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Equality as Reasonableness: Constitutional Normativity in Demise

1. Exploring the Dark Side

What is it about fundamental rights that lends them a ‘dark side?’ At first glance, two answers suggest themselves to this question. Both seek to capture different aspects of one and the same theme, namely, the instability inherent in a system of rights.

According to the first answer, *any* system of rights invariably has a propensity to breed evil. The dark side of fundamental rights is part of their deontological nature. I take this to be the answer that has been given by the so-called ‘critique of rights.’¹ Rights isolate rather than unite. They are essentially individualistic and impoverish political imagination by casting human co-operation in the format of liabilities and duties to which correspond powers and claims. As regards international law, it has been argued that the reverence for human rights has done little to make the international community less aggressive. On the contrary, the doctrine of humanitarian intervention may have made certain states even more inclined to resort to violence in international affairs than they had been before.² Against the background of *erga omnes* human rights

¹ It had once been all the rage in critical legal circles. *See generally*, D. Kennedy, A Critique of Adjudication [fin de siècle] 315 (1997). It has even found its way into public international law. *See* M. Koskenniemi, *The Effect of Rights on Political Culture*, in P. Alston (Ed.), *The EU and Human Rights* 99 (1999); D. Kennedy, *The Dark Side of Virtue. Reassessing International Humanitarianism* (2004).

² *See, e.g.*, J. M. Welsh, *Taking Consequences Seriously: Objections to Humanitarian Intervention*, in J. M. Welsh (Ed.), *Humanitarian Intervention and International Relations* 52 (2004).

obligations, states are increasingly seen to be duty-bound³ not to turn a blind eye to gross and large-scale violations of rights that are either committed by foreign governments themselves or ostensibly condoned by them.

The second answer is more cautious and not at all interested in the wholesale dismissal of rights. The key to exploring the dark side, accordingly, is provided by instances of ‘abuse.’ The second answer does not deny that the consequences of a system of fundamental rights are in large part commendable. It seems to suggest even that a more penetrating critique of fundamental rights would seriously beg the question.

It cannot be denied that the protection of fundamental rights has great appeal. Even though the adverse social and political consequences of their implementation may be severe in some cases,⁴ a more sustained interference with human interests would have to be feared if adequate protection from administrative acts or acts of legislation were unavailable.⁵ Hence, the first answer is not terribly convincing. Conceiving of the dark side in terms of ‘abuse’ appears to be the more promising alternative.

As I will try to demonstrate below, the ‘dark side’ of fundamental rights is not exhausted by abuse, narrowly conceived. There is a broader dimension to be uncovered that is tacitly present in abuse itself. It is concomitant to the collapse of constitutional normativity. I would like to explain this by turning to a paradigmatic case. Its importance, however, can only be appreciated by first bringing abuse into focus.

2. Abuse and Its Targets

Obviously, equating the ‘dark side’ with cases of abuse is consonant with the way in which the potential drawbacks of rights have been acknowledged even by international human rights law.⁶ Beginning with the Universal Declaration of Human Rights (1948),⁷ several international human rights agreements have come to incorporate provisions that rule out categorically the application of these agreements based on a certain interpretation. The relevant provisions

³ For a moral and political argument along these lines, see H. Shue, *Limiting Sovereignty*, in Welsh (Ed.), *id.*, at 11.

⁴ The epitome for that may still be the *Lochner* case and the substantive due process jurisprudence of the US Supreme Court that has come to be named after that case. See C. R. Sunstein, *Lochner's Legacy*, 55 Col. L. Rev. 873 (1987). I shall return to this case below.

⁵ See R. Dworkin, *A Bill of Rights for Britain. Why British Liberty Needs Protecting* 1-12 (1990). Moreover, adopting the distinction between a “bright” use and a “dark” abuse does not preclude encounters with phenomena that have been identified in the context of a broader critique of rights. One may even reach the conclusion that fundamental rights are invariably prone to abuse.

⁶ See H. V. Condé, *A Handbook of International Human Rights Terminology* 2-3 (2004).

⁷ See Art. 30 of the Universal Declaration of Human Rights.

say that no other provision contained in these agreements may be interpreted as implying for any state, group, or person any right to bring about the “destruction” of the guaranteed rights and freedoms.⁸ The thrust of these provisions appears to be twofold. Not only do they prohibit an interference with rights by governments that would exceed the scope of permissible restrictions, they also prohibit any satisfaction of claims that would undercut or nullify the rights of others.⁹ While the prohibition of undue interference merely underscores an obligation that is already incumbent on governments,¹⁰ the prohibition of the satisfaction of claims introduces a negative obligation whose fulfilment has a positive effect on persons that might become the target of the ‘abusive’ right-holders themselves. Thus understood, the negative obligation is part of a more encompassing positive obligation to prevent a loss of rights that might result from an act that purports to be an exercise of rights itself.

These provisions envisage conduct that is targeted at seriously curtailing or damaging the rights and freedoms of others. Indeed, the exercise of rights or the use of state authority has to have its very point in the “destruction” of rights of freedom.¹¹ This may be the case where, for example, a government fails to intervene in order to protect one ethnic group against acts of violence committed by another. For the act of “destruction” to be qualified as an abuse, however, it does not have to have one particular right as its object. For abuse to be abuse it suffices to be targeted at any right.

Moving beyond such *rights-targeted abuse*, international human rights protection was also quick to recognize the notoriously more dramatic form of abuse that might be called *constitution-targeted abuse*.¹² It has come to be

⁸ See Art. 5(1) of both the International Covenant on Civil and Political Rights and the International Covenant of Economic, Social and Cultural Rights. See also Art. 17 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Art. 54 of the Charter of Fundamental Rights of the European Union.

⁹ See T. Opsahl, *Articles 29 and 30*, in A. Eide *et al.* (Eds.), *The Universal Declaration of Human Rights: A Commentary* 449, at 465 (1992).

¹⁰ Arguably, the provisions prohibiting abuse specifically address interference that pursues limitation as an end in itself. See M. Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary* 97 (1993).

¹¹ The relevant provisions, quoted above, usually require that the act be “aimed at” the destruction of rights.

¹² See Nowak, *supra* note 10, at 98. Generally, the European Court of Human Rights has been cautious to transform Art. 17 into a provision that—despite being aimed at preventing totalitarian groups from relying on Convention rights in support of their cause—could be used to deprive political groups of all their rights. The objective of Art. 17 is to limit rights only to the extent that such limitations are necessary to prevent their total subversion. See C. Ovey & R. C. A. White, *European Convention on Human Rights* 362-363 (2002). Art. 17, hence, has not become a prominent basis for the justification of restrictions of free speech. See K. Reid, *A Practitioner’s Guide to the European Convention on Human Rights* 331-333 (2004). Art. 17 has been referred in the past, though, in order to deny the admissibility of a claim by a group

epitomized by German constitutional law. Article 18 of the German Basic Law takes up the notion of ‘abuse’ explicitly by attaching to it the potential sanction of having fundamental rights declared forfeited by the Constitutional Court.¹³ For purposes of the application of this provision, abuse needs to be aimed at overturning the “free democratic basic order” that has been established by the Basic Law. According to the Federal Constitutional Court, this order is based on the self-determination of the people pursuant to majority rule under the constraints set by freedom and equality. It excludes any form of totalitarian and arbitrary rule.¹⁴

3. The Missing Link

As a precaution against the recrudescence of totalitarianism,¹⁵ the outlawing of constitution-targeted abuse may have its virtues.¹⁶ No system of fundamental rights should lend the force of law to those using fundamental rights for the purpose of demolishing the system of which these rights are part. Indeed, from the perspective of the person exercising a right, it would be immoral to claim protection that one would, were one to wield power, deny to others.¹⁷ The difficulty, however, posed by constitution-targeted abuse and its attendant

that endorses an ideology that is incompatible with the system of fundamental freedoms. *See* Commission Decision of 12 October 1987 on the admissibility of application number 12774/87 B.H., M.W., H.P. and G.K. v. Austria.

