PUBLIC REASON AND COURTS

Public Reason and Courts is an interdisciplinary study of public reason and courts with contributions from leading scholars in legal theory, political philosophy, and political science. The book’s chapters demonstrate the breadth of ways in which public reason and public justification is currently seen as relevant for adjudicative reasoning and review practices, and includes critical assessments of different ways that the idea of public reason has been applied to courts. It shows that public reason is not just an abstract theoretical concept used by political philosophers, but an idea that spurs new perspectives and normative frameworks also for legal scholars and judges. In particular, the book demonstrates the potential, and the limitations, of the idea of public reason as a source of legitimacy for courts, in a context where many courts face political backlashes and crisis of trust.

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PUBLIC REASON AND COURTS

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Since John Rawls brought the term “public reason” into academic circulation in the mid-1990s, public reason has been discussed as a criterion of political and legal legitimacy. The idea of public reason is often formulated as the requirement that a polity’s political and legal impositions must be publicly justifiable – or possible to justify with reasons and reasoning that are accessible and reasonably acceptable to all subjects of the imposition. Requiring laws to be publicly justifiable may seem like a means to ensure that all subjects are taken into account, and thus to prevent laws with morally unacceptable outcomes for some groups and individuals. But the criterion of public reason, or public justifiability, is also associated with the idea that not only do the outcomes of laws and public acts count toward their legitimacy, but also the form and content of their justifications: A law that prohibits a certain religious practice may be perfectly legitimate if it is shown that the practice presents a real danger to public health or safety, whereas other types of justifications – such as racist reasons and animus toward a religion – are seen as weakening the law’s legitimacy or rendering it illegitimate altogether.

The role of courts has been a topic in the public reason literature since Rawls famously, and somewhat cryptically, characterized the supreme court in liberal democratic regimes as “the exemplar of public reason.” Rawls saw supreme courts as exemplars, both because they typically refrain from appealing to nonpublic types of reasons, which electorally accountable public officers may be tempted or pressured to use, and because it is the institutional task of constitutional courts to interpret and uphold the constitution. It is furthermore their task to ensure that ordinary acts and legislation are made in accordance with the constitution – which, in liberal democracies, are based on ideas and values that Rawls presumed to be reasonably acceptable to all citizens of such regimes. Rawls also argues that a supreme court can educate other public officials and citizens on the basic political-moral ideas and values of the regime through the reasoning of their opinions in high-profile cases.
However, since Rawls first formulated these ideas, public reason has become one of the most discussed, and most controversial, ideas in political philosophy. A wide range of public reason conceptions have developed, and many of them diverge significantly from those of Rawls, both with regard to how they conceptualize public reason and how they view the role and duties that public reason implies for courts. Moreover, the plurality of approaches to public reason and the ways of relating this idea to judicial practices have further proliferated as the concept of public reason has migrated from philosophy to legal theory to discussions about international courts’ legitimacy.

*Public Reason and Courts* is an interdisciplinary study of public reason and courts with contributions from the perspectives of legal theory, political philosophy, and political science. The book’s chapters demonstrate the breadth of public reason and public justification as relevant for adjudicative reasoning and review practices; they also include critical assessments of the ways that public reason has been applied to courts. Public reason – the book asserts – is not an abstract theoretical concept used by political philosophers but an idea that spurs new perspectives and normative frameworks for legal scholars and judges. In particular, the book demonstrates the potential as well as the limitations of the idea of public reason as a source of legitimacy for courts, specifically within a context in which many courts are facing political backlash and a crisis of trust.

The chapters of this book comprise two main clusters of contribution; the first focuses on domestic courts and the other on international courts. These two parts are preceded by a chapter introducing central terms and discussing lines of division in the public reason and courts literature and are followed by a more critical intervention.

