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Arguments from Unacceptable Consequences and a Reasonable Application of Law

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1. Introduction

In law, judges often use arguments in which they refer to 'reasonableness' to justify their decision. In legal theory, one of the central questions is whether it is allowed to use extra-legal or moral considerations, such as reasonableness, to justify a legal decision. In certain contexts, an argument from reasonableness is an accepted consideration to defend a legal decision. For example, in Dutch civil law, according to clause 6:248 of the Civil Code, a judge is allowed to make an exception to the general principle that a contract binds the parties: a rule that is the result of a contract does not apply if this would be unacceptable in the concrete circumstances according to standards of reasonableness and fairness.[1]

However, there are other forms of arguments referring to reasonableness that are controversial. Often judges refer to reasonableness to justify the decision not to apply a particular legal rule in the proposed literal interpretation in a concrete case because application would lead to unacceptable results that are incompatible with the goals the rule is intended to realize. When a judge refers to such a 'reasonable application of law', he claims that the results of application would be unacceptable because they would be incompatible with certain goals and values the rule is intended to realize from the perspective of a rational legislator.

In international legal theory, arguments from unacceptable consequences are called 'arguments from absurdity', '*reductio ad absurdum*' or 'apagogical arguments'.[2] In the Dutch legal literature this form of argument is called a 'reasonable application of law'. As to the acceptability of such arguments from unacceptable consequences referring to reasonableness, in the legal literature, there are different views. Some authors are of the opinion that such arguments can be acceptable under certain conditions. Other authors think that it is a less suitable way of applying legal rules because the judge decides autonomously, without referring to accepted interpretation methods, what reasonableness in a concrete case prescribes.[3] In ethics and in argumentation theory, the argument from unacceptable consequences, also called the *reductio ad absurdum,* is, in principle, considered as an acceptable way of defending a normative statement.[4] So, the question is what these different forms of arguments from unacceptable consequences that refer to reasonableness amount to in a legal context and whether and under what conditions they are an acceptable way of defending a legal decision.

I will approach these questions from the perspective of pragma-dialectical theory. Using this theoretical perspective, I will give a reconstruction of the complex structure of this form of argumentation and, taking into account legal-theoretical and legal-philosophical ideas, I will establish under what conditions arguments from unacceptable consequences that refer to reasonableness can be an acceptable justification of a legal decision and what forms

of rational critique are relevant in the evaluation.

In 2 I start with an overview of the descriptions in legal theory of various forms of arguments from unacceptable consequences referring to a reasonable application of law and I discuss the conditions under which this form of argumentation can be an acceptable way of justifying a legal decision. Then, in 3, I give a pragma-dialectical reconstruction of the structure and content of the argumentation. In 4 I explain how the legal-theoretical ideas about a correct use of this form of argumentation can be translated in terms of critical questions for the evaluation.

2. Arguments from unacceptable consequences and a reasonable application of law

In 2.1 I start with an overview of the various descriptions in the legal literature of forms of argumentation from unacceptable consequences referring to reasonableness, argumentation in which a judge defends his decision not to apply a rule in a concrete situation by claiming that application would lead to unacceptable or absurd results from the perspective of a reasonable application of law. In 2.2 I discuss the ideas of various legal authors about the adequacy of this form of argumentation as a justification of a legal decision.

2.1 Descriptions of arguments from unacceptable consequences in legal theory

With respect to what I call arguments from unacceptable consequences referring to a reasonable application of law, in their international research project on the use of various forms of interpretative arguments in various legal systems, MacCormick and Summers (1991:485-486) conclude that in all legal systems discussed in this project it is acknowledged that there can be a conflict between application of a legal rule in its literal interpretation and the observation that application in this interpretation would lead to an absurd or a manifestly unjust result. This 'argument from absurdity' or 'argument from justice' takes on a different form in various legal systems. Sometimes it is formulated in terms of a presumption or presupposition to the effect that the legislature does not intend absurd or manifestly unjust outcomes. In other cases it is constitutionalized and is thus formulated as an argument that invalidates the absurd or manifestly unjust result.

The common aspect of these forms of argumentation is that the judge refers to the consequences of the application of the rule in its literal interpretation and gives a negative evaluation of these consequences. This negative evaluation is based on the consideration that this outcome is incompatible with the purpose of the rule and the intentions of a rational legislator. The presumption or presupposition of the rational legislator is that he cannot have intended that a rule should be applied in a concrete case if application would lead to an absurd or unjust outcome that is incompatible with the goal of the rule. The judge claims that the final outcome would be unacceptable from the perspective of a reasonable application of law, because a reasonable application of law implies that application of a legal rule should not yield results that are incompatible with the intention of the rational legislator, with the goals and values underlying the rule.[5]

Various authors consider an argument from absurdity as a specific form of teleological argumentation in which the objective purpose, the rational ends or values that a statute is considered to have, the rational intention of the legislator, the so-called *ratio legis*, is reconstructed.[6] This rational intention is not the intention of the historical legislator but the reconstructed intention of a rational legislator who is supposed to intend a rule to have

reasonable results. As such it is a specific form of objective-teleological argumentation.[7]

In the Dutch legal literature, the decision not to apply a legal rule because application would lead to absurd or unjust consequences is called a 'reasonable application of law'. A reasonable application of law may occur in a situation in which there is discussion about the correct interpretation, but also in situations in which the meaning of the rule in the context of the concrete case is clear.