¹³ So far, however, no forfeiture has yet been declared by the Federal Constitutional Court. *See* M. Brenner, *Article 18*, in von Mangoldt *et al.* (Eds.), *Das Bonner Grundgesetz. Kommentar* 2124, at Paras. 14 and 2131 (1999). This is not to say that the Federal Constitutional Court shied away from taking radical steps in order to protect the Constitution, such as banning the Communist Party. *See* BVerfGE 5, 85 (1956).

¹⁴ *See* BVerfGE 2, 112 (1953); BVerfGE 5, 85 (1956), at 140.

¹⁵ It is part of the larger doctrine of militant democracy that is merely hinted at in various decisions of the Federal Constitutional Court. *See* J. Becker, *Die wehrhafte Demokratie des Grundgesetzes*, [The militant democracy of the Basic Law], in J. Isensee & P. Kirchhof (Eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* 309, at 333, Para. 40 (1992). For a highly useful introduction to the case law, *see* D. P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 217 (1997).

¹⁶ The justification that is usually adduced is the bitter experiences of Germany with the “suicidal democracy” of the Weimar Republic. *See* Brenner, *supra* note 13, at 2126, Para. 2; E. Bulla, *Die Lehre von der streitbaren Demokratie. Versuch einer kritischen Analyse unter besonderer Berücksichtigung der Rechtsprechung des Bundesverfassungsgerichts*, [The doctrine of militant democracy. Attempt of a critical analysis with special reference to the practice of the Federal Constitutional Court], 98 *Archiv des öffentlichen Rechts* 340 (1973); Becker, *supra* note 15, at 315, Para. 11.

¹⁷ This would be the result, at any rate, of an application of Kant’s categorical imperative. *See* I. Kant, *Grundlegung zur Metaphysik der Sitten, Werke in zwölf Bänden*, [Groundwork for the metaphysics of morals. Works in twelve volumes], in W. Weischedel (Ed.), Vol. 7, 51 (BA 52) (1968).

doctrine is to identify clear instances in which a total loss of the enjoyment of certain fundamental rights, such as free speech or freedom of association,¹⁸ is warranted for reasons of necessary constitutional self-defense.¹⁹ The uneasiness that is invariably felt in a liberal democracy about declaring core political rights forfeited explains why until now no such declaration has been made by the Federal Constitutional Court.²⁰

A complementary problem arises where rights-targeted abuse is concerned. Cases of abuse may be too common to be clearly discernible from any other, and more trivial, interference with the rights of others. The difficulty is exacerbated whenever the state is not ostensibly aiding and abetting a group of predators, but merely restricting rights of certain people on public interest grounds. Is not, choosing an obvious example, a ban on the wearing of religious symbols in schools with the professed aim of creating a secular space aimed at the ‘destruction’ of the rights of both teachers and students? No secular space can be created without the suppression (destruction) of religious expression. It is difficult to tell where abuse begins and where mere interference ends.²¹

¹⁸ Art. 18 of the Basic Law reads as follows:

Whoever abuses the freedom of expression, in particular the freedom of the press (Art. 5(1)), the freedom of teaching (Art. 5(3)), the freedom of assembly (Art. 8), the freedom of association (Art. 9), the privacy of correspondence, posts and telecommunications (Art. 10), the rights of property (Art. 14), or the right of asylum (Art. 16a) in order to combat the free democratic basic order shall forfeit these basic rights. This forfeiture and its extent shall be declared by the Federal Constitutional Court.

In English available at: <http://www.iuscomp.org/gla/statutes/GG.htm>.

¹⁹ In a number of ways criminal law is used in order to protect the Constitution, as a result of which the procedure before the Federal Constitutional Court is rendered more or less nugatory. See M. Brenner, *Grundrechtsschranken und Verwirkung von Grundrechten*, [Limits of fundamental rights and their forfeiture], 48 *Die öffentliche Verwaltung* 60, at n.4 (1995). As a consequence, attempts have been made recently to identify potential grounds of restriction, such as ‘public order,’ that can be applied regardless of—and prior to—the application of Art. 18 in order to justify limitations on certain types and occasions of speech. See, e.g., the decision by the Upper Administrative Court Münster, 54 *Neue Juristische Wochenschrift* 2111 (2001). They would not amount to a general loss of certain rights by individuals and organizations. Nevertheless, the rationale of their adoption would still lie in protecting the Constitution against potentially subversive forces. The Federal Constitutional Court appeared to have ruled out this possibility in affirming that the protections of free speech and freedom of assembly are available also to potentially subversive forces unless their activities reach the level at which the forfeiture may be declared pursuant to Art. 18 or a political party may be prohibited on the basis of Art. 21(2). See the decision by the Federal Constitutional Court, 57 *Neue Juristische Wochenschrift* 2814, at 2816 (2004).

²⁰ See H. Krüger, *Artikel 18*, in M. Sachs (Ed.), *Grundgesetz. Kommentar* 703, at Para. 18 (1999). Skeptical of this explanation is Brenner, *supra* note 13, at 2131, Para. 15.

²¹ Needless to say, there are clear instances in which it is permissible to exercise rights with the professed intent to diminish the power and influence of others.

While the threshold for constitution-targeted abuse may be unconsciously high, the line distinguishing *ordinary interference* from its *rights-targeted abuse* appears to be difficult to draw. This observation can be generalized. For the ‘abuse of rights’ to make sense as a category of constitutional law—the requirement of being targeted aside—it has to be more *narrowly* conceived than *any* illicit interference with fundamental rights and *broader* than German-style constitution-targeted abuse, that is, an exercise of rights that threatens to disrupt and overturn the constitutional system as a whole. It seems as though the recognition of instances of abuse would have to be based on some mediating conception. Put in simple terms, as a targeted act, *abuse* presupposes some kind of *misuse* of constitutional rights.²²

In what follows I would like to uncover this missing link, which supplies a necessary, however not a sufficient, condition for abuse. As indicated above, for want of a better term I would like to refer to it as the *misuse* of fundamental rights.²³

Before engaging in this constructive effort I should like to explore the original notion of *abuse*. It will help us understand why the matter is complex.

4. The Distinction between the Right and Its Exercise

We inherit the notion of the abuse of rights from Roman law. The Digest (6.1.38) contains an opinion by Celsus saying that *neque malitiis indulgendum est* (malice is never permitted).²⁴ The Roman doctrine of abuse of rights²⁵ had a narrow range of application. Unlike modern versions of the doctrine, which encompass a wide array of areas of substantive law, the earliest Roman version was concerned with property rights exclusively. Certain practices were considered abusive and therefore illegal. For example, property owners were forbidden from building structures that would deprive their neighbours of any natural light. More revealingly, another Roman law rule prohibited the creation of smoke on one’s property for the sole purpose of aggravating one’s neighbour. Evidently, Roman law did not view rights as absolute, in particular not when the exercise of rights was aimed at obstructing the property rights of another and did not promise any tangible benefit to the right-holder.

As is well known, the notion of abuse entered the German Civil Code (*Bürgerliches Gesetzbuch*, BGB), where it has been given a broader application.

²² By definition, there can be no abuse of fundamental rights that would be authorized by a correct interpretation of the constitution.

²³ I should add that there is no generally recognized distinction between misuse and abuse. Nowak, *supra* note 10, at 94, uses “misuse” for abuse.

²⁴ See also, Gaii Institutiones I.53: “male enim nostro iure uti non debemus” [we must not use our rights for the purpose of wrongdoing].

