

ISSA Proceedings 2006 - A Normative Reconstruction Of Arguments From Reasonableness In The Justification Of Judicial Decisions



1. *Introduction*

In the law arguments from reasonableness play an important role. Judges often refer to reasonableness in 'hard cases' where there is a tension between the requirement of formal justice to treat like cases alike and the requirement of equity (or substantial justice) to do justice in accordance with the particularities of the concrete case. In such situations judges often use an argument from reasonableness to justify that an exception should be made to a general rule for the concrete case. However, the question arises how judges must account for the way in which they use their discretionary space in a situation in which they depart from the literal meaning of a general rule and establish the meaning of the rule for the concrete case on the basis of considerations of reasonableness and fairness. The central question I will answer in this paper is what an adequate justification based on an argument from reasonableness exactly amounts to from the perspective of the application of law in a rational legal discussion.

Although arguments from reasonableness are considered to be an important form of argumentation to defend a judicial decision in a hard case, in the legal literature little attention has been paid to the standards for argumentation underlying the justification of such a decision. Insight into such standards is important from the perspective of the rationality of the application of law because only on the basis of such standards it can be established whether the judge has used his discretionary power in an acceptable way. In order to establish the standards for an adequate use of arguments from reasonableness, I will develop an argumentation model that can be used for the analysis and evaluation of arguments from reasonableness.

In this paper I will proceed as follows. First in (2) I will discuss the legal background of the use of arguments from reasonableness and fairness and I will establish under what conditions they form an acceptable justification of a judicial decision. Then, in (3) I will develop an argumentation model for the analysis and evaluation of legal arguments from reasonableness to be able to make the underlying choices and assumptions explicit. In (4) I will apply this argumentation model to an example from Dutch law in which this form of argumentation is used and establish in what respects it can be considered an acceptable contribution to a rational legal discussion.

2. The role of arguments from reasonableness in a legal discussion

Judges use an argument from reasonableness to justify that in a concrete situation an exception should be made to a legal rule to avoid an unacceptable result. The need for an argument from reasonableness for this purpose can already be found in the classical literature with Aristotle who claims that an argument from 'equity' can be used as an argument to make an exception to application of a universal legal rule in a concrete case if this would yield an unacceptable result. A judge is allowed to correct the law on the basis of 'equity' if it would be unjust because of its generality. According to Aristotle, in such cases equity amounts to justice to correct the injustice that would be caused by strict application of a universal rule in a concrete case.**[i]**

A similar view is defended by Perelman (1979) who argues that the requirement of reasonableness is a requirement for the judge to apply the law in a just way, that is the requirement to treat like cases alike and unlike cases differently. This may result in an obligation for the judge not to apply a legal rule if application would be incompatible with the rational goal of the rule. A rational legislator can never have intended that a rule would be applied that would lead to a result that would conflict with the goal of the rule.

In most legal systems it is allowed to make such an exception on the basis of reasonableness and fairness.**[ii]** The general idea why it would be acceptable to make an exception to a legal rule on the basis of reasonableness and fairness is that the result of legal decisions should be reasonable and fair. The requirement of reasonableness implies that a judge should treat like cases alike and unlike cases differently. The requirement of fairness implies that the judge should apply the law in such a way that justice is done to the particularities of the concrete case.

Normally a judge can comply with these requirements by checking whether the conditions of a general legal rule are fulfilled. The question to be answered, however, is what a judge must do when the conditions of a legal rule are fulfilled but he is of the opinion that application of the rule would be unreasonable and unfair (or when the conditions are not fulfilled but application would still be reasonable and fair).

When a judge is of the opinion that an exception should be made on the basis of reasonableness and fairness, he can make the rule more concrete, he can supplement the rule, or he can correct the rule in such a way that a new rule for the concrete case is formulated. By creating a new 'rule of exception' the judge at the same time tries to do justice to the requirement of formal justice that like cases should be treated alike, as to the requirement of fairness that the circumstances of the concrete case should be taken into consideration. The idea behind this is that the legislator would have included a general exception for situations like the concrete case if he had thought of them. For this reason it is the obligation of the judge to formulate the rule of exception for the concrete case.