Various authors consider a reasonable application of law as a specific form of teleological argumentation.[8] The judge departs from the literal meaning of the rule on the basis of the intention of the legislator. It is argued that the legislator, if he had thought of the present case, would have admitted an exception for the present case because the consequences would be incompatible with the goal of the rule. Wiarda (1999:39) contends that an argument from reasonableness should not be considered as an argument *contra legem* (which would imply that only a linguistic interpretation is allowed), but as an argument based on the intention of the legislator.[9]

The German legal theorist Alexy (1989:283-284) gives a description of the structure and elements of argumentation from unacceptable consequences which he calls the *reductio ad absurdum*.[10] He formulates the following argumentation scheme:[11]

(J.17)
(1) The unacceptable result Z should be prohibited (O-Z)
(2) Interpretation R' of rule R would result in the unacceptable result Z (R' → Z)
(3) Interpretation R' is inadmissable (-R')

Alexy (1989:237) considers this argument from absurdity as a specific form of the general scheme (J.4.2) he formulates for teleological argumentation in a legal context:

(J.4.1)
(1) R' (interpretation R' of rule R) is intended by the legislator
(2) R'

(J.4.2)
(1) R is, for the legislator, a means to end Z
(2) Unless R' obtains, Z does not obtain (that is, R' is a condition for Z) (-R' → -Z)
(3) Interpretation R' is desirable (R')

To make the argumentation complete, the following rule of inference is necessary:

> 'If it is mandatory to realize Z then whatever means are necessary for the realization of Z are also mandatory'[12]

The argumentation underlying this rule of inference is expressed in (S):

(S)
(1) It is mandatory that the state of affairs Z obtains (OZ)
(2) Unless M obtains, Z does not obtain (that is, M is a condition of Z) -M → -Z
(3) It is mandatory that M obtains (OM)

However, Alexy (1989:237) does not specify how the general scheme (S) should be translated to (J.17). (S) presents the action M as obligatory, while (J.17) presents the interpretation R' as inadmissible. A translation of S to J.17 is not completely unproblematic.

According to Alexy, (1) and (2) should be justified in their turn. It should be defended that Z is unacceptable and that R' would result in Z. In his view, argument (1) connects this argument form with legal discourse and argument (2) with general practical discourse. However, he does not specify further how these two arguments in support of 1 and 2 should be reconstructed and how the arguments would relate to each other. So, Alexy offers us some basic ideas about the elements of the argument from absurdity and the structure of this argumentation scheme, but he offers no instrument for a reconstruction of the complex structure of a complete argument from reasonableness in a concrete case.

2.2 The adequacy of arguments from unacceptable consequences referring to reasonableness as a justification of a legal interpretation

In legal theory, the question whether arguments from unacceptable consequences appealing to a reasonable application of law can function as a sound justification of a legal interpretation is approached from the perspective of the hierarchy of interpretation methods. In the international research project on interpretative arguments MacCormick and Summers (1991:512 ff.) describe the hierarchy of interpretative arguments that is acknowledged in most countries, and that we also find in the legal literature in the Netherlands.

This hierarchy is based on the idea that, from the perspective of legal certainty, arguments that refer to the explicit formulations (linguistic argumentation) and intentions of the legislator (systematic argumentation) have priority. And if neither a linguistic nor a systematic interpretation offers an acceptable solution, judges may use teleological/evaluative arguments that refer to the intentions of the legislator and the goals and values that he is supposed to have wanted to realize with the rule. From the perspective of this hierarchy, arguments from absurdity and arguments from justice belong to this last category.

Since argumentation from unacceptable consequences in the context of a reasonable application of law invokes the (reconstructed) intention of a rational legislator, the question is what the terms 'reasonable' and 'rational' refer to in a legal context. Following Perelman (1979), Aarnio (1991:152-153) uses the terms *reasonable* and *rational* to explain the relation between a *reasonable* interpretation of legal rules and the concept of the *rational legislator* in situations in which a judge justifies his decision by arguing that application of a rule in the literal interpretation would lead to unacceptable results. In Aarnio's view, in law, the concept of *reasonableness* refers to the requirements of the application of legal norms by the judge in concrete cases and the concept of *rationality* to the requirements of legislation.

Aarnio holds that the concept of the 'rational legislator' implies that the legislator is supposed to seek consistency in every legislative act; in other words, rationality implies a tendency to avoid conflicts between legal rules. At the same time it means that the legislator is not assumed to seek an absurd result.[13] In the context of absurd consequences of application of a legal rule in a concrete case Aarnio (1991:131) contends that a choice for a reasonable application implies that the judge chooses the solution that is consistent with the intentions of a rational legislator who cannot have intended an absurd result.[14]

Other authors such as Bankowski and MacCormick (1991:371-313), La Torre, Pattaro and Taruffo (1991:222) and Peczenik (1991:312, 340) who contribute to the international research project on interpretative arguments come to a similar conclusion. A reasonable application of law implies that application of a legal rule that leads to an absurd/unjust/unreasonable result that is incompatible with the goals and values of the legislator may be corrected by making an exception to the rule because a rational legislator cannot have wanted an unreasonable result.

If the law is considered as a rational, that is as a coherent, consistent, goal-oriented and morally acceptable system of rules and principles, a reasonable application of legal rules implies that a judge tries to give effect to these rational ideas by only applying a rule in a concrete situation if it is in accordance with these rational starting points.[15] A reasonable application of law may thus result in departing from the literal words of the rule and interpreting it in the way that accords best with these rational starting points.

