May 17th, 9:00 AM - May 19th, 5:00 PM

The role of Arguments from Consequences in Practical Argumentation

Eveline T. Feteris
Univ. of Amsterdam

Title: The role of Arguments from Consequences in Practical Argumentation
Author: Eveline T. Feteris

---

1. Introduction

Arguments from consequences, also called 'pragmatic arguments', have been a neglected subject of research in argumentation theory. As has also been stressed by Walton (1999:162-263), the *argumentum ad consequentiam* has not been recognized clearly enough as a distinctive argumentation scheme or form of inference in its own right by logical theories of reasoning. In logic, from the perspective of fallacy theory, the focus has been only on fallacious forms of arguments from consequences such as *ad consequentiam* and *slippery slope*.

As has been pointed out by van Eemeren and Grootendorst (1987) and Walton (1990: 84-85, 1996:168-200, 1999), arguments from consequences can be a correct discussion move in the context of a practical discussion in which the participants argue for and against a particular course of action, but not in a theoretical discussion about the truth of a particular statement. In argumentation theory, however, no systematic and comprehensive account of the functional use of arguments from arguments from consequences has been given.

For this reason, it seems a good idea to take a closer look at the ideas about the use of arguments from consequences in other disciplines in which this form of argument plays an important role such as legal philosophy. In legal philosophy authors are discussing the question of which kinds of arguments can play a role in justifying legal decisions (which they consider as a specific form of practical decisions). One of the questions is what the exact role is of arguments from consequences and what the exact relation is between arguments from consequences and other legal arguments.

In this paper I will determine which function arguments from consequences can have in practical argumentation in a legal context, and what the exact relation is between arguments from consequences and other legal arguments. I will make a connection between ideas on arguments from consequences in ethics and legal philosophy with a pragma-dialectical framework for the analysis and evaluation of arguments from consequences. I will specify how these ideas can constitute a rationale for the analysis and evaluation of arguments from consequences. Central questions are: what does an argument from consequences exactly consist of, why is argumentation from consequences important in a practical (legal) discussion, what is the relation between arguments from consequences and other arguments, and which standards of soundness are relevant?

2. Arguments from consequences and practical discussions

Before I start with my discussion of the role of arguments from consequences in legal philosophy, first I will briefly sketch the background of the study of arguments from consequences in the context of practical discussions.

In disciplines such as ethics and legal philosophy the role of arguments from consequences is studied in the context of the study of practical arguments, arguments which are used to defend a

decision about a preferred course of action. Most practical discussions, especially ethical and legal discussions, are concerned with the application of rules in concrete situations.

In most situations, the application of a rule is unproblematic and no further justification of its applicability is required. But there are also situations in which there are more rules applicable in a concrete case, or in which the rule must be interpreted. In these situations, further argumentation is necessary to justify why and how a rule must be applied. In this justification, arguments from consequences can play a role.

There are three situations in which further argumentation on the basis of consequences plays a role. First, if there are two rules applicable in the concrete case, and a choice must be made for one of the two, the desirability of the consequences of applying rule A and the undesirability of applying rule B can be relevant as a justification for the final decision. Second, if the rule must be interpreted, the desirable consequences of interpretation X and the undesirable of interpretation X' can be part of the justification for the final decision. Finally, if someone decides not to apply a rule, it can be argued that the rule must not be applied because application will have undesirable consequences. So, the consequences of applying a rule (in a particular interpretation) can be a relevant element of the justification of a practical decision.

Given that consequences can play a role in justifying a decision about the application of rules, the following question is which function arguments from consequences can have and what their relation is to other arguments. In ethics and legal philosophy, according to various authors, there are two ways of justifying a practical decision.[1]) The first way consists of *teleological* or *consequentialist* argumentation in which it is shown that bringing about action x is a good instrument for achieving a particular goal or policy z. This implies that argumentation defending the desirability of action x must show that x has consequences which are desirable in the light of z. Arguments of this kind are also called *goal reasons* or *policy arguments*.

The second way consists of *deontological* or *moral* argumentation in which it is shown that action x is good by appealing to some accepted (ultimate) principle, which is not derived from some form of teleological reasoning. Here the desirability of action x is defended by showing that it is in accordance with principle z. Arguments of this kind are also called *ethical* or *rightness reasons.*

Most authors in modern legal theory and legal philosophy are of the opinion that both kinds of arguments, consequentialist as well as deontological arguments, play an important role in the justification of legal decisions.[2]) The question to be answered here is why and how these arguments work together in the justification.

---

[1] For a discussion of these views see Bell (1983:22-23), Broad (1930, 1967:206-208), Dworkin (1978:172-173), MacCormick (1995:468-469), Summers (1978), Twining and Miers (1991:139-140).

[2] An exception in this respect is Dworkin (1978:294) who contends that a judge must take account of the rights of the individual and not focus on the consequences of the decision for society in general. For a critique of Dworkin's ideas, see Bell (1983:15-17) and MacCormick (1978:262-264) who argue that argumentation which is based on principles can also be based on an evaluation of the consequences of a certain decision in the light of the goals underlying these principles.