In Chapter 1 Silje A. Langvatn characterizes the most prevalent public reason approaches to courts in the current literature discussions, with the aim of making these discussions more accessible across disciplinary and intradisciplinary divides. The first section of this chapter focuses on the many meanings attributed to the term “public reason.” The term is often used to refer to reasons and forms of reasoning that the authors believe to be accessible and acceptable to all citizens as a basis of legal and political regulation. Most also connect public reason to political legitimacy, and they argue that basic political and legal norms and institutions must be publicly justifiable in order to be sufficiently legitimate. Yet, as Langvatn shows, authors using the term often have different understandings of who the relevant public is, *when* and *where* public reasons are required, and *what*
it is that makes reasons and reasoning sufficiently public. And not to be forgotten – authors also have different views on why public justifiability is necessary for political legitimacy. Variations on these questions yield different philosophical conceptions of public reason. However, these philosophical conceptions do not always translate into a specific jurisprudence or into a specific ideal of public reason suitable for courts. Nor does outlining a philosophical conception of public reason necessarily address the question of whether courts are the right institution to review the public justifiability of other public officials’ acts.

In the chapter’s second section, Langvatn goes on to speak of “public reason approaches to courts,” meaning the ways in which philosophical conceptions of public reason and jurisprudential approaches tend to correlate in the literature. Langvatn characterizes the public reason approach to courts in general in an inclusive way, subsuming all authors who (1) accept the general idea of public reason, or the idea that legitimate legal and political impositions must be publicly justifiable, while also (2) accepting an “ideal of public reason for courts,” or seeing the idea of public reason or public justifiability as conferring a duty on at least some courts, in some cases, to help secure the public justifiability of at least some types of political and legal impositions. In this chapter, she also limits the discussion to authors who (3) use the term public reason, or related terms about their own normative thinking. On this basis, the chapter then identifies and characterizes six dominant public reason approaches to courts in the literature: “political liberal approach,” “liberal approach,” “classical liberal approach,” “deliberative approach,” “natural law approach,” and “public reason as justification vis-à-vis a broader audience.” The final sections discuss limitations and objections to the proposed taxonomy of public reason approaches to courts. Each of the approaches has subvarieties, and some authors are associated with more than one of these approaches. Langvatn submits that this taxonomy may help make sense of a literature that is often disciplinary insular and enable more precise and fruitful criticisms of the role of public reason for courts.

Part I of the book consists of a set of chapters relating the idea of public reason to the practice of domestic high courts in general and domestic constitutional courts in particular. The first three chapters start in the political liberal tradition of John Rawls.

Chapter 2 by Micah Schwartzman discusses what implications legislative motivations have for review courts informed by an ideal of public reason: Given that we want courts to review legislation in terms of public
reason, should these courts review whether a law is sufficiently motivated by public reasons? Or should they only review the extent to which the law can be sufficiently justified with public reasons as such? Should, for example, a court strike down a law if the judges find that it is motivated by animus against a religious minority, even when the lawgiver has officially justified the law with publicly acceptable reasons, such as public safety? The issue of legislative motivation – also referred to as legislative purpose or intent – raises many normative and empirical issues.

Schwartzman focuses on an objection against the inclusion of legislative motivation in judicial review: the view that the motivation for a law is irrelevant for determining its moral permissibility. The first section of the chapter discusses this “permissibility objection” in more detail, and the author makes clear that the heart of the matter is whether a morally questionable motivation alone can change the moral status of an act that is otherwise morally permissible. Those who accept the permissibility objection believe that motivations alone cannot be sufficient to change the moral status of an act.

Schwartzman goes on to argue that the permissibility objection is mistaken, thus defending the view that a public reason–oriented court can properly engage in judicial review of legislative motivation. First, he argues that an agent’s motivation can, at least in some cases, be directly relevant to its permissibility. The permissibility objection, he argues, draws its plausibility from examples in which agents’ motivations do not determine the moral justifiability and permissibility of their actions. Yet, Schwartzman finds other examples, examples of discriminatory acts that do not produce impermissible harm, but where the motivation for the act itself makes the act morally impermissible. This, he argues, shows that there are instances when agents’ motivations are relevant in ways that the permissibility objection denies. In the next section, Schwartzman turns to examples in which motivation is indirectly, or derivatively, relevant to the moral permissibility of laws. A discriminating law that fails to treat citizens as free and equal has a motivation that is directly and independently relevant for its moral permissibility, but when this legislative motivation is known to the subjects, it may cause an expressive harm that more indirectly adds to the law’s impermissibility. Finally, Schwartzman discusses laws whose legislative motivations include both nonpublic and public motivations (e.g., a law against eating pork that may be motivated both by religious injunction as well as concerns about public health). Schwartzman’s stance is that laws are permissible when they are motivated by at least one sufficient public justification. Laws
supported by mixed motives may thus be morally permissible, but he also argues that courts in such mixed-motive cases should give such laws careful scrutiny in determining whether they are sufficiently publicly justified.