So, on the basis of these ideas a judge who decides not to apply a rule in its strict literal interpretation on the basis of the unacceptable consequences has a special burden to justify his decision. First, he is obliged to justify why a literal and a systematic interpretation do not offer an acceptable solution. Second, he must explain why the consequences of the decision are unacceptable from the perspective of a rational legislator by referring to the goals, principles and values underlying the rule under discussion.

In the following, in 3, I will establish what the argumentation that has to be put forward according to these obligations amounts to and in 4 I will explain how the legal norms of correctness connected to these obligations can be formulated in terms of critical questions for the evaluation.

3. A pragma-dialectical reconstruction of arguments from unacceptable consequences in the context of the application of law

Starting from the legal-theoretical descriptions of arguments from unacceptable consequences in the previous section, in this section I will explain how the argumentation that a judge is obliged to give from the ideal point of view can be reconstructed from a pragma-dialectical perspective. I will show that the advantage of this perspective is that it enables us to establish that the different forms of argumentation from unacceptable consequences can be reconstructed as variants of a specific form of complex argumentation that is often used in law. This complex argumentation consists on the main level of *pragmatic argumentation* and on the subordinate level of *objective-teleological* argumentation. Having reconstructed the argumentation schemes underlying the argumentation on the different levels, it can be established which forms of rational critique are relevant with respect to these argumentation schemes.

3.1 A pragma-dialectical reconstruction of the structure and content of the argumentation

In the reconstruction of argumentation from unacceptable consequences it is important to make a distinction between two different contexts in which argumentation from unacceptable consequences is put forward, because they have different consequences for the reconstruction of the argumentation.

In the first context (A), a judge decides not to apply a legal rule in its proposed strict literal interpretation. In this context there is only one standpoint: 'rule X should not be applied in the strict literal interpretation X' (-X). In the second context (B), a judge decides not to apply a legal rule in the literal interpretation X' but in another interpretation X" because X' would have unacceptable results and X" has acceptable results. In this context there are two standpoints: (1) rule X should not be applied in interpretation X' (-X') and (2) rule X should be applied in interpretation X". (+X"). In the second context, as we will see, the structure of the argumentation differs from the structure in the second.

First, I will reconstruct the argumentation on the level of the main argumentation,

then the argumentation on the level of the subordinate argumentation.

The level of the main argumentation

In both contexts, the judge defends his decision not to apply the rule by referring to the consequences of application (1.1a) and by evaluating these consequences as unacceptable (1.1b). On the level of the *main argumentation*, the argumentation scheme underlying the argumentation is the argumentation scheme of *pragmatic* argumentation that expresses a causal relation between the argument referring to the consequences and the standpoint. The consequences are evaluated as negative or positive. Following Feteris (2002a), this argumentation can be reconstructed as the negative form of pragmatic argumentation:

(A) Standpoint 1 In this concrete case, rule X should not be applied **(-X)**
Because 1.1a In this concrete case, application of X would lead to Y
1.1b Y is unacceptable from a legal perspective
(1.1a-1.1b')
If Y is unacceptable from a legal perspective, and application of X would lead to Y in this concrete case, then X should not be applied

In the context of (B) the judge decides to apply the rule, although not in the proposed interpretation X' but in another interpretation X". This has consequences for the complexity of the argumentation, because the argumentation consists of coordinative argumentation in defense of two standpoints: a justification of the negative standpoint (-X) and a justification of the positive standpoint (+X):

(B) Standpoint 1 In this concrete case, rule X should not be applied in the restricted literal interpretation X' **(-X')**
Because 1.1a In this concrete case, application of X in the restricted literal interpretation X' would lead to Y'
1.1b Y' is unacceptable from a legal perspective

Standpoint 2 In this concrete case, rule X should be applied in an extensive interpretation **(+X'')**
2.1a In this concrete case, application of X in interpretation X" would lead to Y"
2.1b Y"is acceptable from a legal perspective
(2.1a-2.1b)
If Y" is acceptable from a legal perspective and X" would lead to Y" in this concrete case, then X" should be applied in the concrete case

Underlying the argumentation is the general argument (1.1a-1.1b-2.1a-2.1b'):

If Y' is unacceptable from a legal perspective, and application of X (in the literal interpretation X') would lead to Y' in this concrete case, then X should not be applied (in the literal interpretation X'), and if interpretation X" of X would lead to Y" and Y" is acceptable from a legal perspective, interpretation X" is to be preferred

that expresses how the judge has weighed the consequences of the two rival interpretations.

I use the general term 'unacceptable' to refer to consequences that are unacceptable, undesirable, absurd, etcetera.

The level of the subordinate argumentation

In the legal literature it became clear that the emphasis lies on the justification of the normative argument 1.1.b/2.1b that the consequences of application in the concrete case are (un)acceptable from a legal perspective. As we have seen in the previous section, the argument referring to the unacceptability of the consequences of application in the literal interpretation and the acceptability of the proposed interpretation must be justified by referring to certain legal presuppositions. The question to be answered is how the argumentative relation between the (un)acceptability of the consequences and these legal presuppositions could be reconstructed from a pragma-dialectical perspective.

The general idea among the legal authors is that the result of application in the concrete case is evaluated from the perspective of the requirements of a reasonable application of law. In their view, a reasonable application in a concrete situation should not yield results that are unacceptable or absurd in light of the purposes, goals, principles, values etcetera the rule is intended to realize. They invoke the intention of a rational legislator, which functions as an ideal that prescribes consistency in the application of law, that is that judges should apply legal rules in such a way that the results of application are compatible with the goals and purposes of the rules.

