
The Rule of Reason, a Constitutional Principle

W.T. Eijsbouts¹

Academics are notoriously individualists. There is no way an academic community of any sort can subsist without organizing in its midst a live context of shared discovery. At the origin of the conference leading to the present book lay a discovery and a discussion, in the Europa Institute's weekly 'Court Watch' case law meetings. It concerned a certain impulsion towards 'convergence' between distinct legal regimes applicable and techniques used in European law concerning the internal market. This process seemed to be spirited by a single agent, the rule of reason.

The present conference has allowed us to go further and discover no less than rule of reason's tendency to affect and even *reorganize* the functional and conceptual fields of European law and even of European politics. This appeared compellingly from all the presentations and their discussion, once compounded and compressed, that is, into a single argument according to my assignment.

In order to follow the invisible hand leading the different speakers to this single outcome, let me locate their contributions at six levels of relevance, out of which the seventh and concluding one will emerge by itself.

Lord Hoffman's speech provides the introduction. The *rule of reason* is not an original legal English expression. It was a 'rare bird' from the Americas, skipping the British Isles to land on the European continent. From there it was exported to England by European law and treated to mistrust. Why? Because it implies too broad powers for the Court of Justice, sending this inevitably into political waters. Unlike domestic courts, the ECJ cannot easily be corrected by the legislator, especially if the law is treaty law. So the Court has come to shoulder a political burden, forced upon it by political circumstances. Law, court and legislator: the theme in a nutshell.

True, the *rule of reason* in Europe at its very origin, in *Dassonville*,² looked like a grab for power by the Court of Justice, in the name of European law. But then the irony of the law, as of anything historical, asserted itself. In its first major judgments, the Court seemed to attack national sovereignty in its guise of national bureaucracy. Later, however, it found that this rule of reason, which it had itself invented, had another and often greater potential. And besides being a source of judicial power, *reason* is a motive for judicial *deference* also. Deference to whom or what? Deference of the judiciary for politics. This is the motif lead-

¹ At the conclusion of conferences such as the one leading to this book, the chairman will too often say: 'Well of course, so many beautiful and wise things have been said that it would be impossible or immodest to even try and summarize them'. We have the good tradition here not to abdicate in this fashion but instead to appoint a special person whose task it is to wrap up everything said into a comprehensive summarizing statement. This is demanding. On behest of the occasion and under pressure of time, however, this *wrapperteur* is given the necessary liberty of speaking. This makes the task also attractive. The following text is based on the transcript of the improvised concluding notes.

² Case 8/74 *Procureur du Roi v. Dassonville* [1974] ECR 837.

ing from *Cassis de Dijon*³ to *Keck*⁴ and all the other cases. In the course of seeing its own case law develop, the Court has found how public authority in the European Union is chiefly or mainly produced in the national bodies politic from whence it needs to be picked up and upgraded to a European level, if possible. This is the basic evolutionary line, which can be broken down into several actual levels of transformation and discovery, each involving a stand off or at least a comparison between rule of reason and competing principles or structures.

1. Laurence Gormley, not a speaker at the conference, filled up a page of my notes by way of his questions and remarks. He discussed the convergence between Article 30 EC and the Article 28 EC exceptions holding that the system of prohibiting discrimination is more powerful, if used well, than the rule of reason. Professor Gormley's hesitations concern what may be called the first level of EC legal transformation in which our principle is involved, concerning its distancing from normative equality (non-discrimination). This transformation is well-trodden ground in legal doctrine, with differences of opinion firmly established.

2. The next plane affected by our principle is competition law. Even if a general relevance of the rule of reason has long been denied here, inroads are being made now. Due to the peculiar systematic of this legal field in comparison with general market law, however, these inroads are (still) scattered and lack consistency, allowing Rein Wesseling, in a subtle analysis, to downplay them to a matter of 'various rules and reasons'.

This *divide et impera* account, if it were to be the last word on the matter, would not only withdraw competition law from the restructuring powers of our rule of reason, it would even amount to an almost explicit denial of Annette Schrauwen's claim, in the leading speech, that we are dealing with a single consistent principle. Fortunately for both the present author and the leading speaker, another look at the matter is conceivable, as is being well argued by Johan van de Gronden. Even if there is, according to him, no full convergence between the market regime and that of competition law's exceptions, increasing public concerns acknowledgement is affecting the logic and the systematic of competition law as a whole. Its internal logical divides do not stand up to the forces at play. Surely this is an area where much restructuring is then promised. The concept of *public service*, wedged into the new Constitution by pressures from then French Left, is destined to attract a substantial role here.