In ethics, authors such as Toulmin (1950) and Hare (1952) discuss the use of arguments from consequences in the context of the rational justification of moral decisions. They are of the opinion that both teleological arguments, which they call arguments from consequences, and deontological arguments, which they call arguments based on principles, play a role in practical moral reasoning about the rightness of actions. Arguments from consequences are essential because practical decisions have consequences that can, from the perspective of a certain viewpoint, be desirable or undesirable. Arguments based on principles are important because reasoning about moral decisions is always based on rules and principles.

In Toulmin's (1950:145-146) view, arguments from consequences are important in practical discussions when we must choose between applying or not applying a rule. In these situations, we must weigh the consequences of both options, and decide which consequences are the less dispreferred. Hare (1972:68) argues that to give a complete justification of a decision, we have to bring in both effects and principles: the effects of the decision in the concrete situation, the appropriate principles and the effects in general of observing those principles - because the effects show what obeying these principles consists in.

In legal philosophy, authors such as Gottlieb (1968), MacCormick (1978), Summers (1978) and Bell (1983) discuss the role of argumentation from consequences in the context of the requirements of rational legal argumentation. They consider legal argumentation as a specific, institutionalized form of general practical argumentation.[3]) In both cases, in legal argumentation as well as in general practical argumentation, the aim is to show that the preferred decision or course of action is the best alternative in a concrete situation. The difference is that in the law, apart from showing that the decision makes sense in relation to the requirements of rational argumentation in general (for example the general requirement for practical discussions formulated in ethics by Hare that an ethical decision must be universalizable), it must also be shown that the decision makes sense within the legal system.

The central question is what a rational justification of legal interpretations should consist of. Cases in which an interpretation must be given are also called 'hard cases'. This implies that in these cases the authoritative texts (such as statutes, precedents, etc.) do not provide a clear answer for the present case (for example because there is a choice possible between various rules or because the rule contains 'open-ended' or 'vague' terms) so that the meaning of the text must be clarified.

In justifying such an interpretation, like in practical argumentation in ethics, both teleological and deontological considerations come into play. Teleological arguments, which MacCormick calls consequentialist arguments and Summers and Bell goal reasons, are important because legal decisions are always concerned with the consequences of applying a legal rule in the present case and in hypothetical future similar cases. Deontological argumentation, which MacCormick divides in arguments from coherence and consistency, which Summers calls rightness reasons and Bell ethical reasons, are necessary to show that the decision is coherent and consistent with the legal system and the principles and values underlying this system.

---

[3] Alexy (1989:289) considers legal argumentation to be a 'special case' of general practical argumentation because a legal discussion takes place under certain institutional restraints. For example, a final solution is required and the decision must be justified within the framework of the valid legal order. For a more elaborated discussion of the various views on legal argumentation as a specific institutionalized form of general argumentation see Feteris (1999).

So, according to these authors, in general practical argumentation as well as in legal argumentation, both arguments from consequences and arguments based on ethical and legal principles, goals and values play a role in justifying practical decisions. In what follows, I will go deeper into the question what arguments from consequences in a legal context should consist of, what the relation is between arguments from consequences and other arguments, and which standards of soundness are relevant.

3. Practical arguments in legal philosophy

In *The logic of choice* (1968) the legal philosopher Gottlieb develops a model for rational rule-guided reasoning based on Toulmin's argumentation model. In his view, ethics and law are two fields in which rule-guided reasoning is used par excellence. He describes how such a model could be implemented for arguments in the law, but stresses that the ingredients specified in this model are common to various species of reasoning guided by rules.

In Gottlieb's model, consequentialist arguments play an important role in defending a legal interpretation. Consequentialist elements in the justification of a legal interpretation are the foreseeable consequences of the decision in the present case (CD) as well as the foreseeable consequences of application of the rule formulated for the present case in other cases within the foreseeable range of application (CSL). Furthermore, there are the purposes and interests contemplated by the preexisting rules, the newly formulated rule, and the canons of construction (P) and competing purposes and interests (P'). Finally, there are the preexisting commitments to weigh the competing purposes and interests in favor of specific purposes (P) whenever a conflict between recurring purposes and interests arises (FC). In his model, however, Gottlieb does not specify the relation between the purposes etc. (P) and the preexisting commitments (FC) in relation to the consequences (CD) and (CSL). The consequences seem to be a separate element in relation to the rest of the model.

Gottlieb argues that the application and interpretation of a rule in a concrete situation is always based on an evaluation of the reasonably foreseeable *consequences* of application for the parties and for those closely associated with them in relation to the *purposes* of the rule. He says that the application of rules is a purposive activity, designed to promote ends and policies. As such, the proper use of rules requires that great weight be attached to the consequences of application. Applications of rules that are destructive of their policy ends are essentially irrational.[4]) Therefore, courts must always consider the contemplated consequences of decisions and their compatibility with the rules, the purposes, interests and final commitments which they generally uphold.

In Gottlieb's view, the requirement of considering the consequences of applying a rule in relation to its purposes amounts to the requirement of consistency: rule application is designed to make consistent choices and decisions possible. It imports the variety of factors which provide a context for the use of the concept of consistency: facts, consequences, purposes, policies and

[4] Furthermore, Gottlieb (1968:171) remarks that the use of rules is accompanied by the phenomenon that competing and rival interpretations are frequently unavoidable. This phenomenon arises either because of the irreducible problem of the 'core' and 'penumbra' of meaning characteristic of language generally, or because particular applications may be marginal with respect to the purposes of relevant rules. The difficulties are unavoidably compounded when more than one rule is applicable in any given situation.

principled guidance. The concepts of rule and consistency are so closely intertwined that to say of a decision that it is principled but inconsistent would involve a contradictory usage of these concepts. Another concept of rationality is that means be appropriate for the ends they are designed to promote, this is the prudential quality required of function-serving decision-making.

