decisions), namely Dworkin's idea of integrity and the concept of the rule of law offered by O. Raban. One of the fundamental characteristics of the rule of law, which is nevertheless rarely articulated, is the rationalization of the broadly understood judicial choices.

2. The Weight Formula

Let me begin with a short description of the concept of the Weight Formula. In a situation of multiplicity of legal and moral orders, the question concerning the place and importance of moral reasoning while resolving conflicts of constitutional rights based on the Weight Formula becomes a highly interesting research problem.[6] At the outset, one should present a simplified pattern of reasoning relying on the principle of proportionality.[7]

The first step in this reasoning is to assess the purpose of a given regulation: whether the law is capable of accomplishing a given goal (the so-called principle of suitability). The second step is to determine whether that purpose is sufficiently socially relevant to justify the potential limitations of constitutional rights – a constraint adopted in the reasoning *ex hypothesi* (the so-called necessity test). A positive answer to both purpose-related questions triggers a three-stage test of proportionality in the broad sense of the word (third step). Firstly, it is determined whether measures selected to accomplish that purpose are suitable, secondly, whether the measures adopted in a given regulation impose a limitation on specific constitutional rights in the least burdensome and inconvenient manner; thirdly, whether the benefits achieved by accomplishing that goal outweigh the burdens and inconveniences resulting from the constraints on particular constitutional rights. It should be noted that the third stage consists in comparing the costs and benefits of a given regulation, it may therefore be described as a test of proportionality in the narrow sense (the notion of proportionality *sensu largo* applies to the entire three-stage reasoning).[8]

At this point, one should necessarily stress the relationship between rationality, which justified the entire analysis of proportionality, and the test of necessity at the

[4] M. Smolak, *Uzasadnianie decyzji interpretacyjnej jako praktyczne rozumowanie prawnicze* [Eng. *Justifiactions of interpretive decisions as practical legal reasoning*], in: *W poszukiwaniu wspólnego dobra. Księga Jubileuszowa Profesora Macieja Zielińskiego* [Eng. *In search of the common good. The jubilee book of professor Maciej Zieliński*], Szczecin 2010.

[5] J. Rawls, *Teoria sprawiedliwości* [Eng. A Theory of Justice] Warszawa 1994.

[6] M. Kumm, A.D. Walen, *Human Dignity and Proportionality: Deontic Pluralism in Balancing*, NYU Public Law and Legal Theory, Working Papers 383, 2013, pp.1–2.

[7] See more in M. Klatt, M. Meister, *Proportionality – A benefit to human rights? Remarks on I-CON controversy*, International Journal of Constitutional Law, 2012/10.

[8] M. Kordela, *Możliwość konstruowania ogólnej teorii zasad prawa. Uwagi do koncepcji Roberta Alexego* [Eng. *The possibility of the construction the general theory of legal principles. Remarks on Robert Alexy's idea*], Ruch Prawniczy, Ekonomiczny i Socjologiczny, 2007/2, pp.14–21.

second stage of the analysis of proportionality *sensu largo*, namely at the critical stage of verifying whether the measures used by the legislator are the least onerous of all the realistically available methods of accomplishing the legislator's goal. It may therefore be presumed that in the case of each specific goal, there may be various rational methods, but only one method which can be deemed necessary. Such an argument, albeit logically apposite, seems to be excessively abstract and ignores the fact that the analysis of constitutionality is a domain of practical judiciary, not abstract logic. In a specific social and political practice, the assessments of "proportionality" are tantamount to assessments of necessity, and it is no accident that judicial practice of certain courts which adopt proportionality analysis, treats "necessity" as equivalent to proportionality. Hence it shows that the category or rationality in the strong sense plays the role of a safeguard to civil rights, imposing exceedingly rigorous requirements (necessity, proportionality in the narrow sense) on the legislator wishing to accomplish goals which have certain ramifications for individual rights and freedoms.

The test of proportionality *sensu stricto* assumes the quasi-arithmetical Weight Formula suggested by Robert Alexy, whose simplified version is as follows:

$$W_{ij} = \frac{I_i \text{ x } W_i}{I_j \text{ x } W_j}$$

Individual variables have the following meaning: Wij denotes the relative weight of a competing rule. The remaining variables marked W represent the abstract weight of competing rules/laws; in practice, however, the variables often have no greater significance as it is impossible to ascertain the relations between weights of conflicting rules *in abstracto* and the variables are taken to be equal. The variable I_i and I_j play the crucial role here. The former denotes the intensity of infringement of one of the competing rules. In turn, I_j stands for the importance of implementing the rule. It is the relative value of the variables I_i and I_j that decides which of the competing rules should be given priority in a given case. According to the so-called Weight Formula formulated by Alexy, with increasing violation of one of the competing rules by the planned judgment, the importance of implementing the second rule has to be proportionally higher.[9] The application of the Weight Formula as part of the proportionality principle *sensu largo* may be illustrated in the following example of reasoning:

1) stage one: is the aim of the law protecting artistic freedom important from the social, political or moral standpoint? positive answer: protection of artistic freedom is important from the social, political and moral standpoint;
2) stage two: does the protection of artistic freedom possess sufficient social and political importance to justify potential limitations of constitutional rights, e.g. protection of religious feelings? answer: the protection of artistic freedom does possess sufficient social and political importance to justify potential limitations of constitutional rights, e.g. the protection of religious feelings;
3) stage three: Are measures chosen to protect artistic freedom suitable/rational? Do measures chosen to protect artistic freedom limit the protection of religious

[9] M. Araszkiewicz, *Koherencyjny model rozumowań prawniczych* [Eng. *Coherential model of legal reasonings*], Archiwum Filozofii Prawa i Filozofii Społecznej, 2010/1, p.12, also M. Araszkiewicz, T. Gizbert-Studnicki, *Teoria praw podstawowych R. Alexego* [Eng. *Robert Alexy's Theory of Fundamental Rights*], Przegląd Sejmowy, 2011/3, pp.121–124.

feelings in the least burdensome or injurious manner? Do benefits resulting from the protection of artistic freedom outweigh the burdens and inconveniences due to limitations of the protection of religious feelings (proportionality principle in the narrow sense)?

The above Weight Formula also served as an instrument in devising the so-called Second Law of Balancing. Whereas the original First Law of Balancing is concerned with the impact of interference in a given rule, and thus it is also referred to as the substantive law of balancing, the second law applied to the degree of certitude of premises which justify the intervention, in particular the empirical and normative premises (the epistemic law of balancing). The law states that "The more an interference into a constitutional right weighs, the greater must be the certainty of its underlying premises." A fundamental problem in this paper is the issue of external justification (external rationality), relating to the selection and truthfulness of premises adopted in the moral reasoning conducted when applying the proportionality principle in resolving conflicts of constitutional rights.

3. J. Rawls' methods of reflective equilibrium

The fundamental assumption of this paper is the idea that adequate moral reasoning based on the Weight Formula should demonstrate the reasons for adopting specific principles, i.e. the principle of necessity and the principle of suitability, and in particular the principle of proportionality in the narrow sense and the second law of balancing. The demonstration of those reasons/premises should be rational. In order to maintain the rationality of justification claiming that benefits afforded from the protection of a given right offset the burden and inconveniences resulting from the limitation of another right (proportionality principle in the narrow sense), one should draw on the methods of reflective equilibrium suggested by J. Rawls.

The scope of this outline does not allow a broader presentation of the method of reflective equilibrium conceived by J. Rawls. Suffice it to observe that it consists firstly in identifying the so-called prudent/reasonable individual moral judgments, then in formulating moral principles which explicate those judgments, and finally in formulating philosophical and non-philosophical theories which would validate both reasonable moral judgments as well as moral principles which underlie those judgments. The process of achieving equilibrium consists in eliminating contradictions between those judgments as well as relies on relevant philosophical and non-philosophical theories. The ultimate outcome of establishing coherence, i.e. fitting those three elements into a whole, is an equilibrium which means that they render each other reciprocal support and credibility.

Thus the process of achieving reflective equilibrium comprises three stages: a) selecting reasonable moral judgments; b) explicating those judgments by recourse to moral principles and achieving narrow reflective equilibrium; c) arriving at the broad reflective equilibrium. The core element or concept of reflective equilibrium is that our convictions become mutually supported by means of reciprocal coherence and explication. The model of moral reasoning suggested by John Rawls may be termed as an inductive or bottom-up model, which rests on the assumption that in the event of resolving conflicts of values or rules in reasoning, one sets out from the formulation of individual moral judgments, which are subsequently clarified and supported by

general moral principles, which in turn are validated by the more comprehensive philosophical and non-philosophical theories, until reflective equilibrium is attained. Clearly, this model of moral reasoning displays greater affinity with the solutions *in concreto.*[10]

The second model of moral reasoning is the deductive, top-down model, in which the resolution of conflicts of values or principles in reasoning and achieving reflective equilibrium begins with abstract constitutional rules/principles, moving on subsequently to the analysis of particular examples of individual judgments, which would be supposed to modify, and at times falsify the previous constitutional rules or principles, or even the most general philosophical and non-philosophical theories and concepts.

Without any prejudice as to which of the models of moral reasoning is more attractive and more appropriate in justifying the reasons/premises in resolving conflicts of constitutional rights on the basis of the proportionality principle, while at the same time fully accepting Rawls's core idea of achieving equilibrium by obtaining coherence and reciprocal endorsement of individual moral judgments, moral principles and theories, I assume that adequate and rational moral reasoning should take into account both approaches/models of moral reasoning, which prove to have a value confirming the outcome of the adopted solution for each of those.