In Chapter 3, Ronald C. Den Otter calls for American legal scholars to realize the relevance of the idea of public reason for law and to develop a conception of constitutional public reason that suits the particulars of the United States’ legal system. Den Otter argues that such a conception of constitutional public reason, at its core, will have to perform an extra check on the public justifiability of the reasons relied on, both in the justices’ own reasoning and as an extra check on the justifications provided by public officials for contested laws and measures. He presents his own preliminary take on what such a public reason check could amount to. His account emphasizes that judges should avoid nonpublic reasons – such as those that come from or rely on comprehensive religious, moral, and philosophical doctrines that are disputed and those that conflict with the basics of liberal democracy and the idea of persons as free and equal, even in hard constitutional cases. First and foremost, he attempts to alert other legal scholars in different traditions to work out the details of a conception of constitutional public reason. The hope that the public reason approach holds for the United States, Den Otter argues, is that the different, often conflicting constitutional interpretation traditions – such as originalism, living constitutionalism, pragmatism, and judicial minimalism – will engage with the idea of public reason and work out how their own methodology can be made compatible with it. This can, Den Otter argues, help reduce the tensions between these methodologies by helping inform each other and approximate a reflective equilibrium. The second section of the chapter addresses a main objection to such an idea of constitutional public reason, namely that it will be too indeterminate, or too shallow, to provide sufficient normative orientation when judges must answer the most challenging constitutional questions. Den Otter argues that this “indeterminacy objection” cannot be dismissed altogether, yet he attempts to take the sting out of this objection by illustrating that other methods of interpretation are not necessarily more determinate.

In Chapter 4 Frank I. Michelman interprets John Rawls’s ideal of public reason as implying a stricter constraint of fidelity to the constitution for judges than for citizens. Unlike judges, citizens are at liberty to base a public justification on what they take to be the best balance of values in the constitution, whereas judges are more bound by the actual
text and precedent. This looser constitutional constraint for citizens may seem at odds with Rawls’s “liberal principle of legitimacy” – a criterion of political legitimacy that is constitution-centered and says that ordinary laws must be in accordance with a constitution the essentials of which are reasonably acceptable to all citizens. For Rawls the constitution is a set of previously established and publicly recognized terms for the day-to-day exercise of political power. The constitution can thus function as a fixture, a public procedural pact providing a fund of mutually acceptable reasons. As long as an ordinary law or act is in accordance with a mutually acceptable constitution, citizens can accept the ordinary laws and acts as reasonable and legitimate, even when they disagree with them. In light of this, it may seem paradoxical for Rawls’s ideal to have a looser constitutional constraint for citizens when they exercise their political power. To understand this differentiated constraint, Michelman provides a close analysis of Rawls’s liberal principle of legitimacy, and the role that the constitution plays therein. He finds that there are subtle, but important, differences in how this legitimacy criterion is formulated in Rawls’s early and late writings on political liberalism, and that Rawls’s rationale for a looser constraint for citizens connects with the need for the constitution to figure for citizens both as a “fixture” and as a “project.” Michelman concludes that Rawls envisages an institutional division of labor between the Supreme Court and the citizens in which judges are responsible for maintaining the constitution’s function as a fixture, and citizens are to take the lead in keeping the constitution up as an on-going project. For a judge, the guiding conception of public reason must be the political conception of justice that the judge reads out of the existing constitution’s text and its prior history of application. Citizens, however, can press their sundry views on what they think is the most reasonable balance of the values of the constitution so as to always be pushing the constitution toward its “fully justification-worthy state.”