²⁵ On the following, see M. Kaser, *Römisches Privatrecht*, [Roman private law], 33 (1979).

Section 226 of the BGB states that the exercise of a right is impermissible if its sole point consists in harming other persons. Evidently, this section imposes a heavy burden of proof on the injured party. It threatens to make Section 226 devoid of any application in practice. This explains why German jurisprudence has come to read Section 226 in conjunction with Sections 242 and 826, which impose an obligation to act in “good faith” on any person who has to perform a legal duty. Consequently, the doctrine of abuse of rights now has some application in German civil law.²⁶

The original Roman conception is still intriguing. The idea underlying the notion of abuse is that while a right may be rightfully *held*, it can be *used* by the right-holder in a manner that is morally repugnant. It presupposes, thus, that a line can be drawn between the *existence* of a right on the one hand, and its *exercise* on the other, or, more precisely, between what the right-holder *prima facie* may be entitled to and what he or she may be *denied* owing to potentially adverse consequences or to the presence of an evil intent.

If this observation is correct, it may explain why modern constitutional law, targeted abuse aside, does *not* recognize any equivalent to the ancient doctrine of the abuse of rights (in the sense of *Rechtsmissbrauch* or *Schikane*). Overstating my point a bit, the whole system of fundamental rights can be understood, from a certain perspective, as a response to the problem raised by abuse. It allocates to the legislature and the executive branch the power to interfere with rights in order to prevent, among other things, the socially undesirable consequences of their exercise. Fundamental rights are not absolute.²⁷ They give rise only to *prima facie* claims.²⁸ Hence, the relevant scope of a right always exceeds the set of acts or states of affairs that can be actually guaranteed for it. In principle, the political branches have the power to determine the instances in which the right has to yield.²⁹ In the case of

²⁶ See K. Larenz, *Allgemeiner Teil des deutschen Bürgerlichen Rechts. Ein Lehrbuch*, [General part of German private law. A textbook], 232-233 (1989); J. Esser & E. Schmidt, *Schuldrecht. Allgemeiner Teil*, [The law of obligations. General part], Vol. 1, 45-46 (1975). For a broader comparative exploration of legal systems that recognize abuse as a concept of their system of private law, see J. Voyame, B. Cottier, & B. Rocha, *Abuse of Rights in Comparative Law*, in *Colloquy on European Law* (Ed.), Abuse of Rights and Equivalent Concepts: The Principle and its Present Day Application 23 (1990).

²⁷ It may well be a conceptual truth that no right is absolute. See J. Jarvis Thomas, *The Realm of Rights* 85 (1990).

²⁸ According to mainstream German *Grundrechtsdogmatik*, the right to equal treatment is different in that it is not susceptible to balancing. It protects absolutely by requiring that like cases be treated alike. See, e.g., P. Kirchhof, *Der allgemeine Gleichheitssatz*, [The general equality principle], in Isensee & Kirchhof (Eds.), *supra* note 15, Vol. 5, 837, at 912; G. Lübke-Wolff, *Die Grundrechte als Eingriffsabwehrrechte. Struktur und Reichweite der Eingriffsdogmatik im Bereich staatlicher Leistungen*, [Fundamental rights as negative rights. Structure and reach of negative rights doctrine in the sphere of public services], 236 (1988).

²⁹ It is needless to remind the reader that German legal science draws a distinction between *Schutzbereich* and *Garantiebereich* [scope of potential protection and the actually protected

positive obligations, constitutional law may indeed *require* the legal system to come to the aid of those whose interests have been adversely affected by acts of others. Evidently, the victims would otherwise suffer from some kind of ‘abuse’ at the hands of others and the neglectful state.

It appears plain, then, why constitutional rights jurisprudence, unless there are special constitutional provisions, does not recognize abuse as a separate category and why, even where targeted abuse is mentioned in the text of the constitution itself, it is difficult to hold it distinct from the general system of restrictions.³⁰ In a sense, the whole modern system of rights can be understood as an elaboration of the ancient distinction between ‘existence’ and ‘exercise.’

5. Layers of Constitutional Normativity

This is not to say that it is inconceivable for a system of fundamental rights to accommodate *misuse* as a general legal concept. Accommodation is conceivable, in my opinion, because a modern system of constitutional rights is composed of three layers of normativity. Owing to the interaction between and among these layers, it is possible to articulate the difference between an ordinary interference, on the one hand, and a misuse on the other.

The *first layer* of normativity comprises the private and public law rules that facilitate the exercise of fundamental rights. Invariably, what such rights guarantee is dependent on the efficacy of norms. Evidently, there cannot be a right to free speech unless people are granted access to a country or given the right of residence there. If anything is, access to a territory is legally regulated. Even the existence of the liberties whose exercise is associated with the so-called general permission (‘in the absence of a prohibition one is free to do what one wants’) presupposes the presence of surrounding norms creating restrictions (for example, rules guaranteeing a peaceful social order). Admittedly, in the case of “institutional guarantees” or “guarantees of institutes,”³¹ fundamental rights are *directly* aimed at protecting the effectiveness of specific norms, but this does not alter the fact that fundamental rights also require, to a certain extent, the *guarantee of norms*.³²

The *second layer* of normativity is defined by the meaning of fundamental rights themselves. This meaning is indirectly, but not exclusively, associated

sphere]. See only R. Wendt, *Der Garantiegehalt der Grundrechte und das Übermaßverbot. Zur maßstabsetzenden Kraft der Grundrechte in der Übermaßprüfung*, [The guaranteed content of fundamental rights and the proportionality principle. On the normative force of fundamental rights in the application of the proportionality principle], 104 *Archiv des öffentlichen Rechts* 414, at 436-438 (1979).

³⁰ See Brenner, *supra* note 19.

³¹ See C. Schmitt, *Verfassungslehre*, [Constitutional theory], 170 (1989).

³² See Lübke-Wolff, *supra* note 28, at 151-152.

with norms comprising the first. More importantly, it is not exhausted by them. The constitutional meaning of speech must not be determined by however ordinary legislation may choose to define speech. Conversely, it would be erroneous to assume that even the most general right is devoid of contours. The right to free speech protects speech, and arguably this may mean many things, but the constitutionally protected meaning may come to an end where expression flows out into conduct that is no longer a vehicle for the communication of symbolic meaning (e.g., sleeping within the confines of one's home).

The *third layer* of normativity is comprised of standards of constitutional adjudication. As is well known, the effective protection of a right is dependent upon the application of the proportionality principle or some functionally equivalent test.³³ What is most important about these standards is that they reflect, even if indirectly, *how* the adjudicating body—usually a court—positions itself vis-à-vis other branches of government within a system of separation of powers. For example, even the apparently trivial ‘rational basis review’ indicates that a court or tribunal treats the legislature, counterfactually, as if in adopting legislation it acted as a rational person.³⁴

The existence of these three independent layers of constitutional normativity helps to explain what a defensible general notion of misuse might *prima facie* come to. First, legislation may fail to create the conditions under which a right can be meaningfully exercised. It may thereby, if its omission is targeted, even venture to ‘destroy’ the right. Second, a fundamental right may be given a wrong interpretation. Third, the standards used in the course of fundamental rights adjudication may fail to reflect adequately the adjudicating body's role in the constitutional system.

It would be implausible to posit that merely *one or the other* departure from constitutional normativity already constitutes misuse. One or the other breach cannot be serious enough. But a combination could qualify, arguably, for it would meet the dual condition set out above that misuse, as a mediating conception,³⁵ need not be as egregious as constitution-targeted abuse, but still more salient than a mere interference or misinterpretation. What I have in mind, in particular, is a misreading of a fundamental right (second layer) that seriously tilts the separation of powers in favor of one branch (third layer), without being targeted at overthrowing the institutional setup of the constitutional order. Misuse leaves the institutional architecture in place, but alters the relative powers of institutions.