As previously observed, in my opinion, there are two basic background theories/approaches (endorsing moral choices and decisions) which are the most suitable for the method of reflective equilibrium. One is R. Dworkin's idea of law as integrity and the other is the concept of the rule of law formulated by O. Raban. R. Dworkin's idea of law as integrity is well known whereas Raban's proposal is a new approach to the rule of law. O. Raban believes that one of the functions of the rules underlying the legal state, which often remain implicit, is the rationalization of state governance.

4. R. Dworkin's idea of checkerboard statutes

To maintain the rationality of justification when using the proportionality principle (in the narrow sense), we should draw on the methods of reflective equilibrium. One of the stages in the process of achieving reflective equilibrium is formulating the basic background theory/approach. As I mentioned one of them is Dworkin's idea of law as integrity.

R. Dworkin's idea of law as integrity is well known therefore let me start with a different question raised by R. Dworkin in *Law's Empire*, concerning the so-called checkerboard statutes: "why should Parliament not make abortions criminal for pregnant women who were born in even years but not for those born in odd ones?"[11] As R. Dworkin argued, the reason why we reject the so-called checkerboard statutes is an unnoticed requirement of our law: that all our laws be congruent with a "set of moral principles". This set of moral principles is known as the requirement of "integrity", and checkerboard statutes violate this broader requirement.

So the question is: why do we reject checkerboard statutes? We reject the checkerboard statutes because there is no justification for them. We expect a justification why

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[10] K. Kędziora, *Henry Sidgwick i John Rawls o neutralności normatywnej teorii moralnej* [Eng. *Henry Sidgwick and John Rawls on normative neutrality of moral theory*], Etyka 2008/41, pp. 138–141. See also A. Szutta, *Metoda refleksyjnej równowagi. Część pierwsza: prezentacja metody* [Eng. *The Method of Reflective Equilibrium..Part One: the method presentation*.], Demetrios, 2013/35, pp.136–142.

[11] R. Dworkin, *Law's Empire*, Cambridge 1986, p. 178.

statutes treat different categories differently and checkerboard statutes do not do that. Those kind of statuses prescribe one legal solution to one class and a different legal remedy to a second class.

R. Dworkin explains that checkerboard statutes are the result of a legislative compromise between those who want to criminalize abortions and those who do not.[12] But in this explanation there is still no ready answer to explain the difference in the treatment of those two classes of women . To solve this dilemma, Ronald Dworkin proposes the concept of political community conceived as a community of principle. The idea is this: The justification of the difference in the treatment of those two classes of women should be based on a political community conceived as a community of moral principles, which find their basis in notions of justice, fairness, and due process of law. Accepting the assumption that a political community of moral principles indeed exists means that the moral criteria accepted by the court will be applied consistently in an impartial manner to all members of the community. This excludes the possibility that various principles, with sources in varying notions of justice might be applied.

5. O. Raban's idea of the rule of law

But as many observed, the very conceptual abstractness of proportionality principle produces unpredictable and inconsistent rulings across judges and cases. This is because the practical application of the Weight Formula covers substantive considerations of empirical assessments and value judgments and its effective deployment requires expertise and experience. Therefore accepting R. Dworkin's idea (as a basic background theory/approach in achieving reflective equilibrium), that a political community of moral principles *exists* and consists of very experienced and well educated people, is very doubtful. Besides, the very conceptual abstractness of the proportionality principle also stems cognitive errors. In judicial domain the "worthy goal" test is too easy to satisfy when the constitutional text does not specifically identify the kind of goals which cannot be used to justify an infringement of a right.

Therefore in resolving conflicts of values or rules in reasoning where individual moral judgments are subsequently clarified and supported by general moral principles, which in turn are validated by more comprehensive philosophical and non-philosophical theories, until reflective equilibrium is attained, I propose to apply the more modest idea of O. Raban's concept of the rule of law.

The idea is this: the justification of a court decision which resolves a conflict of constitutional rights, based on the method of reflective equilibrium, should take into account the idea of the rule of law. One of the fundamental characteristics of the rule of law, which is nevertheless rarely articulated and functions as a hidden assumption, is the rationalization of the broadly understood judicial choices. This rationalization consists in the fact that from among many solutions and choices one makes those which are acceptable in the case of legal solutions. In other words, they reduce arbitrariness in governing the state, thus reducing those judicial decisions which are not rational due to their arbitrariness. Naturally, not all decisions meet the rationality requirement. For instance, if by virtue of a decision one recognizes the right to abortion only for those women who have become pregnant as a result of rape and who were born in even years,

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[12] See R. Dworkin, *Law's…*, p. 179.

while those who were born in odd years are refused such a right, then such decisions are not admissible and therefore they are not rational. Obviously, such a decision may be rendered legitimate, yet it does not entail the rationality criterion which is assumed in the case of court judgments. The rationality of such decisions is conditional upon the reference to the characteristics of the class of objects to which those decisions apply. Rationality of judicial decisions construed in this fashion is a unique aspect of the rule of law. On a par with lawfulness or prospectiveness, the rationality of judicial decisions makes up the unique system of governance which is referred to the rule of law.