Turning to questions of nonideal theory, Chapter 5 by Mohammad H. Fadel raises the question of how a public reason-minded judge should proceed when tasked with applying Islamic law. This question, Fadel notes, may seem strange. Could any conception of public reason accept the legitimacy of religious laws in the first place, and could it adopt Islamic legal doctrines as legitimate rules of decision? Not in ideal theory. Yet, Fadel contends that nonideal theory should speak to the fact that numerous states do in fact incorporate Islamic law as part of their constitutional law, and that courts in liberal democracies without a Muslim majority can also be required to apply Islamic law norms
(e.g., when the parties that appear before the court have made private agreements based on Islamic law). In such situations, Fadel argues, Rawls’s ideal of public reason can provide useful guidance for judges. Confronted with Islamic law, a public reason-minded judge should first try to identify the political content of the Islamic rule that is to be applied, and thereafter assess whether this can be compatible with a reasonable political conception of justice, one that free and equal citizens can reasonably be expected to accept. If it is compatible, the judge can proceed to apply the rule. If not, the judge should propose a new rule using reasonable conjecture or extrapolating from historical doctrines, a rule that can vindicate both the Islamic political value and the criterion of public reason. Part of the chapter is devoted to showing that it is possible to distinguish between metaphysical doctrines and political commitment in the Sunni Islamic tradition of law. This makes it possible to appeal to the political ideas of Islamic law in a manner coherent with Rawls’s ideal of public reason, which asks us to stay at the level of political-moral ideas and values in political and legal justifications, and to bracket appeal to, and criticisms of, both one’s own and the others’ deeper comprehensive doctrines. In politics and law, we cannot expect all to embrace the same comprehensive doctrine. What we can hope for, and what suffices, is an overlapping consensus on political-moral ideas and values. Fadel characterizes the proposed approach as a limited version of what Rawls calls “reasoning from conjecture,” one that focuses on the political ideas that can be read out of Islamic law and not on its revelatory and metaphysical foundations. In addition, the judges should avoid applying Islamic law qua asserted revealed truth, and also avoid criticizing the truth of Islamic law as a religious or revealed doctrine. Fadel holds that this jurisprudential approach will both reduce tensions between historical doctrines of Islamic law and liberal states, and it will provide a way for courts to reduce political and social conflict around Islamic law. In the last section of the chapter, he discusses a series of cases from Egypt, India, the United States, and the European Court of Human Rights in which judges have failed to abide by such an ideal of public reason, with negative results.

In Chapter 6 Mattias Kumm puts forward the basic structure of an argument for a normative theory of public reason–based constitutionalism. He begins by setting out the following propositions: Law makes a claim to authority but does not always have the authority it claims to have; the point of constitutionalism as a normative project is to establish as a condition for legal validity the requirements that law needs to fulfill to actually have the authority it claims to have; and if, finally, law has the
authority it claims only if it is justifiable in terms of public reason, and if constitutions seek to constitutionalize as a condition for legal validity this standard, what would that require? Kumm first contrasts public reason–based understandings of constitutionalism with conventionalist and democratic voluntarist conceptions of constitutionalism, both of which leave little room for public reason–based justification. He then goes on to discuss what a public reason–based understanding of constitutionalism implies for the foundations, structure, and interpretation of constitutions. Kumm concludes that even though the demands for establishing legitimate authority within a public reason–based framework are ambitious, public reason–based constitutionalism is the heir of the American and French revolutions, and dominant structures of prevailing constitutional practice in liberal democracies can be best explained and justified within such a framework.