³³ See R. H. Fallon, *Implementing the Constitution*, 111 Harv. L. Rev. 54 (1997).

³⁴ For an introduction, see H. Linde, *Due Process of Lawmaking*, 55 Neb. L. Rev. 195 (1976).

³⁵ See Section 3 *supra*.

6. Constructing Misuse

I already submitted that one condition for a fundamental right to be misused is that it is given an *interpretation* that fails to articulate its meaning. The interpretation of the Fourteenth Amendment during the *Lochner* era is a case in point.³⁶ The Supreme Court's substantive due process jurisprudence rendered impossible the adoption of protective social legislation on the ground of an ill-conceived attribution of meaning to the concept of liberty.

The problem that was posed by *Lochner* also shows that the harm done can be such that branches of government or citizens are *seriously* inhibited from exercising their powers. If it is true that the separation of powers defines the core of any constitutional system, then any interpretation that unsettles this balance would constitute the constitutionally tangible effect of misuse, at any rate, if the notion is to be of *general* constitutional application.³⁷

It would be mistaken, to be sure, to speak of misuse where a constitutional court uses one fundamental right merely to resolve issues that should be more accurately adjudicated on the basis of another right (for example, freedom of association instead of freedom of religion). Mere mistakes of classification do not reach the level of misuse unless the co-ordinate branches are denied power to act in their own respective spheres. Nor is there a misuse if a court decides to let all private law claims partake of the constitutional protection of private property. It would also beg the question to exclaim 'misuse' in a situation where a legislature remains in the position to assert itself vis-à-vis a constitutional court.³⁸ Only when a misinterpretation affects two layers in juxtaposition can constitutional normativity be said to be in a state of collapse. Such is the case, for example, when rights can no longer be exercised because they have been done away with as a matter of interpretation; when the legislature is given leave to interfere with rights without due regard to the conditions of their exercise; when strict scrutiny is applied to legislation on the basis of an implausibly broad reading of a right with the result of seriously stifling the political process, etc.

One cannot simply emulate the Roman law example of abuse in a constitutional context and claim that for an allegation of misuse to be convincing it is sufficient to establish that a fundamental right has been enforced with the intent of harming another social group. In a constitutional context, the

³⁶ See *Lochner v. State of New York*, 198 U.S. 45 (1905). For a comprehensive discussion, see S. A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N. C. L. Rev. 1 (1991).

³⁷ Indeed, it can be shown that the harm done by *Lochner* consisted in replacing a constitutional understanding of legislative rationality with a pre-constitutional one. See Somek, *infra* note 48, at 293.

³⁸ Outside the US, the common law tradition provides examples of this, e.g., the provision to be found in Art. 6 of the UK Human Rights Act 1998, according to which a court cannot do more than arrive at a declaration of incompatibility.

notion of harm is political. Every other use of ‘harm’ would be contrary to the very idea of modern constitutional democracy, according to which no group is *presumably* left in a powerless position—incapable of asserting its interests—as long as the constitutional balance of power is intact. Disenfranchised aliens and denizens aside, any harmed group should be in a position to assert itself vis-à-vis its perpetrators, and where it is not, judicial intervention may well be called for.³⁹ Consequently, modern constitutional law *politicizes* harm. The harm that is done to one group by another can be of *legal* relevance only if it reverberates in the constitutional distribution of political power. The protection of the fundamental rights of one group may give rise to costs to another group. But this is tantamount to misuse only if the legislature is effectively divested of its power to divert the costs or to compensate the group for losses as a result of a legislative inability created by the enforcement of the right.

The most salient and common instance of misuse rests on the combination of a *misinterpretation* of a right with a serious disturbance of the *separation of powers*. Thus understood, misuse need not be targeted at all; indeed, it can be an incidental side effect of a well-meaning attempt to do the most that can be done for the right-holder. A mere misinterpretation that is limited to a specific application of a right does not amount to misuse so long as it does not affect the latter. For example, the more or less surreptitious expansion of the substantive due process clause of the Fourteenth Amendment *in one or another instance* may rest on shaky foundations, but it does not reach the level of misuse unless it alters the structure of government dramatically (as has been claimed, however, by critics of the Supreme Court’s jurisprudence in the United States).⁴⁰ Abuse, by contrast, is misuse that is aimed at the destruction of fundamental rights or the established constitutional order.⁴¹

misinterpretation

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misuse (if misinterpretation involves collapse of normativity)

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abuse (if misuse is targeted at rights or the constitution)

³⁹ See J. Hart Ely, *Democracy and Distrust* (1981).

⁴⁰ See R. Berger, *Government by Judiciary. The Transformation of the Fourteenth Amendment* (1977).

⁴¹ I mention in passing that with the little success that ‘absolute’ theories of the ‘essential content’ have had in German constitutional doctrine, there is no reason to be confident that one could ever succeed in making sense of ‘destruction’ without the proportionality principle. See M. Stelzer, *Das Wesensgehaltsargument und der Grundsatz der Verhältnismäßigkeit*, [The argument from essential content and the principle of proportionality], (1990).

7. Legal Science

In the second half of this article, I would like to give flesh to the bones of the general conception expounded here. I need to concede, at the outset, that the use of misuse as a category of constitutional law would itself be tantamount to misuse if modern constitutional law were a variety of common law. If constitutional law were common law, legal scholarship would be bereft of its critical edge. It would have to be taken for granted, rather, that the standards of constitutional interpretation are to be divined by the judiciary. The best that constitutional analysis could hope for and do would be to explore the consistency in application of the wisdom that is bred by the judiciary.⁴² Taking misuse seriously, hence, involves denying courts the ultimate authority of interpretation. I submit that such a bid for the supremacy of legal science is unusual given that public law doctrine has grown increasingly deferential vis-à-vis the pronouncements made by constitutional tribunals.⁴³

The following case study of misuse describes the equality principle and how it has been transformed by courts into a principle for the intuitive assessment of the rationality and reasonableness of legislation. This transformation of the equality principle has serious repercussions for the separation of powers. It invests constitutional courts with virtually unlimited and erratic power to invalidate the political choices made by the legislature.

My discussion proceeds as follows. In the next section, I would like to point to the root of the misinterpretation of equality in terms of ‘reasonableness.’ I will commence with what I take to be the correct interpretation of that principle and try to point out where constitutional adjudication has been led astray by moral intuition. I would then like to explain the consequences of this shift. They give rise to what I would like to identify as two precious dialectical moments. I will conclude with a plea to return to the accurate understanding.

8. Transforming Equality into Reasonableness: The Fast Track

Equality demands equal treatment unless there are reasons to the contrary. When such reasons can be found, persons *may* be treated differently.⁴⁴ A great variety

⁴² This may have been Langdell’s project. See T. C. Grey, *Langdell’s Orthodoxy*, 45 U. Pitt. L. Rev. 16 (1983).

⁴³ See B. Schlink, *Die Entthronung der Staatsrechtswissenschaft durch die Verfassungsgerichtsbarkeit*, [The deposition of public law doctrine by constitutional adjudication], 28 Der Staat 161 (1989).