In his book *Legal reasoning and legal theory* (1978) and in various other publications, the Scottish legal philosopher MacCormick concentrates on how the choice between two alternative interpretations of a legal rule can be justified in a rational way. In MacCormick's opinion, this implies first that it must be shown that the decision is justified in the context of the legal system, that it makes sense within the law. This is done by using arguments from *consistency* showing that the rule is consistent with the body of existing rules, that it does not contradict any previously established rule of law, and by using arguments from *coherence*, showing that the rule is supported by relevant principles of the legal system. Second, it must be shown that the decision makes sense in the world by using *consequentialist* arguments showing that the preferred ruling has desirable consequences.

The arguments of consistency and coherence have the function of showing that the ruling for the present case fits within the legal system, which is supposed to be a consistent body of existing legal rules. Consistency and coherency aim at showing that the decision is a rational extrapolation from the existing rules, in the sense that the immediate policies and purposes which existing similar rules are conceived as being aimed at would be controverted and subjected to irrational exceptions if the instant case were not decided analogously with them. The law is conceived as a rational teleological enterprise that implies that rational purposes are ascribed to the rules and the legal system. Laws must be conceived of as having rational objectives concerned with securing social goods or averting social evils in a manner consistent with justice between individuals; and the pursuit of these values should exhibit a sort of rational consistency, in that the consequences of a particular decision should be consonant with the purposes ascribed to related principles of law.

Consequentialist arguments have the function of considering the consequences of making a ruling one way or the other, to the extent at least of examining the types of decision which would have to be given in other hypothetical cases which might occur and which would come within the terms of the ruling. In MacCormick's view, consequentialist arguments are not concerned with the consequences for the particular parties of the particular decision.[5])In his view, laws are conceived of in a rational purposive way, and therefore it seems essential that the justification of an interpretation should proceed by testing the decisions proposed in the light of their consequences. But because the justification proceeds by way of showing why such a decision *ought* to go one way rather than the other, the relevant *consequences* are those of the generic ruling involved in deciding one way or the other, not just the specific effects of the specific decision on the individual parties. The ruling, in its turn must be supported by analogies with existing rules or principles of the law preferably authoritatively stated by judges in *obiter dicta* or by respectable legal writers, or by explaining and rationalizing some relevant group of acknowledged legal rules.

---

[5] According to MacCormick (1978:115), consequentialist arguments are a specific form of utilitarian arguments. The utilitarianism involved in consequentialist arguments is 'rule utilitarianism' and not 'act utilitarianism'. In his view, the term 'ideal rule utilitarianism' would be the best expression if we wanted to use the idea of utilitarianism in this context at all.

Arguments from consistency, coherence and consequences may depend on each other in various ways. If a judge is of the opinion that there are two possible rulings which can both be defended by arguments from consistency and coherence because both sides can appeal to settled and sound general principles, the consequences of both rulings can be used as the conclusive argument to decide which of the two has the most desirable consequences.[6]) In other situations, principles are used to evaluate and weigh the consequences of the two alternatives. The conception of justice applied in the evaluation of consequences may be in effect a reflection of the conception of justice embodied in received principles of law.[7])

In an article called *Two types of substantive reasons: the core of a theory of common-law justification* (1978) the American legal philosopher Robert Summers develops a model for the rational justification of legal decisions. Necessary substantive arguments for such a justification are in his opinion *goal reasons* and *rightness reasons*. Goal reasons are a kind of consequentialist arguments. They show that a decision will have effects in the future that serve a good social goal. A rightness reason is a kind of ethical reason which draws its force from the way in which the decision accords with a sociomoral norm of rightness as applied to a party's actions or to a state of affairs resulting from those actions.[8])

Summers formulates a model for a good goal reason consisting of instructions to the judge. A judge must first predict the effects that alternative decisions will have on the parties of the case, on at least those third parties within the zone of immediate effects, and on parties in similar situations in the future. Then he must determine whether any of the alternative predicted states of affairs either affect public interests or represent particular instances of such interests, and therefore qualify as *social* goals such as 'general safety', 'community welfare', 'facilitation of democracy', 'public health'.[9]) In Summers' view, merely personal goals of a party or of the judge that neither affect nor instantiate public interests cannot qualify as social goals. The interests must be fairly attributable to the relevant community as a whole or to a significant segment thereof. If the predicted results of a decision affect or instantiate a public interest and thus qualify as *social*, the judge must appraise predicted decisional effects and determine, in the light of independent values, whether the effects serve or disserve good social goals.

Summers remarks that the question whether a judge can construct good goal reasons and rightness reasons will depend on the facts and decisional context of a case. They might generate only a rightness reason or only a goal reason. In some cases, no good goal reason will be available. There might be no relevant social goal, or the causality might be far too speculative, or

---

[6] See MacCormick (1978:110).