In Chapter 7 Alec Stone Sweet and Eric Palmer develop a Kantian account of constitutional justice in which the proportionality analysis used by constitutional courts in the process of judicial review plays a key role in securing the publicity and legitimacy of laws, or what Immanuel Kant called a Rightful condition. The first section of the chapter identifies principles and concepts in Kant’s thinking that underpin a Kantian constitutional theory. Two principles are seen as foundational: the Internal Duty of Rightful Honor, which prohibits one from consenting to social arrangements that would permit one to be used as a mere means for others, and the principle of Innate Freedom, which says that all persons have an innate inalienable freedom and are entitled to pursue their chosen ends as long as they do not violate the Rightful Honor along the way. These principles come together in the Universal Principle of Right (UPR), which limits public officials’ authorization to coerce to those acts that can uphold or enable a Rightful condition in which all can exercise their freedom consistently with the freedom of others.

Stone Sweet and Palmer argue that these principles imply a rights–focused civil constitution. However, they remark that Kant himself said remarkably little about the institutions and organizations required to realize a Rightful constitutional condition. Stone Sweet and Palmer’s

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project in the chapter is to fill this gap, and they propose a structural account of constitutional justice that they see as both consistent with Kant’s ideas and with the basic facts of contemporary, rights-based constitutionalism. The chapter argues further that such a Kantian constitutional order needs both an enumerated bill of rights and a trustee court – a court with strong powers of constitutional review that can render rights effective and be a caretaker of the system. In many constitutional democracies, the people have already authorized such judicial supremacy, and thus placed their freedom in trust. The trustee court’s primary function is to evaluate the reasons that officials give for acts that burden or infringe the exercise of a right, and invalidate acts when these reasons are inadequate. Reasons for rights infringements are inadequate when they do not conform to the UPR or do not uphold or enable a collective freedom for all.

Modern charters include two types of rights: absolute rights, which cannot justifiably be burdened or limited because no reason that conforms to the UPR can be given for them, and qualified rights with limitation clauses. Stone Sweet and Palmer argue that, for the latter type of rights, the trustee court should use proportionality analysis because this analysis can operationalize the UPR in the legal reasoning. In this way the trustee court supervises the incremental process through which collective freedom of all under law is constructed. They also argue that in a Kantian system of constitutional justice, the trustee courts must be bound by a set of robust obligations: to protect rights in ways that ensure that public officials act in accordance with the UPR to be accountable for or to justify its rulings with reasons, and to engage in dialogue with those who are vulnerable to their rulings. Stone Sweet and Palmer see these obligations as following from Kant’s requirement that laws must be capable of publicity to be legitimate, where the publicity requirement is read as a presumptive support for a right to justification held by citizens, yielding a corresponding duty for officials to give reasons of burdening rights, reason-giving that should be disciplined by the UPR (e.g., as operationalized in the proportionality analysis).

Chapter 8 by Jacob Barrett and Gerald F. Gaus defends public reason liberalism against the criticism that the requirement that laws be publicly justified poses an obstacle to social reform. When public reason liberals argue that laws must be justifiable to each citizen, the criticism goes, they seem to preclude the use of law to improve the justice of the social order: A reasonable minority can block the passage of any law that they do not see as justified. Barrett and Gaus argue that this criticism is premised on
a popular but empirically false theory of the conditions for effective legal regulation and law as an instrument of justice. On this theory, the law is an autonomous instrument for justice because it shapes behavior primarily through the threat of punishment, and so it can direct recalcitrant citizens to just actions and outcomes through coercive threats. Barrett and Gaus present and criticize two versions of this theory. First, the doctrine of punishment-focused legal centrism and, second, a more nuanced view referred to as moral-focused legal centrism.

Barrett and Gaus’s alternative “normative perspective” draws on empirical studies to show that social norms and personal moral convictions are more important for compliance and effective legal regulation than the threat of punishment. The chapter discusses several studies that show that laws effectively regulate behavior when they cohere with social norms but are typically ineffective and sometimes even counterproductive when they conflict with them. Social norms, in turn, are effective when they align with the personal normative convictions of those subject to the norm. This, then, leads to a case for a minimal form of public justification in which members of the norm network, as a matter of fact, overwhelmingly endorse the norm because it aligns with their personal normative convictions. Barrett and Gaus then consider a stronger form of public justification: reflective endorsement by most members of the group. They argue that robustly and publicly justified norms tend to be even more stable and effective than those that are only minimally publicly justified.