When making an exception, the judge cannot refer to the literal formulation of the rule. However, he can refer to the goal of the rule and/or general legal principles and show that the 'new' rule is in accordance with the 'spirit' of the law. The question that rises in this context is how the judge can give an adequate justification of the use of his discretionary power to formulate such a rule of exception.

In modern legal theory arguments from reasonableness are considered as a form of *teleological-evaluative argumentation*, that is argumentation in which an interpretation is justified by referring to the goals and values the rule is intended to realize.**[iii]** From this perspective it is considered as an argument based on an objective teleological interpretation in which the interpretation is justified by referring to the intention of a rational legislator who could not have wanted that application of the rule would lead to an unacceptable result. The intention of the legislator can be reconstructed by referring to the goals and values implemented in the general legal principles that are underlying the branch of law in question.**[iv]** From this perspective, when a judge uses teleological-evaluative argumentation, he must justify his decision by arguing that, in light of the personal and social interests involved in the concrete case, application in the strict literal meaning would have unacceptable consequences from the

perspective of the goals and values the rule is intended to realize.[v]

On the basis of these considerations, in what follows, I will develop an argumentative model of the burden of proof for the use of arguments from reasonableness in cases in which judges makes an exception to a rule. I will do this by reconstructing the complex argumentation underlying the claim that application of a particular rule is unreasonable and unfair in the concrete case because application would lead to an unacceptable result that is incompatible with the goals and values of the rule in light of the circumstances of the concrete case.

3. An argumentation model for the burden of proof of a judge who uses an argument from reasonableness

A judge who argues that strict application of a rule in the concrete case would be unacceptable because application would be incompatible with reasonableness and fairness does this in the context of a dispute in which one party argues that the rule R must be applied in the literal meaning R", and the other party argues that in the context of the concrete case the rule R must not be applied in the literal meaning R" but in the amended meaning R' with an exception, so that the rule is not applicable to the concrete case.[vi] For the burden of proof of the judge who wants to make an exception, this implies that he has to justify why in the concrete case the rule R must be interpreted in the amended meaning R' and not in the strict meaning R". On the main level the decision and the main argumentation can be reconstructed as follows:

(1)

1. Application of rule X in the amended meaning X' is reasonable and fair

1.1. Application of rule X in the amended meaning X' leads to an acceptable result and

2. Application of rule X in the strict meaning X" is unreasonable and unfair

2.1. Application of rule X in the strict meaning X" leads to an unacceptable result

This reconstruction of the complex standpoint and the main argumentation does justice to the fact that the judge has a burden of proof for defending a complex standpoint consisting of a preference for the amended interpretation and a rejection of the strict interpretation.

The burden implies that the standpoint must be supported with subordinative argumentation in which the judge specifies why the preferred interpretation 1 is

coherent with certain legal goals or values which can be reconstructed from certain general legal principles underlying the relevant branch of law, as well as with the personal and social interests involved in the concrete case. He must also justify why the rejected interpretation 2 is incompatible with them.. These considerations, in their turn, must be supported with arguments that specify the legal and factual background of these arguments. A schematic reconstruction of the complex argumentation in support of the standpoint can be modeled as follows:

(2)

1. Application of rule X in the amended meaning X' is reasonable and fair in the concrete case

1.1. Application of rule X in the amended meaning X ' leads to an acceptable result in the concrete case

1.1.1a. Application in the amended meaning X' is compatible with the goals and values the rule is intended to realize of the rule

1.1.1a.1. The amended meaning X' is compatible with the general legal principle R that is underlying the rules r1, r2....rn

1.1.1b. Application in the amended meaning X' is compatible with the circumstances of the concrete case (the social and personal interests of the parties involved in the concrete case) C

1.1.1b.1. Statement about the social and personal interests in the concrete case (...)