The argumentation underlying these presuppositions can be reconstructed as argumentation expressing that a certain result would be (un)acceptable because it is (in)compatible with a particular goal, value etc.[16]

Substandpoint	1.1b	Y is (un)acceptable
Because	1.1b.1a	Y is (in)compatible with goal G (principle P, value V, etcetera)
	1.1b.1b	Goal G is a rational goal objectively prescribed by the valid legal order[17]
	(1.1b.1a-b')	If goal G is a rational goal objectively prescribed by the valid legal order, and if Y is (in)compatible with this goal G, then Y is (u)acceptable from a legal perspective

The rationale for a reasonable application of law is that a rational legislator cannot have intended an application of rule X that would lead to a consequence Y which is unacceptable because it is incompatible with goal D etcetera. Therefore, a reasonable application of law requires that the judge apply the rule in the interpretation that is consistent with the goals etcetera that a rational legislator is supposed to have intended.

From a pragma-dialectical perspective, the argumentation scheme underlying the subordinate argumentation is an argumentation scheme based on a *symptomatic* relation in which it is decided that, given certain characteristics, something belongs to a certain category, deserves a certain predicate, etc. In this case it is contended that if the result of a legal decision has the characteristic that it is (in)compatible with certain legal goals etcetera, this decision is (un)acceptable.[18,19]

If, on this sub-level, the judge refers to the goals and intentions of the legislator, from

a legal perspective the symptomatic argumentation can be considered as a specific form of objective-teleological argumentation. It is argued that the rejected application/interpretation is incompatible with a particular objectively prescribed legal goal. If the judge also proposes an alternative interpretation, he argues that the preferred interpretation is compatible with this objectively prescribed goal.

In the following section, by way of illustration, I will discuss some examples of these forms of argumentation from unacceptable consequences and I will show how they can be reconstructed from a pragma-dialectical perspective.

3.2 An exemplary analysis of examples of arguments from unacceptable consequences with an appeal to a reasonable application of law

In this section I will demonstrate how the above described pragma-dialectical perspective enables us to reconstruct the argumentation underlying the justification of legal decisions in concrete cases in which the judge defends the decision not to apply a legal rule on the basis of the unacceptable consequences of a literal interpretation and by appealing to a reasonable application of law.

First, in 3.2.1, I will discuss two examples from the situation characterized in the previous section as context (A) when a judge decides not to apply a legal rule in its strict literal interpretation and where the standpoint is: 'rule X should not be applied' (-X). Second, in 3.2.2, I will discuss two examples from context (B) when a judge decides not to apply a legal rule in the strict literal interpretation (- X') but in another extensive (teleological) interpretation (+X").

3.2.1 The decision not to apply rule X in the strict literal interpretation (context A)

In the first case the Supreme Court decides not to apply a rule that, according to the judge in appeal, seems applicable in the literal interpretation in the concrete case. The case is about the question whether a wife can be deprived of her right to compensation for the physical injuries that make her unable to work if these injuries have been caused by an accident that has been caused by her husband's fault. The question is whether the rule of clause 95 of the Statute of Accidents of 1921 that obliges the driver of a car to pay the damages that are caused by his fault, is also applicable between spouses. The Supreme Court rules that the rule that holds the husband liable for the damages does not force to the conclusion that the wife is denied compensation, because it would lead to the unacceptable result that the wife would be deprived of her right to compensation, which would be incompatible with the goal of the rule. According to the Supreme Court, a reasonable application of law implies that a rule should not be applied if application has consequences that are unacceptable from the perspective of the goal of the rule and that the legislator evidently could not have wanted if he had thought about these cases.

In this case, Mrs. Millenaar has been wounded in an accident caused by her husband.[20] As a consequence of these injuries, she has become unable to work. The insurance company of her former employer pays her the costs necessary for medical treatment. Subsequently, the insurance company sues the husband and claims that he should pay them back the costs because he has caused the accident through his fault. As a support for their claim, the insurance company refers to clause 95 of the dutch Industrial Accident Act (Ongevallenwet) of 1921, saying that the driver of a car is liable for the damages he has

caused by his fault. Therefore the insurance company is of the opinion that Mr. Millenaar should pay his wife the damages, which implies that he should pay the insurance company back the costs they have paid to Mrs. Millenaar.

Finally, the Supreme Court decides that clause 95 does not apply in this case because application would lead to the unacceptable result that Mrs. Millenaar would not receive compensation because her husband is the person who has caused the accident. The Supreme Court gives the following justification:

> **that this course of events, which would lead to the result that** the insured would be deprived of the compensation she is entitled to on the basis of the Industrial Accident Act of 1921 (for which marriage nor fault are relevant), because she has community of property with the person who has caused the accident through his fault, **is so incompatible with the purport of the legal accident insurance**, **that a reasonable interpretation of clause 95 of that act implies that this clause should not be applied in the concrete case**;

A pragma-dialectical reconstruction is as follows:

Standpoint:	-X	In this concrete case, the rule of clause 95 of the Industrial Accident Act should not be applied	
Because:		1.1a	Application would lead to the result that Mrs. Millenaar would be deprived of her right to compensation based on the Industrial Accident Act on the sole ground that she has community of property with the person who has caused the accident through his fault (Application of X would lead to Y)
		1.1b	It is unacceptable that Mrs. Millenaar would be deprived of her right to compensation based on the Industrial Accident Act for the sole reason that she has community of property with the person who has caused the accident through his fault (Y is unacceptable)
Because		1.1b.1	This is incompatible with the purport of the Industrial Accident Act (Y is incompatible with goal G)

3.2.2 The decision not to apply rule X in the strict literal interpretation X' but in another extensive teleological interpretation X'' (context B)

In the following two cases, the Supreme Court does not only reject a literal interpretation but also proposes an alternative interpretation. Because the Supreme Court defends two standpoints, the structure of the argumentation is more complex than in the previous case.