⁴⁴ Alexy would add at this point that the permission of unequal treatment would coalesce into an obligation where there are reasons requiring unequal treatment. See R. Alexy, *A Theory of Constitutional Rights*, (J. Rivers (trans.)), 271-272 (2004).

of reasons can be invoked in favor of unequal treatment. In most instances, unequal treatment plays the role of a rational means to attain legitimate public policy objectives.⁴⁵ For example, the use of a *numerus clausus* system for the admission of students to public universities is not a completely unreliable means to weed out the less talented or the less industrious. Its use is warranted by the legitimate goal of guaranteeing a high level of education.⁴⁶

Not all cases of rational unequal treatment, however, are permitted by the equality principle. There are cases in which even rational unequal treatment amounts to discrimination. It is ruled out on constitutional grounds. Hence, the meaning of the equality principle is not merely drawn out by some standard requiring rational state conduct (for example, an elementary *Willkürverbot*⁴⁷ (prohibition against arbitrariness)), but also by the anti-discrimination principle. The latter says that rational unequal treatment becomes impermissible where efforts to avoid disadvantage are either unavailable to the addressee or would require adaptation that implicates self-denial.⁴⁸

I cannot discuss the meaning of this principle here. What I would rather like to invite attention to is the tacit substitution that can be observed, in much of modern constitutional law, of the anti-discrimination principle with a principle of reasonableness. At this point, it may suffice to say that this substitution makes its most elementary appearance in the form of an interpretation of the equality principle. According to this interpretation, equality requires the equal treatment of what is equal and the unequal treatment of what is unequal.⁴⁹ It results in a transformation of the principle that takes several steps. I hasten to add that the reconstruction below explores the matter from a logical point of view and not from the perspective of a historical genealogy. It does not explain how this transformation was brought about, in particular, by the

⁴⁵ These reasons are conspicuous by their absence in Alexy's analysis. See Alexy, *id.*, at 265, where it is overlooked that it is the rationality of conduct that supplies the perspective from which relevant points of comparison come into view.

⁴⁶ See the *numerus clausus* decision, BVerfGE 33, 303 (1972); and more recently Case C-147/03, Commission of the European Communities v. Republic of Austria, [2005] ECR, I-5969.

⁴⁷ See BVerfGE 1, 14 (1951), at 52. See C. Gusy, *Der Gleichheitssatz*, [The equality principle], 41 *Neue Juristische Wochenschrift* 2502, at 2505 (1988).

⁴⁸ See A. Somek, *Rationalität und Diskriminierung. Zur Bindung des Gesetzgebers an das Gleichheitsrecht*, [Rationality and discrimination. Equality as a constraint on the legislature], (2001); for a short exposition, see A. Somek, *Gleichheit als Diskriminierungsschutz. Eine Replik auf Huster*, [Equality as protection from discrimination. A reply to Huster], 43 *Der Staat* 425 (2004).

⁴⁹ This is the doctrine that has come to be endorsed by the Austrian Constitutional Court. See W. Berka, *Die Grundrechte. Grundfreiheiten und Menschenrechte in Österreich*, [Fundamental rights. Basic liberties and human rights in Austria], Rz. 918, S. 508 (1999). On German doctrine, see Kirchhof, *supra* note 28.

Austrian Constitutional Court, which is the one court in Europe that has most fully embraced the idea that equality simply requires reasonable government action.⁵⁰

One can begin with the following statement of the equality principle:

- (E) Unless there are reasons to the contrary, everyone ought to be treated equally.

I have already hinted at the fact that there may be many conceivable “reasons to the contrary.” The equality principle, properly understood, serves a constraint, that is, as a norm that excludes from the range of reasons only those that do not meet a negative condition. These are the reasons that do not pass muster in the eyes of the equality principle. When the condition “reasons to the contrary” is interpreted to reflect the anti-discrimination principle, then the equality principle can be taken to mean the following:

- (E1) If the reasons for unequal treatment are discriminatory, then everyone ought to be treated equally.

According to this reading of the equality principle, the relation between equal treatment and unequal treatment is asymmetrical.⁵¹ This is manifest in the fact that where in one case there is an obligation, in the other there is merely a permission.

- (U) Unless there are reasons to the contrary, some may be treated differently.

The “reasons to the contrary” referred to in U are, of course, the “discriminatory reasons” that are a component of E1. If equality is understood, as I think it should be, as an articulation of the anti-discrimination principle, then the antecedent for E is the contradictory opposite of the antecedent for U. It then follows:

- (E1) If the reasons for unequal treatment are discriminatory, then everyone ought to be treated equally; *and*
 (U1) If the reasons for unequal treatment are not discriminatory, unequal treatment is permissible.

⁵⁰ For a genealogy, see Somek, *Rationalität*, *supra* note 48, at 612-620. The Austrian Court has not been the only one to take that course. The German Federal Constitutional Court, in particular its Second Senate, has adopted a very similar interpretation. See A. Somek, *The Deadweight of Formulae: What Might Have Been the Second Germanisation of American Equal Protection Review*, 2 U. Pa. J. Const. L. 284, at 304-306 (1998).

⁵¹ See Alexy, *supra* note 44, at 272-273.

U permits equal treatment even where difference obtains.⁵² It permits it up to the point at which E1 gives rise to a claim that the differential burdens or unequal consequences engendered by the application of a rule that is equal on its face amount to discrimination.

The meaning that is attributed to the equal treatment principle hinges critically on the meaning that is ascribed to the antecedent condition “unless there are reasons to the contrary.” Hence, the misinterpretation of the equal treatment principle, upon which is built the substitution with a principle of reasonableness, can be located in a specific interpretation of E:

- (E*) The presumption in favor of equal treatment (E) means that all like cases ought to be treated alike.

At first glance, E* may indeed appear to be an entirely accurate rendition of E. All that needs to be done is to bracket the understanding of the equality principle that treats it as roughly co-extensive with the anti-discrimination principle. Under this condition one is inclined to perceive an elementary symmetry in the relation of both E and U:

- (E) Unless there are reasons to the contrary...
 (U) Unless there are reasons to the contrary...

The symmetry can then be explained with an eye to E*. If like cases ought to be treated alike, then “reasons to the contrary” can only refer to the fact that cases are not alike. Likewise, the unequal treatment principle can be read as permitting unequal treatment if and when the cases are not alike.

- (E1*) Unless the cases are not alike, they ought to be treated equally.
 (U1*) Unless the cases are alike, they may be treated unequally.

The misinterpretation of E1 is transferred to U1. What is remarkable, even on that logical scale, is what happens to the presumption of equal treatment. The fulfilment of the obligation of equal treatment is seen to depend on a successful determination that the persons or the set of facts concerned “are” not “unequal.” The equal treatment principle is made to command equal treatment categorically if it can be shown that what is to be treated equally is not unequal but equal.

Moreover, in light of this transformation, the asymmetry in the relation of E and U becomes difficult to sustain. Why should the unequal treatment of that which is unequal merely be permissible and not also mandatory? Why maintain inequality in the relation between equality and inequality given that

⁵² A point that has been noted also by Alexy, *id.*, at 274.

there are no reasons to the contrary? Indeed, once the re-interpretation is in place, the distinction can no longer be sustained. What one arrives at, then, is the symmetry of obligations:

- (E2*) Unless the cases are unequal, there ought to be equal treatment.
- (U2*) Unless the cases are equal, there ought to be unequal treatment.

All that is left to be done to arrive at the full-blown interpretation of equality as reasonableness is to juxtapose E2* and U2* and to draw out what they have in common. Needless to say, one is likely to come up with a principle such as ‘to each his own’ or some other obligation to treat everyone justly.⁵³ In a word, the result is an Aristotelisation⁵⁴ of the equality principle in which equality is cast—or rather, recast—as an articulation of a general obligation of reasonableness (*Sachlichkeit* or *Sachgerechtigkeit*). The idea is, apparently, that the facts themselves, the nature of things, tell the legislature what it ought to do. If the legislature does not listen faithfully to what the things themselves have to say, it runs the risk of being told later by a reviewing tribunal.⁵⁵

9. Extension and Intension: A First Dialectical Moment

Do we not expect the law to be just? Is this not a laudable development?