[7] MacCormick (1978:115) stresses that there is not some single standard shared judicial conception that the law is supposed to serve, as is defended in utilitarian theories. In his view, there is a multiplicity or a complex of criteria such as 'equity', 'public interest', 'justice', 'common sense', 'corrective justice', etc.

[8] Summers also distinguishes a form which combines elements of both, which he calls a *parasitic goal reason*, which predicts that a particular decision will have desirable effects becuase, as a precedent for future decisions, it will result in a state of more rightness. Such a reason is a goal reason because it contemplates a future state of affairs brought about through decisional effects.

[9] See Summers (1978:717).

the community might already have enough fulfillment of the goal. In the absence of good goal reasons, there might be one or more rightness reasons available to justify the decision.[10])

On the other hand, reasons of both types might be available, and these might be mutually supporting or they might conflict. They are mutually supporting when each of them, standing alone, would be too weak to provide sufficient justification for the proposed decision. If, for example the goal reason lacks the required justifcatory force, the judge must then add the force of the rightness reason, which may strengthen the justification. There can also be two conflicting goal reasons, and the judge might need a rightness reason to break the resulting stalemate. There is a conflict between both types of reason when there is a goal reason and a countervailing rightness reason. Here the judge might resolve the conflict by resorting to differences in the strength of the reasons by invoking further rightness reasons.

In his book *Policy arguments in judicial decisions* (1983) the British legal philosopher John Bell discusses arguments from consequences in law in the context of 'policy arguments'. In a policy argument, a judge proposes the adoption of a policy with regard to a concrete case (in the context of the particular area of law in question), which is advantageous in the government of society. Judges use policy arguments in situations in which the authoritative standards and rules of the legal system do not provide a clear resolution of a dispute. They propose a solution for the concrete situation by proposing a strategy for resolving similar cases in the future.[11]) Policy arguments are raised in evaluating the consequences of one interpretation as against another.

The reasons used in policy arguments can be both ethical and non-ethical. Ethical reasons justify a result by showing that it will conform to some ethical standard, such as fairness, which is valuable in itself. Non-ethical or goal-based reasons justify a decision by showing that it advances some accepted goal, such as greater wealth for the community or a better environment. They seek to show ways in which the decision will be good for individuals in society, whereas ethical arguments do not turn so much on the benefits accruing from the decision, as on its moral desirability. Though each may be consequentialist in its approach, they may produce different solutions to a particular case, and should thus be distinguished as separate kinds of argument. On the whole, in line with current doctrinal and judicial usage, the various models of the judicial function accept a definition of policy argument which covers both of these kinds of reason.

In Bell's view, like in MacCormick's, judges refer to more general standards or *principles* of the law to assess which of possible alternative rulings is most desirable within the overall framework

---

[10] Summers (1978:783) notes that there may be areas of the law in which one type of reason should figure more prominently than the other. The applicability of a goal reason depends on whether the effects of the decision can be predicted adequately.

[11] Bell (1983:23-36) is of the opinion that it is the judge's task to determine whether it is necessary and proper to create new rules to meet a purported need for clarifying the law or for providing remedies for persons harmed by the acts of others. The task goes beyond simply providing an appropriate answer to resolve a particular case and involves considerations about the long-term effects of introducing new rules, similar in many ways to those which might be found in parliamentary debate.

Limitations of consistency with existing goals pursued by the law and some references to community attitudes ensure that what the judges decides is not too far out of line with current thinking. Unlike authority reasons, where reliance is placed simply on the clear rules and principles established by statute or precedent, in policy arguments a judge refers to the values which could justify a rule, or an interpretation of it, and the argument centres on the balancing of conflicting values.

of the legal system. These principles rationalize a number of legal prescriptions and set out the goals of the law in a generalized way, such as, for instance, that a person should restore to another any advantage which he has unjustly gained at the latter's expense. Such principles may help to provide an explanation of how particular rules interrelate and guide the decision whether to extend a rule by analogy to a new situation.

Nevertheless, the law often has competing principles that have to be weighed against each other. The law of a particular society can be conceived of as a system, and can thus be considered as an elaboration of the purposes of social co-existence wthat can be used in resolving conflicts. Although reality may fall short of this ideal in some respects, the coherence and consistency of legal prescriptions are important in enabling individuals to guide their lives within the demands of the law, even when those demands are not clear. The coherence of legal standards is provided by general social aims expressed in an *ideology*. The ideology of the legal system consists of the general ideals about the purposes of society that justify the rules and principles of the legal system.

4. Results of the discussion of arguments from consequences in practical argumentation in law

Practical decisions in law, like practical decisions in general, must be justified by two kinds of arguments: arguments from consequences (also called goal reasons) and arguments based on principles and goals which show that the decision is in accordance with the principles and goals of the legal system.

The essential role of arguments from consequences in legal argumentation is based on the idea that the application of rules is a means or instrument for realizing a particular legal or social goal. The idea is that the consequences of application of a rule be in accordance with the goals and principles that the rule is supposed to realize. If the application of a rule has undesirable consequences for the persons concerned and these consequences are inconsistent with the purposes of the rule, it may be desirable to make an exception on the basis of the undesirable consequences. There would be an inconsistency in the legal system if the consequences of a decision would contradict the goals and principles of the rule or the legal system.