The two cases are about the legalization of a child that has not yet been recognized by

the father. In the first case the father dies before he has knowledge of the pregnancy, in the second case he lapses into a coma before the child is born. In these cases the central question is whether the rule of 1:215,2 of the Dutch Civil Code:

> 1. If after the recognition of a child the planned marriage of its parents has become impossible because of the death of one of them, legalization can be requested of the King. The request can be submitted by the surviving parent or, if this parent dies, by the child.
> 2. The request for legalization can also be submitted if the man who, having knowledge of the pregnancy, had the intention of marrying the mother but dies before the child is born without having recognized the child.

is also applicable in these situations. In a literal interpretation, this rule would not be applicable. In the first case it would not be applicable because it requires knowledge of the pregnancy as a condition for legalization. In the second case it would not be applicable because it requires that the father dies before the child is born. However, in both cases, the Supreme Court is of the opinion that the result of such a literal interpretation would be unacceptable in the light of the goal of the rule. In his view, a reasonable application of the law implies that the rule should not be applied in the literal interpretation (which would lead to a rejection of the request for legalization) but should be applied extensively in these concrete cases (which would lead to granting the request for legalization).

In the first case, (Hoge Raad December 3, 1992, NJ 1993, 731), the Supreme Court rules:

> '**A strict application of this requirement would, in a case like the present case, lead to an unacceptable result, that evidently has not been intended by the legislator**: the child is refused the state of a legal child for the sole reason that the father died so soon after the conception that he could not have had knowledge of the pregnancy. The purport of the rule - legalization of a child that has not yet been recognized in cases in which an intended marriage cannot take place because of the death of the father - does not oblige to accept this result. **A reasonable application of law** therefore implies that the facts that resulted from hearing the mother, that the father wanted to beget a child by the mother and that the mother would have informed the father of her pregnancy as soon as this would have been possible, are sufficient. From the above it follows that the conditions of clause 215, 2 are fulfilled and that there is no impediment against granting the request, which implies that according to the Supreme Court the request can be granted.

In the second case (Hoge Raad November 21, 1996, NJ 1997, 422) the Supreme Court rules:

> **It would, however, lead to an unacceptable result, that the legislator evidently cannot have intended**, that these circumstances would impede granting the request for legalization. Thus the child would be denied the state of a legal child for the sole reason that the father, with whom it was impossible to have any contact since several days before the child was born, died several days after the child was born. The purport of clause 1:215, 2 is to make it possible to legalize a child that has not yet been recognized in cases in which the intended marriage cannot take place because of the death of the father. It is in keeping with this purport to treat the present case in a similar way as the case in which the man dies before the child is born. From the above

it follows that the conditions for legalization have been fulfilled and that there is no impediment to granting the request, so that, according to the Supreme Court, the request can be granted.

From a pragma-dialectical perspective, the argumentation in these cases could be reconstructed as follows, using the model B:

Standpoint: 1 In this concrete case, the rule of 1:215,2 of the Dutch Civil Code should not be applied in the literal restricted interpretation X' (implying that the rule is not applicable in a situation in which the man dies before he knows about the pregnancy/lapses into a coma before the child is born **(-X')**

Because:

1.1a Strict application in the literal interpretation (X') would lead to the unacceptable result (Y'), that the legislator evidently cannot have intended, that the child would be refused the status of a legal child for the sole reason that the father died so soon after the conception that he could not have had knowledge about the pregnancy/that the father lapsed into a coma before the child was born

1.1b It is unacceptable that the child would be refused the status of a legal child on the sole ground that the father died so soon after the conception that he could not have had knowledge about the pregnancy/that the father lapsed into a coma before the child was born (Y' is unacceptable from a legal perspective)

1.1b.1 The purport of the rule (to make it possible to legalize a child that has not yet been acknowledged in cases in which the planned marriage cannot take place because of the dead of the father) does not oblige to accept this result (Y' is incompatible with G)

Standpoint 2 In this concrete case, the rule of 1:215,2 of the Dutch Civil Code should be applied in an extensive interpretation **(+ X'')** (implying that the rule is also applicable in a situation in which the man dies before he knows about the pregnancy/lapses into a coma before the child is born)

In the first case, the following argument in support of 2 is put forward:

2.1a On the basis of the purport of the rule the situation in which the father wanted to beget a child by the mother and dies before he has knowledge of the pregnancy belongs to the area of application of the rule (Y is compatible with G)

3.3 The pragma-dialectical analysis of arguments from unacceptable consequences

In all three cases (that invoke a reasonable application of law) we saw that the Supreme Court justifies his decision not to apply a rule by referring the unacceptability of the consequences of application of the rejected interpretation, and by referring to the acceptability of the consequences of the preferred interpretation. The unacceptability of the consequences is defended by stating that these consequences are incompatible with the purport of the rule.