In a similar way, the standpoint 2, that application of rule X in the strict meaning X'' leads to an unacceptable result implying that application is unreasonable and unfair in the concrete case should be justified.

This reconstruction of the burden of proof from the perspective of a complete justification in the ideal case shows that the argumentation must consist of at least three levels of argumentation. The 'core' of this justification is formed by the argumentation on the second and third level where he must make the underlying choices and assumptions explicit by specifying why the amended meaning is coherent with the law and with the circumstances of the concrete case.

This reconstruction of the burden of proof into a model for the argumentative burden of proof of a judge who uses an argument from reasonableness clarifies his argumentative obligations. It makes clear under what conditions a judge lives up to his formal burden of proof from an argumentative perspective. Whether the

arguments are acceptable from the material perspective depends on the criteria of acceptability in a specific field of law.

4. An exemplary analysis and evaluation of the use of arguments from reasonableness and fairness in Dutch civil law

To give an exemplary demonstration of how the argumentative model can be used for analyzing and evaluating concrete examples of arguments from reasonableness I will discuss a recent and representative example of the way in which the Dutch District Court uses the argument from reasonableness. The Court decided not to apply a rule in a concrete case on the basis of the consideration that an exception should be made because strict application would have unacceptable consequences from the perspective of reasonableness and fairness. This decision is based on a certain degree of discretion by the judge (because he limits the right of the defendant on the request of the plaintiffs) and it is therefore important to determine whether the way in which he accounts for this use of discretion is acceptable from the perspective of his burden of proof.

In Dutch civil law, in some cases an argument from reasonableness and fairness is an argument that is explicitly recognized as an acceptable argument by the legislator. On the basis of clause 6:248, 2 of the Dutch Civil Code the judge has the authority to make an exception to an arrangement by the parties on the basis of reasonableness and fairness if application of the arrangement would be unacceptable in the concrete circumstances:

Clause 6:48,2 - An arrangement that is valid between the creditor and the debtor on the basis of the law, a custom or a legal act, does not apply if this would be unacceptable from the perspective of the standards of reasonableness and fairness.

In book 3 of the Dutch Civil Code in the general clause of article 12 the legislator has formulated the following rule that specifies the factors that play a role in determining what can be considered as reasonable and fair:

When establishing what reasonableness and fairness require, generally accepted legal principles, legal convictions that are generally accepted in the Netherlands, and social and personal interests in the concrete case, should be taken into account.

These articles contain rules that specify under what conditions an argument from reasonableness and fairness is an acceptable argument to justify an exception to a

legal rule. The articles also specify the factors a judge must mention to justify the exception.

Apart from cases covered by this article, also in other cases a judge can make an exception to a rule but he has a heavier 'burden of proof' which is in line with the obligations described in the previous section. First, he must explain why a strict application would lead to an unacceptable result by specifying why a strict application would be incompatible with the intention of the legislator. Second, he must specify why an exception would be compatible with certain factors specified in the above mentioned article 3:12 of the Civil Code such as generally accepted legal principles, and he must specify what the circumstances in the concrete case are that justify the exception by specifying which social and personal interests are relevant.