Later in the chapter, Barrett and Gaus reconsider the charge that a commitment to public justification thwarts the pursuit of greater justice. They reject this charge because empirical findings show that law does not have the autonomy or power that the criticism presupposes. The requirement that laws be publicly justified does not undermine the possibility of using laws as a tool for promoting justice because laws seldom succeed in effectively promoting justice, unless they cohere with social norms that approximate robust public justification. This, Barrett and Gaus argue, also speaks against top-down models of public reason that posit supreme court judges as the key agents in securing the public justifiability of laws. Rawls, for example, characterizes justices as the exemplars of public reason because of their exclusive focus on politico-legal norms when assessing whether a law is publicly justified. Against this, Barrett and Gaus object that laws that meet a politico-legal test of public justification but do not cohere with social norms that approximate robust public justification are neither publicly justified nor effective.
Part II turns to public reason in international adjudicative bodies and in discussions of the European Court of Human Rights and the World Trade Organization’s dispute settlement system.

In Chapter 9 Wojciech Sadurski considers how the European Court of Human Rights (ECtHR), an emerging European constitutional court for human rights, has engaged in scrutiny of legislative aims pursued by national laws interfering with the proclaimed rights. In so far as the Court has, it can be viewed as adopting a standard similar to public reason. However, Sadurski concludes that the Court has almost always eschewed its authority to evaluate the aims of state laws or decisions in this way. On the very few occasions when it has expressed its doubts about the plausibility of the aims cited by the governments concerned, the Court has either refused to attach any weight to these doubts and moved on to the next stage in the analysis (the necessity scrutiny), or it has identified another aim that it found legitimate and, for this reason, moved on to the necessity scrutiny stage. The main burden of the aim scrutiny has therefore shifted to the necessity stage, when the Court has assessed whether the restrictions were necessary (in a democratic society) to attain this aim.

Sadurski offers an explanation for this puzzling (as he claims) argumentative maneuver. Challenging the state at the stage of aim scrutiny brings the Court into a head-on collision course with the state and risks weakening the Court’s legitimacy, which is tenuous at the best of times anyway. In turn, postponing the aim scrutiny to a later stage, and hiding it within the much more technical and complex necessity review, helps the Court reduce the reputational losses for a state found eventually to be in breach of the European Convention of Human Rights, and thereby maintain its legitimacy through a shrewd exercise in judicial diplomacy. After all, if the legislative restrictions have been found “unnecessary” to achieve a stated aim, it sounds more like an error on the part of the state; if, in contrast, the state is found to publicly provide an aim that is not credible under the circumstances, it sounds much more like deceit. If you are a state, you would rather be found mistaken than dishonest – suggests Sadurski.

But such a replacement of goal scrutiny by the necessity scrutiny has its cost: As Sadurski shows, the necessity scrutiny is imperfect as a device for discerning the true goals of legislation. When necessity is translated into “a pressing social need,” the temptation for the Court is to consider it a self-standing rather than a relational concept, in which case its capacity to ascertain the goals is lost. When necessity is viewed through the prism of necessity scrutiny, it becomes a self-standing concept, which makes it difficult to discern the true goals of legislation. Sadurski argues that this is problematic because it makes it difficult for the Court to properly assess the legitimacy of the state's actions. He suggests that the Court should consider the necessity of legislation within the context of the state's overall policies, rather than viewing it in isolation.
of proportionality, the Court’s capacity for goal ascertainment decreases with the lowering of a standard of proportionality (based on the broadening of the “margin of appreciation”). The less strict a scrutiny of proportionality, the less proportionality serves as a proxy for necessity, in turn reducing the latter standard’s potential as a tool for credible goal ascertainment.

Chapter 10 by Sivan Shlomo Agon discusses the World Trade Organization dispute settlement system (WTO DSS) as an example of a prominent international adjudicative body in which the idea of public reason is noticeable.