These reconstructions show that argumentation based on a reasonable application of law can be reconstructed as a complex form of argumentation consisting of pragmatic argumentation referring to the unacceptable consequences of application on the main level and symptomatic argumentation referring to the incompatibility of the consequences with the purport or goal of the rule on the subordinate level. In all three cases, from the perspective of a reasonable application of law, a decision that would lead to consequences that are unacceptable because they are incompatible with the purpose of the rule relevant in this case, should not be given.

These reconstructions also show that the complexity of the argumentation on the main level is connected to the amount of standpoints that are in dispute. In the second and third case that are examples of context (B), the Court rejects a restricted literal interpretation (X') and opts for an extensive objective-teleological interpretation (X"). The argumentation on the main level reflects how the two interpretations are weighed against each other on the basis of compatibility with the goal of the rule and consistency with the principles and values underlying this goal.

The pragma-dialectical instrument for the analysis of argumentation from unacceptable consequences appealing to a reasonable application of law shows how this form of argumentation can be reconstructed in a rational way as a specific implementation of a complex form of argumentation that tries to show that the decision in the concrete case is acceptable from the perspective of fairness in the concrete case that takes into account the consequences of application in the concrete situation and that the decision is acceptable from the perspective of the legal system, e.g. that it is consistent with the legal system as a whole, with other relevant rules, principles, goals and values.

In the following section I will explain how the pragma-dialectical perspective enables us to specify how the argumentation thus reconstructed can be submitted to rational critique.

4. The evaluation of argumentation from unacceptable consequences

From a pragma-dialectical perspective, for the evaluation of the various argumentation schemes that underlie the complex structure of argumentation from unacceptable consequences, various types of critical questions are relevant. The rationale for reconstructing the argumentation schemes is to be able to establish which critical questions are relevant in the evaluation of various forms of argumentation.

The first type of critical question asks whether this type of argumentation is an adequate way of defending this type of standpoint in this context. The second type of question asks whether the argumentation has been applied correctly in the concrete case. In what follows, in 4.2 I will address the first type of question, and in 4.3 I will address the second type of question.

4.1 Are arguments from unacceptable consequences an adequate way of defending a legal decision?

The pragma-dialectical reconstruction of the complex structure of argumentation from unacceptable consequences appealing to a reasonable application of law made clear that this form of argumentation, to be adequate as a complete justification of the decision, should consist of two levels. On the main level the judge should explain that the consequences are unacceptable. To justify that the consequences are unacceptable, it is necessary to justify on the subordinate level why they are unacceptable in the context of the application of law. A complete justification consists of pragmatic argumentation underlying an argument from negative consequences and symptomatic argumentation consisting of objective-teleological argumentation.

This requirement for a complete justification is in accordance with ideas developed in legal theory I have described in 2. As I have also described elsewhere (Feteris 2003a), and according to legal authors such as Bell (1983), Gottlieb (1968), MacCormick (1978), Summers (1978), a complete justification of the interpretation of a legal decision should consist of both arguments referring to the effects of the legal decision and arguments that relate the decision to the legal system. A complete justification in the ideal situation consists of arguments from consequences referring to the consequences of applying the rule in the concrete case and similar future cases, and arguments from consistency that show that the decision is consistent with the principles, goals, values etcetera of the legal system.

The first question to be answered in the evaluation is whether the complex argumentation consisting of pragmatic argumentation referring to unacceptable consequences and symptomatic-objective-teleological argumentation referring to the incompatibility of these consequences with the goal of the rule from the perspective of a reasonable application of law, is an adequate way of defending a legal decision. As I have explained elsewhere in Feteris (2002a, 2002b, 2003a, 2003b), pragmatic argumentation and objective-teleological argumentation can form an adequate way of defending a legal decision.

From the perspective of a modern approach of the hierarchy of interpretation methods, these forms of argumentation belonging to the category of objective-teleological/evaluative argumentation can form an acceptable justification if the judge justifies why a literal and a systematic interpretation, that refer to the explicit intentions of the legislator, do not lead to acceptable results. The judge can justify his decision not to apply the rule (in the literal interpretation) by referring to the (reconstructed) objective rational intention of the legislator by explaining that the preferred solution is based on what a rational legislator is supposed to have intended as the preferred interpretation of the rule if he had thought of the present case.

On the basis of this hierarchy, the relevant questions with respect to pragmatic and objective-teleological argumentation are:

1a Does the judge explain why a linguistic and a systematic interpretation do not offer an acceptable interpretation of rule R?

1b Does the judge explain why the proposed interpretation is desirable from the perspective of its consequences in the concrete case and from the perspective of the goals, principles and values of the legal system?

4.2 Has the argumentation from negative consequences been applied correctly in the concrete case?

From a pragma-dialectical perspective, for different forms of argumentation schemes different critical questions are relevant with respect to a correct application in the concrete case. In earlier publications Feteris (2002a, 2002b, 2003a, 2003b) I have described the critical questions that are relevant for the argumentation scheme of pragmatic argumentation and the argumentation scheme of symptomatic objective-teleological argumentation.[21]

Critical questions for pragmatic argumentation

As I have explained in Feteris (2003a), pragmatic argumentation is a form of general practical argumentation that is also used in the law in the context of the application and interpretation of legal rules.