With respect to the kind of consequences judges refer to, most authors agree that legal decisions must be 'universalizable' in the sense that the judge must base his ruling on an evaluation of the acceptability of the ruling as a general legal rule which would also be acceptable for hypothetical similar future cases. So, in every case, the judge must consider the acceptability of the consequences of the decision for parties in similar situations in the future. Several authors such as Summers also contend that the judge must consider the effects that alternative decisions will have on the parties to the case, and on at least those third parties within the zone of immediate effects.[12])

[12] MacCormick (1981) is of the opinion that another kind of consequences consists of the consequences of the decision for the legal system as a whole: if a decision does not fit within the legal system as a whole, the consequence would be that the system would become incoherent, which is undesirable. This function of consequentialist argumentation seems to be a specific implementation of the requirement of consistency.

As has been pointed out earlier, the consequences of a decision must be evaluated in the light of certain legal goals, principles and values. With respect to these goals, principles and values the general opinion is that a judge can find or reconstruct them by extrapolating them from the explicit intention of the legislator expressed in the parliamentary materials, or that he can reconstruct the intention by clarifying the underlying general principles of the law, and explaining that these are aimed at securing some goal or value.[13]) Summers even calls arguments from consequences goal reasons, because they are aimed at showing that the decision is in accordance with some social goal. In Summers' opinion these goals are social goals securing a value which is desired from the perspective of society.

With regard to these goals, principles and values that are used for the evaluation of the consequences, according to authors such as MacCormick and Bell, and Burg (2000:11-17), from an analytic perspective, various levels can be distinguished in the evaluation of consequences. The first level of evaluation refers to certain principles which rationalize a number of legal prescriptions and set out the goals of the law in a generalized way.[14]) However, the law often has competing principles which have to be weighed against each other. So, sometimes a second level of evaluation is required on which the principles are weighed against each other on the basis of an elaboration of the purposes underlying the legal system as an instrument of social ordering and co-existence. According to Bell (1983:26) this is the underlying ideology of the legal system which consists of the general ideals about the purposes of society which justify the rules and principles of the legal system.[15])

In the discussion of the various kinds of arguments used in the justification it became clear that there is a close connection between arguments from consequences and the various types of argument which express the consistency and coherence with the goals, principles and values of the legal system. In hard cases in which a judge must justify the interpretation of a legal rule, both kinds of arguments are often necessary and may depend on each other.

One reason for this mutual dependence has to do with the fact that the statement that the consequences of a certain interpretation are desirable implies a value judgement attached to these consequences which must, if challenged, be defended. The defence may consist of reasons specifying the goals, principles and values in light of which the consequences can be considered desirable. In this way, arguments based on the consistency and coherence with the legal system,

---

[13] As is pointed out by Burg (2000:12-14) it is not necessary that such principles are explicitly recognized either in the formally legal material. Of course, part of the principles may well have received explicit recognition, but this is by no means requisite.

[14] Burg (2000:12-13) uses the general term 'principles' in the broad sense of 'something good to be promoted or protected'. As such, the term may refer to what others call principles, goals, values, etc.. According to Burg (2000:13) these priniciples are the main values which the law as a whole attempts to promote such as 'no man may profit from his own wrong', 'protection of the privacy', 'the protection of human life', 'the principle of autonomy', 'freedom of contract'. There is a plurality of such principles at the top which, toghether, make the law in principle coherent. These principles should be applied in a consistent manner so that like cases are treated alike.

[15] With respect to these two levels of evaluation Burg (2000:12-13) notes that two levels of principles can be distinguished: the 'immediate' or 'local' principles (others call them goals) that are the justifying reasons immediately underlying individual statutory rules, and the 'general' principles of which these immediate principles are an expression. In her principle based theory, she considers the second category of principles as the basis for a broad theory of principles which has coherence-creating capacity.

that is, with its goals, principles and values constitute a defence of the evaluation of the consequences as desirable. You might say that the defence is aimed at rebutting a challenge of the desirability of the consequences by putting forward supporting arguments.

Another reason for this mutual dependence has to do with the fact that one of the arguments, whether it be an argument from consequences or an argument from coherence and consistency, is not sufficient on its own. In this context, the defence is aimed at showing that there are also other considerations that make the defence complete. If the argument from consequences is not a sufficient defence on its own, arguments from coherence and consistency may complete the defence. And if the argument from coherence and consistency is not sufficient on its own, an argument from consequences may complete the defence.

Both forms of defence may be used in the context of the justification of only one interpretation, or in the context of two rival interpretations X and X'. For example, in the first context, according to the judge, one interpretation has desirable consequences and the other undesirable consequences, and the desirability of the consequences is defended by referring to the underlying goals, principles and values of the legal system and by showing that the consequences are desirable in light of the goals which are an expression of certain legal principles or values. In the second context, for example, both interpretations can be justified on the basis of a principle, and an argument from consequences is required to justify a choice between one of the two, to show that one has desirable consequences and the other undesirable consequences. Or, both interpretations can be justified on the basis of their desirable consequences, and an additional argument based on coherence and consistency is required to justify the choice. It can also be the case that there is a consequentialist argument in favor of one interpretation and another type of argument for the other interpretation. In such a situation an extra argument is required to justify the choice.