In the example, called the 'Unworthy Grandson', the Court uses an argument from reasonableness and fairness to justify that the legal rule of article 4:889 of the Dutch Civil Code about the right of a heir to his legal part of the inheritance should not be applied in the concrete case. The central question is whether someone who has been condemned to life imprisonment in Australia because he has killed his father and the wife of his father, has a right to his fathers legal part of the inheritance of his grandmother. (This example resembles the famous example used by Ronald Dworkin of the *Riggs v. Palmer* case in which the court denies the grandson Elmer who has killed his grandfather his inheritance on the basis of the principle that no one should profit from his own wrong.)**[vii]**

The Court decides that the rule of clause 4:889 jo and clause 4:960 of the Dutch Civil Code that give a child as a substitute a right to the legal part of the inheritance of a deceased parent, is not applicable in the concrete case because it would lead to an unacceptable result from the perspective of the underlying principle regarding unworthiness in the law of inheritance:

District Court Haarlem, July 24, 2001, nr. 68989 (Court of Justice Amsterdam, August 15, 2002, nr. 1304/01, NJ 2003, 53)

5.7 The exceptional situation of this case has not been foreseen by the legislator. But even if it would have been foreseen, this does not exclude that in certain circumstances the judge can appeal to the 'derogating' function of reasonableness and fairness if application of the law would lead to an unacceptable result.

5.8 The Court is of the opinion that in this case such circumstances obtain. The Court holds that the defendant acts in this special case as inheritor and statutory

heir of his grandmother because he has killed his father, the inheritor in the first line.

(...)

5.10 The rules regarding unworthiness in the law of inheritance make explicit the underlying general legal principle to which the decision of the Supreme Court of December 7 1990 also refers, i.e. that someone should not profit from the intentionally caused death of someone else. In the light of this principle the right of the defendant to exercise his right to his legal share of the inheritance on the basis of clause 4:889 of the Dutch Civil Code would, according to the standards of reasonableness and fairness in the circumstances of this concrete case, lead to an unacceptable result.

5.11 The Court holds that in the present circumstances it is also important that the testatrix, who had suffered a great deal from what the grandson had done to her, had explicitly stated in her will that she did not want that the grandson would get a share of her inheritance. Although it is true that a testator cannot disinherit someone from his legitimate share to the inheritance, the right to the legitimate share is not absolute. In the present circumstances disobeying the will of the testatrix would conflict with the sense of justice in such a serious way that exertion of this right cannot be accepted.

Clause 4:885 of the Dutch Civil Code:

The following persons can be considered to be unworthy to be an inheritor and can, for this reason, be excluded from the inheritance:

1. He who has been convicted of killing or trying to kill the deceased;

Clause 4:889 of the Dutch Civil Code:

1. Replacement in the direct downward line takes place infinitively.

The discussion takes place between the plaintiffs, the other inheritors, and the defendant, the grandson. The plaintiffs ask the court to deny the defendant, the grandson, his right to the inheritance because a strict application of clause 4:889 in the exceptional circumstances of the concrete case would, from the perspective of reasonableness and fairness, be so contrary to the purpose of the rule, that it would lead to an unacceptable result. The Court argues that in the concrete circumstances it can be justified to make an exception on the basis of reasonableness and fairness because application would result in an unacceptable consequence that would not be compatible with the purpose and purport of the rule.

The Court honors the claim and decides that this exceptional case has not been foreseen by the legislator (5.7) and that for this reason in these exceptional circumstances it can be justified not to apply the rule on the basis of the derogating function of reasonableness and fairness. On the basis of the general legal principle expressed in the famous case of the murder marriage, the unworthy spouse, of (HR 7 December 1990) someone should not profit from the intentionally caused death of someone else. In the light of this principle, in the circumstances of this concrete case, according to the standards of reasonableness and fairness it would be an unacceptable result if the defendant could exercise his right of legal heir on the basis of clause 4:889.