For the normative argument:

2 Is Y indeed (un)acceptable in light of relevant legal principles, social goals and values?

For the empirical argument:

3 Does X' indeed lead to Y?

Critical questions for objective-teleological argumentation

As I have explained in Feteris (2003b), objective-teleological argumentation is a specific legal implementation of the general form of pragmatic argumentation. For the context of the interpretation of legal rules I have formulated the following questions:

2a Is goal G indeed a rational goal objectively prescribed by the valid legal order and is goal G based on general legal principles and/or values underlying the legal order?
2b Is attaining goal G not inconsistent with other goals G', G" etc.?
3a Is Y indeed incompatible with goal G?
4a Does interpretation R' have any undesirable side-effects?
4b Is R' coherent and consistent with relevant legal values and principles?

The critical questions thus formulated on the basis of an integration of pragma-dialectical and legal-theoretical ideas, specify which forms of critique are relevant in the evaluation of argumentation from unacceptable consequences from the perspective of a reasonable application of law. If the critical questions can be answered satisfactorily, the argumentation constitutes a sufficient justification of a legal decision.

5 Conclusion

In this contribution I have analyzed the role of arguments from unacceptable consequences appealing to reasonableness in the justification of judicial opinions. Integrating

ideas from pragma-dialectical argumentation theory and legal theory, I have clarified the complex argumentation structure of this form of argumentation and the argumentation schemes underlying this complex argumentation. I have explained which forms of rational critique are relevant in the evaluation.

By clarifying the structure and content of this form of complex argumentation, I have established that a complete version of this form of argumentation is a specific implementation of the argumentation that is, according to various authors in modern legal theory, the standard for a sound justification of the interpretation of a legal rule. In the case of the argumentation I discussed here, the argumentation consists of general practical argumentation (pragmatic argumentation) and objective-teleological argumentation (symptomatic argumentation).

The pragma-dialectical reconstruction of the argumentation clarified that the element of the argumentation that invokes the evaluative moral element is the argument referring to the unacceptability of the consequences in the main argumentation. To connect this evaluative element to the law, the subordinate argumentation on the second level functions as a justification which shows why the consequence is unacceptable from a legal point of view. With this argumentation, the judge refers to the (reconstructed) objective goals and values underlying the legal system, that are the goals and values a rational legislator is supposed to realize and secure by formulating this rule. Given these goals and values, it would be against the intentions of a rational legislator to apply a rule that would lead to results that are incompatible with these goals and values. The appeal to reasonableness thus implies that the judge tries to show that the consequences in the concrete case are unacceptable from the perspective of a rational legislator. The proposal for a reasonable application of the rule in the concrete case implies that a solution is proposed and justified that is compatible with the goals of a rational legislator.

The pragma-dialectical reconstruction offers an important supplement to the legal-theoretical literature in various respects.

First, the pragma-dialectical reconstruction makes clear that various forms of argumentation such as arguments from absurdity, etc. and a reasonable application of law that are treated as completely different forms of argumentation in legal theory, could be considered as different variants of the same type of argumentation, the negative form of pragmatic argumentation, argumentation referring to negatively evaluated consequences.

Second, I have shown that the pragma-dialectical approach makes it possible to give a systematic reconstruction of the complex structure of this form of argumentation by taking into account the various aspects of the difference of opinion. Authors in legal theory such as Alexy only describe the elements and the structure of the *reductio ad absurdum* on the main level, but do not go into the justification of the unacceptability of the consequences on the sub-level. Furthermore they do not always take into account the possibility of a balancing of various alternative interpretations.[22]

Third, I have established that the argumentation schemes underlying the argumentation on the main level and sub-level are different forms of argumentation. They can be reconstructed as pragmatic-consequentialist argumentation on the main level and symptomatic-objective-teleological argumentation on the sub-level, and argumentation of consistency with legal principles and values on the lowest level. Most authors in legal theory only say that arguments from absurdity can be considered as a form of teleological argumentation, but they do not specify the content and structure of this argumentation.

I have explained that arguments from reasonableness can be an acceptable way of justifying a judicial opinion if certain conditions are fulfilled. I have explained that, from a legal perspective, 'reasonableness' is not necessarily a subjective criterion that is not open for discussion. By referring to the unacceptability of the rejected outcome and the acceptability

of the preferred solution a judge can explicitly account for the balancing of a legally desirable and a legally undesirable solution. In doing so, he has the obligation to refer to objective goals intended by the legislator and to the principles and values underlying these goals. By explicitly referring to these legal considerations, he opens his argumentation to rational critique and intersubjective testing.

To be able to get a better understanding of the legal backgrounds of this form of argumentation, further research into the legal, argumentation-theoretical and philosophical definitions and uses of the concepts 'rational', 'reasonable', 'consistency' and 'incompatibility' are required. Furthermore, to get a systematic insight into the way in which this form of argumentation is used in legal practice, further reconstructions using the pragma-dialectical perspective developed here for the analysis and evaluation of argumentation from unacceptable consequences should be carried out.

Notes

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1. Art. 6:248 lid 2 B.W.: 'Een tussen partijen als gevolg van de overeenkomst geldende regel is niet van toepassing, voor zover dit in de gegeven omstandigheden naar maatstaven van redelijkheid en billijkheid onaanvaardbaar zou zijn.'

2. The term '*reductio ad absurdum'* is used by Golding (1984:59), La Torre et al. in MacCormick and Summers (1991:222), the term 'argument from absurdity' by Bankowski and MacCormick in MacCormick and Summers (1991:366), the term 'argument from unacceptability' by Alexy (1989:283), the term 'apagocial argument' by Perelman (1979a), Tarello (1972, 1980) and La Torre a.o. in MacCormick and Summers (1991:233).