What we have gathered from the discussion of the various ideas of the role of arguments from consequences in the context of the law is a kind of rationale for the analysis and evaluation of arguments from consequences in a legal context. As we have seen, arguments from consequences play an important role in the justification of legal interpretations because they link the consequences of the interpretation to the principles, goals and values of the legal system. Other than authors such as Dworkin who argue that consequences cannot play a role in a rational justification of a legal interpretation, these arguments, if present, must be reconstructed as a vital part of the justification that must also be taken into consideration in the evaluation. The next step is to translate the results of the discussion into a framework for the analysis and evaluation of practical arguments.

5. Towards a pragma-dialectical framework for the analysis and evaluation of practical arguments in law

5.1 The analysis of practical arguments in law

In the analysis it must be determined which elements play a role in practical argumentation in law and what the exact place of arguments from consequences is in relation to the other arguments in the justification. In earlier OSSA papers (Feteris 1998,...) I have described the

elements of a complete argument from consequences on various levels in the form of an analytical model, which I will use here as a point of reference.

This model specifies the most elaborate and complete form of an argument from consequences in a legal context as a basis for an adequate evaluation. Depending on the discussion context, of course, some levels such as 2 and 3 may coincide.

Positive form

Level 1	1	Interpretation X is desirable
	1.1a	Interpretation X leads to Y
	1.1b	Y is desirable
Level 2	1.1b	Y is desirable
	1.1b.1a	Y serves principle/goal/policy/value Z
	1.1b.1b	Z is desirable
Level 3	1.1b.1b	Z is desirable
	1.1b.1b.1	Z is coherent/consistent with general legal principles, goals and values P underlying the legal system[16])

[16] In some cases, the arguments on level 1 and 2 are combined so that the argument is a goal argument in which the argument that X has desirable consequences in light of Z remains implicit (Cf. Golding (1984: 55-58) for a formulation of a goal reason. Walton (1990) considers this scheme for a goal reason as the basic scheme for practical argumentation):

Level 1	1	Interpretation X is desirable
	1.1a	Interpretation X serves goal Z
	1.1b	Z is desirable

In other cases, the arguments on level 2 and 3 are combined because the desirability of the consequences Y are defended directly by referring to general legal principles:

Level 2	1.1b	Y is desirable
	1.1b.1	Y is coherent/consistent with general legal principles etc.

Sometimes, the order of level 2 and level 3 is changed, when the desirability of Y is first defended by referring to the coherence/consistency with certain principles P and then by showing that these principles serve certain goals Z.

Negative form

Level 1	1	Interpretation X' is undesirable
	1.1a	Interpretation X' leads to Y'
	1.1b	Y' is undesirable
Level 2	1.1b	Y' is undesirable
	1.1b.1a	Y' does not serve principle/goal/value Z
	1.1b.1b	Z is desirable
Level 3	1.1b.1b	Z is desirable

1.1b.1b.1a Z is coherent/consistent with general legal principles, goals and values P underlying the legal system

In this chain of arguments, level 1 contains an argument from consequences, level 2 a goal argument (which is a specific form of an argument from consequences), and level 3 an argument from coherence/consistency.

5.1.1 The content of the argumentation

On the basis of the above discussion, the content of the elements of the argumentation on the various levels and their potential positions in relation to each other can now be specified further, taking the positive form as a starting point.

Level 1

1.1a Interpretation X leads to Y

This empirical statement consists of a prediction of the relevant forseeable consequences/effects of the decision based on a causal relation between the proposed course of action X and its consequences Y. The consequences may concern the parties to the case (Y1), third parties within the zone of immediate effects (Y2), and parties in similar situations in the future (Y3). According to most authors the most essential consequences are those of the foreseeable range of application of the rule in similar situations in the future.

1.1b Y is desirable

This normative statement consists of a characterization of the consequences Y in certain evaluative terms in order to transfer the desirability of Y to the desirability of X which is expressed in the standpoint

Level 2

1.1b.1aY serves principle/goal/value Z

This empirical statement consists of a description of the causal relation between the consequences Y and the principles, purposes/(social)goals and (public) interests Z contemplated by the preexisting rules of the legal system. According to some authors this argument refers to the immediate purposes or principles underlying the particular rule. According to others, the argument refers to more general principles.

1.1b.1b Z is desirable

This normative statement consists of a characterization of Z in certain evaluative terms in order to transfer the desirability of Z to the desirability of Y which is expressed in the substandpoint

Level 3

1.1b.1b.1 Z is coherent/consistent with general legal principles/goals/values P underlying the legal system

This argument consists of a description of the relation between Z and the general principles, goals and values underlying the legal system

For our present purposes it suffices to stop at this third level. For a complete justification of an interpretation in the context of a legal decision it is enough that a judge specifies his evaluation of the consequences in light of certain general legal principles. Sometimes it can be necessary to specify the choice for a certain principle if two mutually inconsistent principles seem to be applicable. Then a fourth level of justification is necessary. From the perspective of legal philosophy, further levels could be specified in which a 'deep justification' is given of the choice of certain legal principles.[17])

5.1.2 The argumentation structure

If we look at the results of the above discussion in terms of the various types of pragma-dialectical argumentation structure, we can distinguish various ways in which consequentialist arguments and other arguments may be related to each other. From the perspective of pragma-dialectical profiles, we can distinguish two dimensions with respect to how the argumentation structure can be explained in relation to the various forms of complexity of the discussion.