I will try to point out below why I think that this is not the case. I need to grant, though, that my objections are based upon an understanding of the role of constitutional adjudication that does not vest in a court the power of ultimate censorship of the rationality and reasonableness of legislation.⁵⁶ Whoever has no qualms about attributing such a role to a court⁵⁷ may be actually highly content with understanding equality as reasonableness.

The concept of equality as reasonableness lends universal relevance to equal protection review. For two reasons, I take this to be the case. First, every legal

⁵³ See S. Huster, *Rechte und Ziele. Zur Dogmatik des allgemeinen Gleichheitssatzes*, [Rights and goals. On the theory of the general equality principle], 352, 430 (1993).

⁵⁴ It was Aristotle who introduced the idea that justice requires the equal treatment of that which is equal and the unequal treatment of that which is unequal. See Aristotle, *Politics* III, 9 (1280a); *Nicomachean Ethics* V, 3 (1131a).

⁵⁵ See, e.g., the Second Senate’s attentiveness to the “peculiarities of the situation” in BVerfGE 75, 108 (1987), at 156-159.

⁵⁶ For a similarly skeptical attitude, see D. Currie, *Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany*, 11 Sup. Ct. Rev. 333 (1989). For a classical statement of ‘judicial minimalism,’ see J. B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893).

⁵⁷ See H. F. Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4 (1936).

rule involves either unequal or equal treatment. Hence, the reasonableness standard applies to any rule. If it applies, thus, in any event, it may even be applied *without regard to equality or inequality of treatment*. This has been the conclusion drawn by the Austrian Constitutional Court.⁵⁸ If equality requires the equal treatment of that which is equal and the unequal treatment of that which is unequal, the major point of the analysis becomes to ascertain what it is that makes situations ‘essentially’ equal or ‘essentially’ unequal. Since, however, either equal or unequal treatment is merely a trivial consequence of a determination of what situations are by their nature and what they require as a result of this nature, reasonableness becomes transformed into a standard that can be applied in a freestanding way. In what arguably needs to be seen as a precious dialectical moment, the application of the equality principle cuts itself loose from examining the question of equal treatment. A court can look at legislation by asking whether it is reasonable ‘in itself’⁵⁹ or reflects accurately the nature of things.

Second, the application of the judicial test for whether the legislature (or an administrative act) has treated equally what is equal and unequally what is unequal does not admit of any differentiation as regards levels of scrutiny. The reason is simple. If the equality principle, in the format of a reasonableness standard, guarantees justice (‘to each his own,’ ‘according to the peculiarities of the situation,’⁶⁰ or ‘with regard to the nature of things’), there can be no room for a differentiation between and among standards of scrutiny. Why should the legal system admit of a lesser degree of justice in some cases than in others?⁶¹ Consequently, one and the same reasonableness principle becomes applied *without any explicit internal differentiation* of stringency to whatever factual situation may come before the court. Consequently, in jurisdictions where the reasonableness standard is in place, there is a great abundance of constitutional precedents dealing with the *details* of legislation.⁶² Since there is no constitutional philosophy that would prevent courts from examining certain areas of policy making, it should come as no surprise to see courts

⁵⁸ See, notably, VfSlg. 8457/1978.

⁵⁹ On this development, see K. Korinek, *Gedanken zur Bindung des Gesetzgebers an den Gleichheitsgrundsatz nach der Judikatur des Verfassungsgerichtshofs*, [Thoughts on how the equality principle constrains the legislature according to the practice of the Constitutional Court], in H. Schäffer *et al.* (Eds.), *Im Dienst an Staat und Recht* (Festschrift Melichar) 39 (1983).

⁶⁰ On this standard that is used by the Federal Constitutional Court, see BVerfGE 17, 122 (1963), at 130; Kirchhof, *supra* note 28, at 929.

⁶¹ Indeed, if the equality principle is equated with justice there is no reason to leave discretion to the legislature. For a similar observation, see Alexy, *supra* note 44, at 269.

⁶² For an overview of the Austrian jurisprudence, see S. Bernegger, *Der (allgemeine) Gleichheitsgrundsatz (Art. 7 B-VG, Art. 2 StGG) und das Diskriminierungsverbot gemäß Art. 14 EMRK*, [The general equality principle (Art. 7 B-VG, Art. 2 StGG) and the prohibition of discrimination pursuant to Art. 14 ECHR], in R. Machacek *et al.* (Eds.), *Grund- und Menschenrechte in Österreich*, Vol. 3, at 709 (1997).

venturing into the depths of tax or social security legislation. The exposition of the case law often reaches a level of detail at which matters become next to incomprehensible even to legally trained outsiders. The application of the equality principle is transformed into a *Geheimwissenschaft*, that is, a secret legal science that is seemingly mastered by a few initiates who happen to be familiar with both the field of legislation and the precedents generated by the court.

The universal relevance of the reasonable standards, thus, has an extensional and an intensional dimension. It is of unlimited reach because no area of legislation is exempted from its scope of application, but it is also of unrestricted relevance where the detailed examination of regulatory issues is concerned. Judges find themselves in the position to act as the ultimate censors of legislation. As we shall see, it is not by accident that such a development can be observed in the civil law tradition.

10. Local Justice and a Second Dialectical Moment

The reasonableness standard shifts the orientation of the core of the equality principle from the treatment of persons to the treatment of things (or states of affairs). Of course, it would be ludicrous to present a differential treatment of facts in terms of discrimination. Only human beings can become victims of discrimination. In an interpretation that expounds equality from the perspective of the anti-discrimination principle, equality remains of limited constitutional relevance. When, however, the equality principle becomes applied to states of affairs, every minute detail of legislation is susceptible to review. As a consequence, the field of application of the equality principle begins to implode.

In such an imploded state, the evaluation of reasonableness needs to be given some orientation, too. Judicial reasoning creates guidance for itself by attributing to some distributive criterion that underlies one norm the role of a yardstick with regard to other norms.⁶³ If there is a 25 percent value added tax on most consumer goods, why should there be a 35 percent tax on wine? A court endorsing the reasonableness standard would explore the reasons conceivably justifying differential treatment (e.g., health-risks, potentially non-regressive tax yields from the wealthier consumer) and would conclude that *for one or the other reason* the differential tax is fair or unfair. What a court using the reasonableness standard would *not* do is, first, assess the 35 percent tax on the basis of the assumption that a legislature is in principle free to pursue objectives by its own lights and, second, presume that legislation does not pose a constitutional problem unless it is patently irrational⁶⁴ or

⁶³ See, e.g., VfSlg. 12.923/1991; VfSlg. 12764/1991.

⁶⁴ This is the idea underlying the American rational basis test. See *Allied Stores v. Bowers*,

raises the spectre of discrimination. On the contrary, the court applying the reasonableness standard would examine the merits of legislation, acting on the premise that equality is a right to have just laws.

At times, a court will also resort to a criterion that it will take to have been articulated in a whole field of legislation. The ‘ability to pay’ is one such criterion that is often perceived to underlie the system of income taxation.⁶⁵ It is used by courts to assess whether every taxpayer, as a result of the application of the tax code, is left in a position that reflects more or less accurately his or her ability to pay. Criteria such as the ability to pay or “the allocation of voting rights in committees according to expertise and ability,”⁶⁶ are standards of “local justice” that enter into judicial reasoning. The “local” quality of such standards “[...] refers to the fact that different institutional sectors use different substantive principles of allocation.”⁶⁷ Given the complexity of institutional design, a problem may arise in linking the right local standards to the relevant cases. Judgement seems to be required here.⁶⁸ In the final event, the rebuttable presumption in favor of equal treatment is abrogated by an irrebuttable presumption that various standards of local justice have left their trace in the legal materials:

- (E3*) The validity of the principle that like cases be treated alike presupposes the relevance of criteria of equal and unequal treatment according to local standards of justice.