3. See Pontier (1995:38) and Veegens (1971:284). Algemene bezwaren tegen resultatenrechtsvinding omdat daarmee een beroep wordt gedaan op een buitenjuridisch criterium.

4. Walton (1996:75-77) is of the opinion that in the general context of deliberation an argument from consequences (whether positive or negative) is an acceptable way of arguing. Certain forms of argumentation from negative consequences, that Walton calls *threat appeal* arguments can be fallacious if they constitute an illicit shift to a different type of dialogue. In the context of arguments from reasonableness in the application of law discussed here, this fallacious use of threat appeal arguments does not occur.

5. See also Wróblewski (1991:105-106).

6. See Aarnio (152-163) for Finland, La Torre, Pattaro, Taruffo (221-222) for Italy, Bankowski and MacCormick (371-373) for England and Scotland, Peczenik (312) for Sweden in MacCormick and Summers (1991).

7. In MacCormick and Summers (1991:371) Bankowski and MacCormick argue that there is a specific form of teleological argumentation, an argument from 'justice', that refers to the goal of the rule in the light of what Dworkin (1986) calls the 'integrity' of the legal system. An argument on the basis of integrity goes further than the *ius positivum* and becomes more

axiological in a wider sense. Bankowski and MacCormick ask themselves in this context how far this gets one beyond merely expressing an appeal to straightforwardly legal principles and values.

8. See for example Geppaart (1968), Wiarda (1999:40).

9. According to the Dutch authors den Boer (1991) who discusses the use of this form of argumentation in the context of tax law, the decision not to apply a legal rule on the basis of unacceptable consequences will occur in situations in which the quality of the legislation is poor or if there are important changes in society after the rule has been formulated (because of technological or ideological developments) which make that the law has become out of date. Other developments that play a role are the influence of civil law, non-discrimination clauses in treaties, a balancing on the basis of general principles, etcetera.

10. For a similar description see Golding (1984:58-59) who considers the *reductio ad absurdum* as a specific form of goal argumentation. The argumentation states that because X is a goal the law ought to promote, and legal recognition of Y would defeat the realization of X, Y ought to be prevented by the law/ought not to be legally recognized.

11. Alexy uses the German term 'Untragbarkeitsargument' (1978:345-346) and the English term 'argument from unacceptability' (1989:283-284). Alexy takes this description of the analysis of this form of argumentation by U. Diederichsen, 'Die 'reductio ad absurdum' in der Jurisprudenz', In: Festschrift f. K. Larenz, hrsg. von G. Paulus und U. Diederichsen, C.-W. Canaris, München 1973, pp. 155-179.

12. In Alexy's view, (J.17) is a strong form of an argument from unacceptability, weaker forms would involve showing that Z is not absolutely prohibited but that it is only the worst of available alternatives.

13. Aarnio (1991:152-153) contends that the concept of the rational legislator also contains a presupposition of morality: the legislator is assumed to seek only results that are in harmony with the prevailing system of morality and values. In this respect Aarnio considers the demand of justice as part of the rational drafting of legislation.

14. Aarnio in MacCormick and Summers (1991:131) stresses that one of the major problems in adjudication in Finland will be the balancing of the relative weight of predictability and equity in the individual case must established. Overemphasis on predictability (for example 'pacta sunt servanda') leads to a rigid attitude, while an emphasis on equity in the individual case leads to a decrease in predictability. Peczenik (1989:198-204) specifies what consistency and coherency in a legal context imply. For a description of arguments from coherence and consistency see MacCormick (1978).

15. For a description of the principles of rationality in law see Aarnio (1987), Alexy (1981), Aarnio, Alexy and Peczenik (1991), and Peczenik (1989).

16. In Dutch examples of this form of argumentation judges use the formulation 'is strijdig met' or 'is in strijd met' to express that the result is incompatible with the goals etcetera of the rule.

17. In its present form, the reasoning underlying this form of argumentation is invalid. To

make the argumentation complete and logically valid, certain translations and additions are required.

18. Cf. Schellens (1985:127-140) who describes two ways in which a rule can be justified (apart from a justification on the basis of authority and a justification on the basis of similar cases). The first mode of justification is on the basis of coherence with other rules (he calls this internal justification):

R1 is coherent with/follows from R2

R2 is acceptable

Therefore: R1 is acceptable.

The second mode of justification is on the basis of the consequences of application:

Application of R leads to A etc.

A etc. is desirable

Therefore: R is acceptable.

19. Schellens (1985:130 ff.) would characterize this form of argumentation as argumentation on the basis of evaluation rules: given certain characteristics, a certain evaluation should be applied. The relation between the characteristics and application of the evaluative predicate can be one of necessary conditions, sufficient conditions, and necessary and sufficient conditions.

20. Hoge Raad February 2, 1973, NJ 1973, 225.

21. From a pragma-dialectical perspective we can distinguish two forms of objective-teleological argumentation: one form based on pragmatic argumentation described in Feteris (2003b) and one form based on symptomatic argumentation described here. In both cases, for the normative argument 1.1b.1b the same critical questions are relevant.

22. As has been argued by various legal authors such as Bertea (2003) and MacCormick and Summers (1991:529) not all forms of legal argumentation can be easily reduced to classical forms of legal reasoning or single arguments. I have shown that by using the pragma-dialectical perspective it can be accounted for how various forms of legal argumentation can be related in a complex argumentation, and how the various forms of argumentation can have a function on various levels.

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