The chapter starts from the premise that the exercise of authority by international courts requires legitimacy; yet, as international courts come to play an ever more significant role in global governance, their traditional source of legitimacy embedded in state consent seems no longer sufficient, and additional grounds are needed to sustain the claim for legitimacy of these empowered international institutions. In this state of play, Shlomo Agon suggests that public reason offers one supplementary source for international courts to enhance their legitimacy by ensuring that the courts’ decisions, as well as the states’ decisions they are called upon to review, are the result of reasons and forms of reasoning that can be reasonably understood and accepted to all subjects affected. Such ideas of public reason and public justification, the chapter shows, are not merely theoretical conceptions of legitimacy and legitimation; rather, they are discernible in the actual practice of at least one key international adjudicative body – the WTO DSS. A close examination of the jurisprudence developed by the DSS over the last two decades or so reveals its attempt to “go public” by drawing on a range of practices often associated with the public reason tradition, especially in cases that go beyond the WTO’s core trade domain to involve “noneconomic” public values (such as environmental protection) in which the system’s legitimacy concerns are intensified.

The chapter elaborates how the various substantive and deliberative public reason orientations identified in WTO jurisprudence may be seen not only as a strategic attempt by the DSS to build up and sustain the support for its authority among expanding circles of audiences, but also as a sincere recognition by the DSS of the necessity to expand the normative bases of its legitimacy in a world where its decisions exert effects over a wider range of issues and stakeholders, far beyond member states. At the same time, Shlomo Agon highlights some of the challenges and constraints an international court like the WTO DSS might confront
in its public reason–giving endeavors. Most notably, the DSS’s case seems to suggest that in situations of friction between the court’s numerous stakeholders, the public of member states still remains the primary audience for whom the DSS’s reasoning and decisions must be accessible and acceptable, an element that effectively limits the ability of this court to go public all the way. In so unfolding the WTO DSS’s public reason account, Shlomo Agon thus aims to illustrate the different forms in which the idea of public reason can be said to apply to international courts as well as to develop a better understanding of the promise, and limitations, embedded in the concept of public reason as a means for international courts to enhance their legitimacy given their unique features and the pluralistic global setting in which they operate.

In Chapter 11 Alain Zysset discusses Mattias Kumm’s view that courts’ use of the proportionality test provides an adequate test for the public justifiability of limiting rights. The chapter explores how Kumm’s view is informed by Rainer Forst’s account of the right to justification, and the author argues that the right to justification can provide even further normative guidance for how courts should operate the proportionality test.

The chapter begins by offering a brief reconstruction and interpretation of the right to justification. The right to justification requires laws, and also basic political and social norms, to be justified with reasons that are strictly reciprocal and general. Zysset’s reading of Forst says that the right to justification not only provides the basis for mutually biding basic norms and basic structure but also justifies establishing appropriate procedures that help realize individuals’ right to justification and, more specifically, justifies the right to democratic participation. Further, Zysset argues that the right to justification can also help specify a more determinate and stable set of rights/duties and duty-/right-holders that underpin the right to democratic participation.

Later in the chapter, the author explores Kumm’s argument that the right to justification can be operationalized in the proportionality context when courts evaluate reasons for restricting rights. While endorsing this approach, Zysset suggests that Kumm has not fully brought out the potential of the right: Kumm gives examples of “excluded reasons” for limiting rights (e.g., teleological, perfectionist, consequentialist reasons), but Zysset argues that Kumm is not explicit about whether the test also helps identify what the right to justification positively requires (i.e., whether the test identifies the rights/duties, and right-/duty-holders that are of particular importance for the pursuit of mutual justifiability
as a normative ideal). Zysset argues that the right to democratic participation and its procedural preconditions are of such particular importance, and that focusing on this right offers further clarity and determinacy to courts’ use of the proportionality test.