The most excellent ruse of misinterpretation is to be found here. It rests on two unwarranted inferences. The first is the transmutation of the equality principle into a reasonableness standard itself, the second the counterfactual presumption that, since equality means the like treatment of like cases, criteria of equal and unequal treatment can be found on a level relevant to constitutional adjudication. In other words, equality is transformed into a ‘derivative right,’ that is, a right whose application presupposes the existence of a variety of normative standards of treatment.⁶⁹ No longer is equality understood as a non-derivative right that merely presupposes the treatment of a member of a certain group for the claim to arise to the equal treatment of

358 U.S. 522, at 530 (1980); *Minnesota v. Clover Leaf Creamery C.O.*, 449 U.S. 456 (1981); BVerfGE 17, 122 (1963), at 130; BVerfGE 33, 44 (1972), at 51.

⁶⁵ See, e.g., VfSlg. 11.368/1987.

⁶⁶ See VfGH 29.11.1995, G 1249/95-8, G 1289/95-8.

⁶⁷ See J. Elster, *Local Justice. How Institutions Allocate Scarce Goods and Necessary Burdens* 3 (1992).

⁶⁸ See C. J. Peters, *Equality Revisited*, 110 Harv. L. Rev. 1211, at 1230 (1997).

⁶⁹ Some think that this is the only conceivable or defensible understanding of equality. See, notably, P. Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537 (1982); Peters, *supra* note 68; for a (convincing) refutation, see K. Simons, *Equality as a Comparative Right*, 65 B. U. L. Rev. 387 (1985).

all other members, regardless of whether the equal treatment of all constitutes a commendable criterion of justice.⁷⁰ In its original focus on *treatment*, the right to equal treatment is not derivative of some criterion of distribution. In the format of the reasonableness standard, however, equality is turned into a derivative right.

Undeniably, areas of legislation are laced with several different normative standards. For the purveyors of equality as reasonableness, distributive criteria emanate from already established legal institutions. Since the pertinent criteria are often deemed to be more or less dimly reflected in earlier legislation, later legislation becomes in effect forced to abide by these criteria even where there is nothing to indicate that deviating from them would amount to discrimination.⁷¹ What is more, the application of the equality principle is seen as giving rise to the question of whether or not the established criteria need to be extended to other types of cases or whether they need to be restricted in the face of conflicting demands.⁷² Equality problems are dealt with as if they merely involved analogical reasoning. This reduction indicates one of the major shortcomings of equality as reasonableness: the *de-constitutionalization of constitutional reasoning*. It stems from the assimilation of the application of the equality principle to a style of legal reasoning that prevails in civil law.

According to a widely accepted methodological position known under the name of *Wertungsjurisprudenz*⁷³ (jurisprudence of values), every systematic field of law is based on certain evaluations, that is, fundamental choices or trade-offs between and among conflicting values. These choices and trade-offs leave their mark on the legal rules used to adjudicate legal claims. For the purpose of the adequate construction of these rules and the filling of gaps, recourse needs to be had to the underlying evaluations. What a judge is to do in hard cases, thus, is to bring to a conclusion the process of evaluation that was initiated by the legislature regulating the field.

Equality as reasonableness abandons constitutional analysis to a style of ratiocination that bears the imprint of *Wertungsjurisprudenz*.⁷⁴ Above all, the standards of constitutional adjudication (the third layer of normativity identified above) are stripped of their eminently constitutional dimension. In a full-blown format, standards of constitutional adjudication reflect the self-regulation of legal knowledge. They are a response to the question of what *may*

⁷⁰ See Simons, *id.*, at 408; J. Raz, *The Morality of Freedom* 225 (1986).

⁷¹ See, e.g., VfSlg. 12.764/1991.

⁷² For a discussion of those cases, see Somek, *Rationalität*, *supra* note 48, at 167.

⁷³ See C.-W. Canaris, *Systembegriff und Systemdenken in der Jurisprudenz entwickelt am Beispiel des deutschen Privatrechts*, [The concept of the legal system and systematic legal thought developed by using the example of German private law], (1983); K. Larenz, *Richtiges Recht. Grundzüge einer Rechtsethik*, [Right law. Outlines of a legal ethic], (1979).

⁷⁴ This is apparently welcomed by K. Korinek, *Entwicklungstendenzen in der Grundrechtsjudikatur des Verfassungsgerichtshofs*, [Trends in the fundamental rights jurisprudence of the Austrian Constitutional Court], (1992).

legitimately be known by the adjudicating body about constitutional law.⁷⁵ Hence, such standards are Janus-faced. On the one side, they are amenable to reflecting the substantive legal issue, such as the meaning of equality; on the other side, their application incorporates a certain conception of the separation of powers with regard to the implementation of the constitution by a court.⁷⁶ The latter dimension, which accounts for the fact that constitutional adjudication is *distinct* from substantive styles of legal reasoning, becomes eclipsed in the very moment in which the analysis of equality is turned into another exemplar of *Wertungsjurisprudenz*. Needless to say, constitutional law is thus deprived of its *political* core.

The de-constitutionalization of constitutional law is pushed even further as the legislature is no longer regarded as free to intervene in established fields of regulation so long as it does not change laws in a discriminatory way; rather, the legislature is forced into the straight-jacket of evaluations that allegedly constitute the field. Above all, the meaning of legislative acts becomes redefined from within the context of a limited number of such evaluations. Consequently, only objectives are deemed persuasive, and only those exceptions permissible that conform to the overall organization of the field. What is more, the legislature is not taken seriously as a political agent. Legislative texts are treated as if they were proposals for reform among others. The legislature is demoted (or elevated) to the level of those who are interlocutors in the discourse known as *Rechtsdogmatik* (legal science). Legislation as such disappears. It becomes absorbed by the legal discourse of *Wertungsjurisprudenz*, which is constituted, not surprisingly, by the consent of those regarding themselves and their peers as a group of reasonable, and reasonably just, men (*vernünftig und gerecht denkende Männer*).⁷⁷ In the upshot, constitutional adjudication, which for obvious reasons is different from reasoning in the field of private law, becomes assimilated to a mode of legal analysis that has to have the ‘right’ answer to every substantive legal question, for it cannot defer in certain matters to the power of the legislature to strike a balance between conflicting demands. Consequently, constitutional adjudication takes on an inflated and treacherously omni-competent form.

A constitution in which the reasonableness principle is doing its work is, therefore, a *total constitution*.⁷⁸ It is a gapless system. Not surprisingly, reasoning in terms of reasonableness becomes a wellspring of new and

⁷⁵ See Somek, Rationalität, *supra* note 48, at 58-59.

⁷⁶ The *Flores* case is an obvious case in point. See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁷⁷ On this topos, which I take from “topics,” see T. Viehweg, *Topik und Jurisprudenz. Ein Beitrag zur rechtswissenschaftlichen Grundlagenforschung*, [Topics and legal thought. A contribution to legal theory], (1974).

