

## SUMMARY

# Public Reason – Judicial Justification – the Judges’s Mind

The basic question posed in this work is this: How can we reasonably justify judicial decisions in cases involving the resolution of conflicts of values or goods in the case of moral and legal pluralism? The question asked in this way prompts us to take a closer look at the idea of public reason as proposed by John Rawls. It is shown that the essence of Rawls’ approach to public reason is not so much to indicate the reasons that should be invoked, but to show the reasons that cannot be indicated in the process of legitimising the decisions of political authorities. Following this line of argument, the book formulates a question about the possibility of applying the concept of public reason to the theory and the practice of justifying judicial decisions, particularly when employing proportionality analysis. The book assumes that proportionality analysis is an excellent tool in this respect, because it proposes a structure of justifications that allows the idea of public reason to be used successfully.

On the basis of the jurisprudence of the Constitutional Court of South Africa and the Constitutional Court in Poland in applying the proportionality test, a special relationship has been identified between proportionality analysis, the idea of public reason and the rule of law. It is shown that linking the analysis of proportionality to the culture of justification and the idea of public reason supports the rule of law, and not linking the analysis of proportionality to the idea of public reason in a situation where the rights and freedoms of individuals are restricted leads to a weakening of the rule of law.

It is on the basis of these findings that we move on to a presentation of judicial justification understood as arguments from public reason. Argumentation from public reason is reasoning that consists in demonstrating the accuracy of judgemental decisions, and the accuracy of judgemental decisions refers to its being accepted by the audience to which the argumentation is addressed. Acceptance of court decisions, on the other hand, is the consequence of citing the particular type of rationale that is public reasoning in the justification of a decision. The court’s decision is accepted, because in its justification, the court has given such reasons, with regard to which no rational member of society has reasonable grounds for questioning them, in accordance with their status as free and equal citizens. This acceptance is possible if one accepts the assumption of a sceptical, reasonable and coherent audience, i.e. that each member of the audience is sceptical as to whether a given reason is sufficiently public; that this member is reasonable and therefore ready, as an equal and free citizen of a democratic state, to accept different arguments; that this member is coherent, i.e. that the courts are consistent, and cannot reject the arguments made in their favour.

Taking this background into consideration, particular attention is paid to the importance of the idea of public reason for the process of monitoring the constitutionality of the law. This concerns applying the principle of the sincerity of public reason. A law that violates the principle of the sincerity of public reason would be unconstitutional. The principle of sincerity is infringed when there is incompatibility between the declared objective and the objective of the law attributed to a rational and coherent legislator.

Another of John Rawls' ideas is referred to in this work. The question is posed as to whether the method of broadly reflective equilibrium, a method that is used in moral rather than legal reasoning, can be applied in the process of judicial justification. It is shown that this is possible, and sometimes necessary, while the basic background theory supporting court decisions would be the idea of the rule of law.

Finally, the book tackles the assumptions on the basis of which court decisions are justified (assumptions about a rational and coherent legislator and about a rational and coherent audience) with empirical research in the field of moral and cognitive psychology. The aim of this research was to verify whether the largely postulative and adaptive character of the proposal to include legal argumentation as arguments from public reason is reflected in the moral and cognitive competence of judges. After all, arguments from public reason refer to a strictly philosophical and moral idea, hence the question of whether judges have any particular cognitive and moral competence is most justified. From the psychological perspective, the book shows that due to the way in which judges process information and their level of cognitive competence, the rationality of judicial decisions and their justification is limited. Of course, faith in judges and their decisions is not called into question, but only the limitations of rational thinking and the mistakes they can make, just as the rest of us can. Nevertheless, it is recognised that the merit of argumentation from public reason is that it can eliminate, or at least reduce, the possibility of falling into the cognitive and moral traps that lie in wait for judges in making and justifying decisions.

*Translated by Rob Pagett*