The first dimension is that the argumentation structure depends on the way in which the protagonist reacts to (real or potential) expressions of doubt of the antagonist. Asked for further arguments, he can put forward *subordinate* arguments supporting the already given argument that results in an argumentation structure with vertically linked arguments. As we have seen, this often happens when the judge reacts to or anticipates doubt with respect to the desirability of the

[17] For a description of what a 'deep justification' consists of see Peczenik (1983, 1989), and Alexy (1989) and Aarnio (1987) with respect to the 'legal ideology' underlying this deep justification.

consequences. He can also put forward *coordinative compound* arguments supplementing the already given argument resulting in an argumentation structure with horizontally linked arguments. This often happens when the judge reacts to or anticipates doubt with respect to the sufficiency of the consequentialist argument.[18]) (Of course there also combinations of the two.)

The second dimension is that the argumentation structure depends on the question whether the original difference of opinion was a *non-mixed* or a *mixed* dispute. In a non-mixed dispute the protagonist is only required to show that his own standpoint is acceptable. In a mixed dispute, it can be necessary to show that the preferred standpoint X is defendable and that the rejected standpoint X' is not defendable.[19])

Taking these two dimensions we can have four possible forms of argumentation structure consisting of arguments from consequences and other arguments:

A1 Subordinate argumentation in a non-mixed dispute

A2 Subordinate argumentation in a mixed dispute

B1 Coordinative compound argumentation in a non-mixed dispute

B2 Coordinative compound argumentation in a mixed dispute

A1 Subordinate argumentation in a non-mixed dispute

In this argumentation structure, the consequentialist argument has the function of main argument which directly supports the interpretative decision. For a complete defence, however, the desirability of interpretation X (or the undesirability of X') must be defended by subarguments referring to the goal of the rule or system of rules, and ideally this goal must be defended by referring to further arguments specifying the values and principles underlying these goals. This line of defence results in the following argumentation structure consisting of various levels of subordinate argumentation (as described in the reconstruction of the positive and negative form):

1

Interpretation X/X'

8

[18] Cf. Snoeck Henkemans (1992:85ff) in her description of the various forms of doubt and the relevant reactions resulting in different argumentation structures.

[19] Although in a mixed dispute someone does not have a burden of proof of showing both the strength of his own standpoint and the weakness of the other standpoint, from a rhetorical perspective it can be stronger to do so, and this is also what is often done. It can enhance the convincingness of the defence if it is shown that there are arguments for the defended standpoint and arguments against the rejected standpoint.

1.1a

1.1b

8

1.1b.1a 1.1b.1b

8

1.1b.1b.1

(1)

A2 Subordinate argumentation in a mixed dispute

As occurs in most cases in a legal context, the choice for interpretation X is defended in the context of a discussion about a choice between the two alternative interpretations X and X'. In these cases, the argumentation of the judge becomes more complex and will consist of coordinatively compound argumentation consisting of a combination of argumentation for X and argumentation against X', which may both consist of the subordinate argumentation of A1. The completing bridging argument (1.1a-1.1b') saying that because of the desirability of X and the undesirability of X', X is to be preferred often remains implicit:

1

X

8

1.1a 1.1b

(1.1a-a.1.1b')

argument pro X argument contra X'

X has desirable X' has undesirable

consequences consequences

(2)

B1 Coordinative compound argumentation in a non-mixed dispute

If both the consequentialist argument and the other argument(s) cannot constitute a sufficient defence on their own, there is coordinative compound argumentation in which the consequentialist argument and the other argument(s) complement each other:

1

X

8

1.1a

1.1b

consequentialist argument pro X other argument(s) pro X

(3)

The other argument(s) may consist of the coherence and consistency of the interpretation with the legal system (other rules, its goals and principles) or reference to certain canons of interpretation (some of which result in arguments of coherence and consistency, arguments referring to the legal system such as systematic interpretation, analogical interpretation, arguments referring to goals: teleological interpretation)[20])

B2 Coordinative compound argumentation in a mixed dispute

Within this form of coordinative compound argumentation there are two possibilities. In both cases the arguments for X and the arguments for X' are weighed against each other. In the first situation, this results in a preference for X on the basis of the consequences. In the second situation, it results in a preference for X on the basis of the principles.

When both interpretation X and X' can be justified by referring to principles, the desirable consequences of X can constitute the 'clinching' argument for preferring interpretation X. Following the proposal described by Plug (2000:216) for weighing pro and contra arguments, we can give the following reconstruction of this argumentation:[21])

---

[20] Sometimes combinations of 2 and 3 are used. For an example of such a reconstruction see my analysis of a legal decison in my OSSA paper of 1999.

[21] This argumentation can also be supplemented or supported by arguments based on the canons of interpretation such as linguistic arguments, systematic arguments (sometimes in the form of analogy), teleological arguments, etc. Sometimes this is done by saying that the wordings of the law and the system of the law do not contradict the given interpretation.