An analysis according to the model is as follows:

1. Application of rule X in the amended meaning X' , implying that the rule is not applicable is to a person who has murdered his father, is reasonable and fair in the concrete case

1.1. Application of rule X in the amended meaning X' leads to an acceptable result in the concrete case that the son who has murdered his father does not profit from the intentionally cause death of his father

1.1.1a . Application in the amended meaning X' is compatible with the goals and values the rule is intended to realize, implying that it should be prevented that someone who is unworthy can inherit

1.1.1a.1. The amended meaning X' is compatible with the general legal principle underlying the law of inheritance, that someone should not profit from the intentionally caused death of someone else, formulated by the Supreme Court in his decision of December 7 1990 (the unworthy spouse)

1.1.1b. Application in the amended meaning X' is compatible with the personal interests of the parties involved in the concrete case, implying that it is in the present circumstances compatible with the sense of justice that the will of the testatrix is obeyed

1.1.1b.1. The testatrix, who had suffered a great deal from what the grandson had done to her, had explicitly stated in her will that she did not want that the grandson would get a share of her inheritance

The analysis demonstrates that the court, from the formal perspective, lives up to his burden of justification as specified in the model for his argumentative burden of proof. The exception is justified by three levels of argumentation specifying that the exception is in accordance with the law (1.1.1a.) and with the personal

interests of the persons involved in the concrete case (1.1.1b.).

Whether the justification is acceptable from the material perspective depends on the question whether the support for the arguments 1.1.1a. and 1.1.1b. is acceptable. Argument 1.1.1a. can be considered as acceptable because it is defended by the legal principle mentioned in 1.1.1a.1. that is also based on a decision of the Supreme Court in the case of the 'Unworthy spouse'. Argument 1.1.1b. can be considered as acceptable because it is adequately supported by 1.1.1b.1. in which it is specified that the history of the case makes clear that the personal interests of the testatrix are indeed in accordance with the decision to deny the grandson his right to his legal share.

In a similar way, the other line of argumentation supporting the claim that application in the strict meaning X" would be unreasonable and unfair can be analysed and evaluated.

This analysis and evaluation of an example show that the argumentation model makes it possible to reconstruct the underlying argumentation and to clarify the argumentative obligations of the judge that have to be met for the justification to be acceptable. If an argument from reasonableness can be reconstructed as part of the complex argumentation specified in the argumentation model and if a judge lives up to his formal and material burden of proof, an argument from reasonableness can be considered as an acceptable contribution to a rational legal discussion.

4. Conclusion

In this contribution I have developed a model for a rational reconstruction of arguments from reasonableness and fairness in the application of legal rules. The instrument offers a tool that can be used for the analysis and evaluation of all forms of complex argumentation in contexts in which the application of a legal rule is disputed and where the judge refers to reasonableness and fairness to make an exception to a rule. The model provides a heuristic tool for reconstructing the argumentative steps that are required for a complete justification of the decision and it offers a critical tool by clarifying the elements of the justification that should be submitted to critique. By thus applying the instrument to examples from legal practice the gap between normative descriptions of forms of legal reasoning and legal interpretation on the one hand, and actual legal practice on the other hand can be bridged.

NOTES

[i] See Aristotle, *Ethica Nicomachea* (Book V, x).

[ii] See Hesselink 1999 for an overview of the role of reasonableness and fairness (good faith) in European law.

[iii] See MacCormick and Summers 1991:524 ff and MacCormick 2005: 132 ff.

[iv] See MacCormick 2005: 114 about the role of values as the grounds of evaluation of juridical consequences.

[v] See MacCormick 2005: 114 about the role of values as the grounds of evaluation of juridical consequences. For a more detailed description of the requirements of a justification in the context of teleological-evaluative arguments see Feteris 2005.

[vi] For a more extensive description of such a model see Feteris 2005.

[vii] See Dworkin 1986:15-20

REFERENCES

Alexy, R. (1989). *A theory of legal argumentation. The theory of rational discourse as theory of legal justification*. Oxford: Clarendon Press. (Translation of *Theorie der juristischen Argumentation. Die theorie des rationalen Diskurses als Theorie der juristischen Begründung*. Frankfurt a.M.: Suhrkamp, 1978).

Aristotle. *The Nicomachean Ethics*. Translated with an introduction by David Ross. Oxford/New York: Oxford University Press.

Bell, J. (1983). *Policy arguments in judicial decisions*. Clarendon Press, Oxford.