The chapter concludes by reconstructing the approach of the European Court of Human Rights to the conflict between the right to freedom of expression and the right to privacy in the proportionality test. Zysset first shows what he takes to be the central role of democratic considerations in the evaluative part of the proportionality test of the ECtHR, and then explains how the Court has linked freedom of expression to democratic participation in that part. Finally, Zysset shows how the Court uses the link between freedom of expression and the right to democratic participation as a basis for justifying restrictions of the right to privacy. This principled reasoning in the ECtHR, Zysset argues, offers an illustration of how the right to justification offers a prism through which we can interpret the ECtHR’s approach to proportionality testing.

Chapter 12, the final chapter of the book, takes a more critical approach. Christopher F. Zurn refutes what he calls a surprisingly common strategy among prominent liberal and deliberative democratic theories: the strategy of extolling courts as exemplars of public reason in an attempt to assuage democratic worries about judicial review. This strategy, Zurn argues, builds on an analogy between judicial reasoning and public reasoning that is seductive, but empirically misleading – at least when we examine the opinions and reasoning of the US Supreme Court.

The chapter first outlines the legitimacy problem of judicial review and how public reason can be seen as an attempt to deal with this problem. Constitutional courts have the power to strike down laws and acts they see as violating the constitution, and, Zurn argues, in effect these courts take on powers of constitutional legislation. At the same time, courts are institutionally insulated from democratic control and accountability. The legitimacy of court-based constitutional review is therefore often questioned on democratic grounds. Yet, few liberal and deliberative democratic theorists are willing to say that democratic legislation is less important than the protection of individual rights, and they therefore seek a strategy for addressing the institutional tension between democratic authorization and individual rights protections through review courts. The public reason strategy, Zurn argues, has become popular both among deliberative democrats and liberal theorists because it seems to solve the tension in an attractive way. Democracy, on this account, is not just a matter of numbers or majority rule; it also involves
making decisions based on the best available reasons that are acceptable to all citizens – at least in connection with fundamental political-moral questions and “constitutional essentials.” When constitutional essentials are decided with such public reasons, this confers legitimacy on ordinary laws and decisions. To decide constitutional essentials with public reasons is typically taken to mean that they should not be decided on the basis of sectarian and controversial reasons, but rather on the basis of widely shared abstract political-moral principles. According to Zurn, part of the public reason strategy is to see constitutional courts as a uniquely reason-based institution, a type of institution that is shielded from the corrupting influence of money and power and the need for reelection, a “forum of principle” that is also institutionally tasked with protecting the constitution through the expression of citizens’ constitutive powers.

Zurn discusses Rawls’s claim that a supreme court or constitutional court can be seen as an “exemplar of public reason” but also the view of Christopher Eisgruber who defends court-based constitutional review, not just as a rights-protecting counterweight to majoritarian democracy, but as a kind of representative institution that can speak in the name of, and for, the people’s shared political principles. Eisgruber, Zurn argues, sees the constitutional court in a way that is, in some respects, more representative of the true will and interests of the people than the reasoning of democratically accountable branches. While Eisgruber goes further than some in presenting courts as democratic agents, the more general idea that judicial review represents the people’s sovereign precommitment to individual rights as expressed in a legitimacy-conferring social contract is widely accepted, according to Zurn.

Zurn then draws on previous work and examines several high-profile constitution-interpreting opinions of the US Supreme Court. What is striking, Zurn argues, is that these opinions very seldom resemble the type of reasoning that public reason theorists attribute to courts. He finds that the opinions do refrain from appealing to comprehensive doctrines, but they do not concentrate on principled political-moral reasoning, as many public theorists seem to think. Rather, the judicial reasoning is dominated by “the technicalia of legal argument,” establishing jurisdiction, outlining precedent, deciding justiciability, and so on. The chapter does not argue that the US Supreme Court never reasons in the way that public reason theorists recommend, or that the court never has the type of educative function they hope for. The argument is that there are disanalogies between judicial reasoning and public reasoning in an overwhelming majority of their constitutional cases, and that this undermines...
the public reason strategy as a way to assuage democratic worries about judicial review.

The chapter outlines three institutional determinants that may explain this finding, and it concludes by providing a framework for a program for future empirical research on whether the public reason strategy may be more successfully applied to Hans Kelsen-style constitutional courts and international courts.
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