O. Raban convincingly argues that people expect judicial decisions to have justifications for the specific legal distinctions they make: differences in treatment must be traceable to the differences in the characteristics of the differently-treated classes.[13] The rule of law principle (particularly the Equality Before the Law principle) does not require that laws be applied similarly to all those affected: it requires that those similarly situated be treated similarly, so that any dissimilar treatment must be based on "some reasonable differentiation fairly related to the object of regulation". Therefore the equality before the law principle is not a matter of moral equality, but as a matter of rationality – as the substantive requirement that those who are similarly situated be treated similarly.[14] We may have a justification for forbidding *all women* to abort, but why forbid it based on whether they were born in an even or an odd year? For that, there is no justification. As O. Raban argues, the rational justification demands that judicial decisions be justified by a rational explanation linking the required treatment to the features of the targeted class. This approach can also be applied in the proportionality principle. In order to maintain the rationality of justification claiming that benefits afforded from the protection of a given right offset the burden and inconveniences resulting from the limitation of another right, differences in treatment must be traceable to the differences in the characteristics of the differently-treated classes (e.g. characteristics of those who protect artistic freedom and those who protect religion feelings).

But is this rationality principle really a part of *the rule of law*? We can say that we reject judicial decisions which allow abortions for pregnant women who were born in even years but not for those born in odd years because they seem silly and the lack of silliness is not a rule of law principle. But what is important is that any judicial decision that rewards some social groups must do so in a way that is related to their status. This demand is a unique feature of justifications. We do not expect that all justifications possess such rationality. But we do demand this of judicial justifications. The requirement that judicial decisions be justified by reference to the characteristics of the class to which they apply is a unique aspect of the application of law. This justification is a requirement of the rule of law – indeed it is part of the equality before the law principle – which, strictly speaking, is not a principle of equality at all but that of rationality.[15]

6. Conclusion

Everything that has been stated so far clearly indicates that the problems cropping up in the practice of justifications of judicial decisions have some deeper grounds than adopting R. Dworkin's idea of integrity. I argue that the process of achieving reflective

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[13] O. Raban, *Racjonalizacja…*, p. 30.
[14] O. Raban, *Racjonalizacja…*, pp. 32–33.
[15] O. Raban, *Racjonalizacja…,* p. 35, p. 38.

equilibrium, in the case of resolving a conflict of constitutional rights, is determined by the rule of law in terms of O. Raban's approach. Roughly speaking, the rule of law helps us to make and justify rational choices when balancing constitutional rights.

Finally, it should be stressed that the adoption of the above approach within a reflective equilibrium method in moral reasoning does not require that judges have special moral competence. Naturally, the adequate articulation of constitutional rights entails moral reasoning, but the reasoning of the judges, oriented towards constitutional rights, is no more moral than judicial reasoning which is not oriented towards the articulation of constitutional rights. Nor is it morally different from the reasoning which is not oriented towards the articulation of constitutional rights.[16] Also, one cannot agree with the notion alleging that judges possess particular moral competence stemming from their judicial practice, i.e. continuous involvement in resolving moral quandaries, through which they acquire the skill of empathizing with the actual moral dilemmas of specific people. With respect to the application of the proportionality principle in resolving a conflict of constitutional rights, I assume that judges do not possess/are not characterized by special/other moral competence to address moral dilemmas while utilizing the proportionality principle compared with other subjects, e.g. legislators. I argue that cognitive competence is the basic capability of a judge. This competence consists in rationalizing a decision in which the concept of the rule of law plays the leading role. In other words, the principles of the rule of law rationalize moral reasoning and its outcome when balancing constitutional rights.

[16] Cf. W. Sadurski, *"Rozumność" między teorią prawa a filozofią polityczną* [Eng. *"Reasonableness" between legal theory and political philosophy*], in: *Rozumność rozumowań prawniczych* [Eng. *Reasonableness of legal reasonings*], Warszawa 2008. See also W. Sadurski, *Rights and moral reasoning: An unstated assumption – A comment on Jeremy Waldron's "Judges as moral reasoners"*, International Journal of Constitutional Law, 2009/1; J. Waldron, *Judges as moral reasoners*, International Journal of Constitutional Law, 2009/1.

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