Burg, E. (2000). *The model of principles*. Dissertation University of Amsterdam.

Dworkin, R. (1986). *Law's empire*. London: Fontana.

Eemeren, F.H. van & R. Grootendorst (1992). *Argumentation, Communication and Fallacies*. Erlbaum, Hillsdale, NJ.

Eemeren, F.H. van & R. Grootendorst. (2004). *A systematic theory of argumentation. The pragma-dialectical approach*. Cambridge University Press, Cambridge.

Eskridge, W.N. jr. (1994). *Dynamic statutory interpretation*. Cambridge: MA: Harvard University Press.

Feteris, E.T. (1999). *Fundamentals of legal argumentation*. Dordrecht etc.: Kluwer.

Feteris, E.T. (2002a). 'A pragma-dialectical approach of the analysis and evaluation of pragmatic argumentation in a legal context'. *Argumentation*, Vol. 16, No. 3, 349-367.

Feteris, E.T. (2002b). 'The role of arguments from consequences in practical argumentation in a legal context'. In H. Hansen C.W. Tindale, J.A. Blair, R.H.

- Johnson, R.C. Pinto (eds.), *Argumentation and its applications, Ontario Society for the Study of Argumentation*. (CD-rom)
- Feteris, E.T. (2003). 'The rational reconstruction of pragmatic argumentation in a legal context: the analysis and evaluation of teleological argumentation'. In: F.H. van Eemeren, J.A. Blair, C.W. Willard (eds.), *Proceedings of the fifth ISSA conference on argumentation*. Amsterdam: Sicsat.
- Feteris, E.T. (2004). 'Arguments from unacceptable consequences and a reasonable application of law'. In: J.A. Blair, D. Farr, H.V. Hansen, R.H. Johnson, C.W. Tindale (eds.), *Informal Logic@25*. Windsor, ON: OSSA (CD-rom)
- Feteris, E.T. (2005). 'The rational reconstruction of argumentation referring to consequences and purposes in the application of legal rules'. *Argumentation*, Vol. 19, No. 4, 459-470.
- Fuller, L. (1948). 'The case of the Speluncean Explorers' law', *Harvard Law Review*, Vol. 62.
- Fuller, L (1958). 'Positivism and the fidelity to law - A reply to professor Hart', *Harvard Law Review*, Vol. 71, 630-672.
- Golding, M. (1984). *Legal reasoning*. New York: Knopf.
- Gottlieb, G. (1968). *The logic of choice: An investigation of the concepts of rule and rationality*. London: Allen and Unwin.
- Hesselink, M.W. (1999). *De redelijkheid en billijkheid in het Europese privaatrecht* (Good faith in European private law). Dissertation Utrecht. Dordrecht: Kluwer.
- Lyons, D. (1993). *Moral aspects of legal theory. Essays on law, justice, and political responsibility*. Cambridge: Cambridge University Press.
- MacCormick, D.N. (1978). *Legal reasoning and legal theory*. Oxford: Clarendon Press.
- MacCormick, N and R.S. Summers. (1991). *Interpreting statutes. A comparative study*. Aldershot etc.: Dartmouth.
- Nozick, R. (1993). *The nature of rationality*. Princeton: Princeton University Press.
- Peczenik, A. (1989). *On law and reason*. Dordrecht etc.: Kluwer.
- Pontier, J.A. & E. Burg. (2004). *EU Principles on jurisdiction and recognition and enforcement of judgments in civil and commercial matters according to the case law of the European Court of Justice*. The Hague: Asser Press.
- Summers, R.S. (1978). 'Two types of substantive reasons: The core of a theory of Common-Law justification', *Cornell Law Review*, 63, 707-788.
- Wróblewski, J. (1992). *The judicial application of law*. (Edited by Zenon Bankowski and Neil MacCormick). Dordrecht etc.: Kluwer.