3. A third level at which the rule or reason reorganizes the field is that of the meeting between EU public concerns and those of the Member States. Annette

³ Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

⁴ Case C-267/91-268/91 *Keck and Mithouard* [1993] ECR I-6097.

Schrauwen in her introductory analysis put the question: 'Is the public concern that is being taken care of in the rule of reason a European or national public concern?' And she didn't, as far as I understand, answer that question. It was answered convincingly by Jukka Snell. Introducing the notion of the Community's 'constitutional structure', which is 'a divided power system', Snell argued essentially that national measures may in part be in discharge of Union public responsibilities. This would explain the Court's line to justify many national measures with economic aims, which, if taken as purely national, should be condemned out of hand as protectionist. Under the 'divided power system' the Member States are even allowed to discharge these public responsibilities in their own (various) ways.

What is the reorganizing agency of public concerns under the sway of the rule of reason here at play? There are conceptual and practical aspects. Once the taboo lifted on measures with economic aims, the Court should seek a new line of defence, a new limiting criterion. This will inevitably draw into political consideration. Snell's suggestion to consider it a matter for the European legislator completes the image of the rule of reason as a public interest conveyor between the national and the European levels, with the Court of Justice as the hinge between the national and the European legislative (political) institutions.

4. The next level of relevance for the rule of reason is in the interface between judicial and political intelligence. Tridimas, Biondi and Rutgers dealt with it. Tridimas first talked about proportionality and then about subsidiarity. Subsidiarity is the most difficult problem. Why is it so difficult? I might venture that subsidiarity is a principle of a distinct intelligence. It is not a brain principle or a mind principle; it is a gut principle. That is why it is so hard to apply by a judicial body. It is important, however, *ex ante*, working very well but at the political level.

Once the conflict between judicial and political reasoning was introduced, Biondi, in a very elegant way of being critical, first held that the Court of Justice did well in *Peterbroeck*⁵ and *Van Schijndel*⁶ and then he came out full force against the latest cases of *Köbler*⁷ etc. in which he reproached the Court of Justice for wanting to do justice too much. Jacobien Rutgers added insult to injury claiming that, in spite of all talk of rule of reason, the Court of Justice under the rule of reason constraints is totally incapable of promoting social justice. This was the critical wing, proving that even a principle as powerful as the rule of reason has limits.

⁵ Case C-312/93 *Peterbroeck v. Belgian state* [1995] ECR I-4599.

⁶ Joined Cases C-430/93 and C-431/93 *Van Schijndel and others* [1995] ECR I-4705.

⁷ Case C-224/01 *Köbler* [2003] ECR I-10239.

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5. Professor Goebel, not an official speaker and not appearing in these official proceedings, has to be mentioned for addressing yet another level at which the rule of reason is conceptually relevant, that of the rift between the legal cultures of the US and the EU. His was a reaction to Annette Schrauwen's initial point to consider the rule of reason as a manifestation of a 'European model' or 'European way'. Not necessarily, was Goebel's implication.

6. After the comparative field of EU v. US law, the only step left to widen the field was taken by Jochem Wiers, drawing a comparison between EU and the World (WTO). He found that, although there are some similarities, these are outweighed by, as it seems, two fundamental differences. EU rule of reason is general, whereas the comparable WTO's technical barriers to trade regime is limited and specific. Secondly and more fundamentally: EU has its own dynamic legislator, the like of which is lacking in the WTO.

7. This brings us to the last stage at which our principle can be considered active as an agent of transformation. Unlike GATT/WTO, EU has become fundamentally not a market but a community for the organization of public responsibility. In normal language, we call this a political community. No better proof of this and of our Rule's wide political relevance than the contribution from Wouter van Ballegooij and Géraldine Gonzalez on Freedom and Justice.

Conclusion: A political community proper has a constitution and has constitutional principles. A principle as crucial for the organization of responsibilities in this community as we have found the rule of reason to be, is justly called a constitutional principle.