⁷⁸ I grant that this expression is a play on Schmittian words. On the quantitatively total state, see C. Schmitt, *Die Wendung zum totalen Staat*, [The turn to the total state], in *Positionen und Begriffe im Kampf mit Weimar – Genf – Versailles 1923-1939*, at 146-157 (1988).

surprising legal ideas. New institutes of constitutional law are beginning to grow out of the equality principle. This has been the case, again in Austria, with regard to the protection of “legitimate expectations,” in particular where the reduction of present or future pension benefits is at issue. This type of protection was deemed to emanate from equality as reasonableness.⁷⁹

The demotion of constitutional adjudication to the rank of ordinary legal reasoning gives rise to another remarkable and again, in a sense, precious dialectical moment. Evidently, the great danger of equality as reasonableness—not least owing to its alliance with *Wertungsjurisprudenz*—lies in its propensity to foster the *political petrification* of certain fields of law.⁸⁰ Once a system has been put into place, the legislature is seen to be bound by its organising principles. The Austrian Constitutional Court, in particular, has been inclined to see the present legislature bound by “systems of order” that have been introduced by its predecessor.⁸¹ Accordingly, it becomes increasingly difficult for the legislature to break away from once established principles. More recently, however, the reverse effect can be observed, too. Where a legislative field is composed of different principles that pull in different directions, it is turned into a true minefield for reform. Public pension legislation is a case in point.⁸² Several constitutional standards, most of which emanate from equality as reasonableness, claim their relevance here: the protection of legitimate expectations, property rights, unequal treatment proper, or protection from discrimination. Owing to the simultaneous relevance of several standards, every single legal reform appears to be problematic from the perspective of some constitutional value. However, once *every* legislative reform is suspect from a constitutional perspective, then *none* is, because it would be bizarre to construe the constitution such as to render legislation impossible. In the final event, equality as reasonableness is in danger of losing its normative edge.

⁷⁹ For an introduction, see M. Holoubek, *Verfassungsrechtlicher Vertrauensschutz gegenüber dem Gesetzgeber*, [The protection of legitimate expectations vis-à-vis the legislature], in Machacek *et al.* (Eds.), *supra* note 62, at 795.

⁸⁰ The matter was discussed fairly early in German constitutional law under the name of “*Systemgerechtigkeit*.” See C. Degenhart, *Systemgerechtigkeit und Selbstbindung des Gesetzgebers als Verfassungspostulat*, [Systematic coherence and legislative estoppel as a constitutional principle], (1976); F. J. Peine, *Systemgerechtigkeit*, [Systematic coherence], (1985).

⁸¹ See, e.g., VfSlg. 13.726/1994.

⁸² For a critical analysis, see T. Tomandl, *Der verfassungsrechtliche Schutz von Sozialanwartschaften und Sozialleistungen*, [The constitutional protection of future social benefits], in G. Schefbeck (Ed.), *Festschrift 75 Jahre Österreichische Bundesverfassung* 617 (1995).

11. Is It Not Defensible?

Arguably, there is something commendable about equality as reasonableness. The US *Marijuana* case,⁸³ which I simplify for matters of exposition, may help to illustrate the point.

A federal law prohibits the sale, the growing, the distribution, and the consumption of marijuana (among other “controlled substances”).⁸⁴ This prohibition applies even to those who need marijuana in order to alleviate pain associated with severe or incurable illnesses. In the US, patients who need to endure such pain arguably have no fundamental rights case. The Bill of Rights and the Fourteenth Amendment are very old documents. They do not explicitly guarantee a right to health, let alone a right to be free from inhuman treatment by the state.⁸⁵ For reasons that need not concern us here,⁸⁶ the most promising constitutional challenge that remains needs to be based on the Commerce Clause.⁸⁷

From the perspective of the reasonableness approach, one would have no reservations about claiming that the general law is over-inclusive with regard to its purpose. It treats as equal that which is unequal. There is a significant difference between marijuana users who indulge in the consumption of the drug for mere pleasure and those who need it for medical reasons. In fact, in a European context the case could well have been resolved on the basis of a teleological reduction, that is, by exempting patients from the scope of application of the norm (by constructing the statute in light of the constitution).

The major thrust of such an application of the equality principle would reflect a moral intuition, namely, our belief that it is unjust to let patients suffer where it would be relatively easy to alleviate their pain. Maybe most legal reasoning is *de facto* an articulation of moral intuitions.⁸⁸ In fact, reading

⁸³ See *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003); vacated and remanded in *Gonzales v. Raich*, 125 S.Ct. 2195 (2005).

⁸⁴ See Controlled Substances Act, 21 U.S.C.A. Secs. 801-904.

⁸⁵ It is not inconceivable, however, to extract from dicta a certain judicial compassion as regards freedom from pain. For an attempt to argue a substantive due process case on behalf of medical marijuana use, see Notes, *Last Resorts and Fundamental Rights: The Substantive Due Process Implications of Prohibitions on Medical Marijuana*, 118 Harv. L. Rev. 1985 (2005).

⁸⁶ It has to do with the fact that the state of California adopted in 1996 a Compassionate Use Act that would make it permissible to use marijuana for medical purposes. The Act would only have been applied to the question raised in the medical marijuana case if the Federal Controlled Substances Act had been unconstitutional and void.

⁸⁷ In fact, the challenge succeeded in the Federal Appellate Court. See *Raich v. Ashcroft*, *supra* note 83, at 1235. The Supreme Court, however, upheld the Controlled Substances Act. See *Gonzales v. Raich*, *supra* note 83.

⁸⁸ This is a belief that was widely held among American legal realists. See L. Kalman, *Legal Realism at Yale 1927-1960*, at 18-20 (1986).

Rawls' description of moral intuitionism, one is reminded of a constitutional jurisprudence that has been cut to the intellectual size of *Wertungsjurisprudenz*. Intuitionism, according to Rawls, is the

[...] doctrine that there is an irreducible family of first principles which have to be weighted against one another by asking ourselves which balance, in our considered judgement, is the most just. Once we reach a certain level of generality, the intuitionist maintains that there exist no higher-order constructive criteria for determining the proper emphasis for the competing principle of justice. While the complexity of the moral facts requires a number of distinct principles, there is no single standard that accounts for them or assigns them their weight.⁸⁹

Rawls captures very accurately the fact that intuitionist appeals to reasonableness do not avail over a critical principle. Such a principle would help to explain what criteria ought to be applied in which case and whether the criteria themselves are defensible from a moral point of view. Much of the application of equality as reasonableness comports with Rawls' characterization of intuitionism. What courts do is to extend old legal ideas to new cases.

An interpretation of equality in terms of the anti-discrimination principle introduces a critical principle. For its application, the matter needs to be recast. In the case of marijuana, one has to ask whether the unequal effect of the law—justification in terms of the rational pursuit of objectives aside—is humiliating because it leaves patients with no reasonable alternative to obtain relief from their pain. Since, however, a good deal of moral intuition is at stake in arriving at the relevant conclusion here, it is advisable to restrict the application of the anti-discrimination principle to certain serious types of cases: for example, cases in which fundamental interests are affected (such as, arguably, the interest to be free from avoidable pain).

12. Conclusion

The discussion above may have already shown that a reading of the equality principle in terms of anti-discrimination would preserve some of the moral appeal that equality apparently has to the champions of the reasonableness standard. The application of the anti-discrimination principle, however, requires submitting moral intuition to a critical test by asking whether what one finds morally disturbing can also plausibly be presented as an instance of discrimination.

I contend, also, that the constitutional implementation of equality as reasonableness is a clear case of a *misuse* of a fundamental right. First, the application of equality is based on a false interpretation. Second, it invests the court with the power to assess comprehensively the rationality

⁸⁹ See J. Rawls, *A Theory of Justice* 34 (1971).

and reasonableness of state acts. As I tried to explain above, equality as reasonableness, in abandoning the constitutional dimension of judicial review, seriously threatens to subvert the balance of power, because constitutional discourse is turned into the playing field of civil-law-style intuitionist tinkering.

There is nothing inherently wrong with intuitive reasoning. In many instances of moral conflict there may be no alternative to it. However, when it comes to passing intuitive judgements on moral matters, democratically elected and accountable legislatures are in a better position than courts to represent the people. It is through their representatives that the people speak. Unless constitutional adjudication is based on standards that are more elaborate than hidden intuitive appeals, courts have no business replacing the moral judgement of the legislature with their own. Where such a replacement is the result of the abandonment of constitutional legal discourse, there can be no doubt that it amounts to a misuse of a fundamental right.