1

X

8

1.1a 1.1b

1.1c

argument pro X argument pro X' X has desirable

principles etc. (and contra X) consequences

principles etc.

and X' has

undesirable

consequences

(4)

Other things being equal because both X and X' can be justified on the basis of goals and principles, the desirable consequences of X are the clinching argument.

Second, there is the form of argumentation referred to by Summers in which both interpretation X and interpretation X' can be defended by arguments from consequences, and the final choice is based on a principle, which could, for example be, that there is stronger principle for X than for X':

1

X

8

1.1a 1.1b

1.1c

argument pro X argument pro X'

principles etc. desirable consequences desirable consequences

(5)

For example, 1.1c says that there are principles in support of both X and X, but that the principles in support of 1.1a weigh heavier. It can also be that there are principles in support of X and not of X'.

In A1 and A2 the arguments from consequences are the main arguments and the other arguments are subordinate arguments supporting the desirability of the consequences of the proposed course of action in light of the goals and principles. In B1 and B2 both types of argument are main arguments which are both necessary for a sufficient defence and together they constitute coordinative compound argumentation.

By translating the ideas of the various authors about the relation between consequentialist arguments and other arguments in pragma-dialectical terms and argumentation structures, we see that the relation between consequentialist arguments and other arguments can vary, depending on the way in which the relation is expressed. In the interpretation and reconstruction of the argumentation, it must be determined how such an analysis can be justified. The interpretation and reconstruction may depend on various factors which, in combination, can help us in giving an adequate analysis. That may be verbal indicators, conventions of legal presentation, knowledge of the context of the discussion on the basis of what the parties and other judges have said, and other considerations derived from legal theory and legal philosophy about the hierarchy of the various types of argument in a legal system.[22])

5.2 The evaluation of practical arguments in law

With respect to the evaluation, the discussion shows that various considerations must be taken into account in assessing the acceptability of the argumentation. In pragma-dialectics two types of evaluative questions are applied. The first type of question is whether arguments from consequences are a correct way of defending a legal interpretation. The second type of question is whether the argumentation scheme is applied correctly.

With respect to the first type of question, whether arguments from consequences are a correct way of defending a practical decision in law, we have seen that most authors are of the opinion that arguments from consequences can play a crucial role in the justification of a legal interpretation, other than authors such as Dworkin who argue that consequences cannot play a role in a rational justification of a legal interpretation. In a practical discussion, consequences link the application of rules in concrete situations to the goals and principles underlying these rules. The consequences are not used in a context that is isolated from the legal principles and values. On the contrary, the legal system and its underlying principles and values are invoked to defend the desirability of the consequences.

The second type of question is whether the argumentation scheme is applied correctly. For the various elements of the argumentation there are relevant questions that can be posed by an antagonist and must be answered adequately. In my description of the positive and negative form, I have sketched the basic structure of the argumentation schemes on the various levels. For concrete examples the various parts of the argumentation can be specified in more detail. For now, I take the characterization I have given above of the various elements as a starting point:

---

[22] or an overview of the way in which this hierarchy is used in various legal systems see MacCormick and Summers (1991).

Level 1	1	Interpretation X is desirable
	1.1a	Interpretation X leads to Y (Y1/Y2/Y3)
	1.1b	Y is desirable

With respect to 1.1a: For any of the consequences Y mentioned:

- What is the degree of likelihood of any of these predictions? Has the judge an unquestionably reliable basis for predicting decisional effects? How certain is the prediction itself?

- Has the judge accurately characterized the predicted state of affairs in all relevant respects and in appropriate terms?

With respect to 1.1b:

- Is Y desirable in light of all relevant legal principles, and legal and social goals, and values?

An adequate answer to the question with respect to 1.1b may generate a subordinate argument on a following level 2, justifying 1.1b, and with its own relevant critical questions:

Level 2	1.1b	Y is desirable
	1.1b.1a	Y serves principle/goal/policy/value Z
	1.1b.1b	Z is desirable

With respect to 1.1b.1a: Does Y serve Z?

With respect to 1.1b.1b: Is Z good/desirable in light of all relevant principles, goals, policies and values?

An adequate answer to the question with respect to 1.1b.1b may generate a subordinate argument on a following level 3, justifying 1.1b.1b, and with its own relevant critical questions:

Level 3	1.1b.1b	Z is desirable

1.1b.1b.1 Z is coherent/consistent with general legal principles/goals/policies and values underlying the legal system

With respect to 1.1b.1b.1: Can the values/principles P be considered as generally accepted or are they an acceptable extrapolation of the principles underlying (the relevant part of) the legal system?

6. Conclusion

In my discussion of the ideas taken from legal philosophy on the justification of practical decisions we have learned which considerations play a role in a rational justification, why they play a role, and which evaluation criteria are relevant in assessing the justification. These ideas have been integrated in a pragma-dialectical framework for the analysis and evaluation of practical arguments consisting of consequentialist arguments and other arguments. It is shown how such an integration can provide a rationale for the analysis and evaluation of arguments from consequences in a legal context.

Of course, the results of this discussion are also relevant outside the legal field. Like authors working in ethics such as Toulmin, Hare and Gottlieb argue, in ethics, as in other contexts in which people argue about the desirability of courses of action, people always rely on certain rules or principles of behavior when they defend a particular course of action. In a legal context, these goals, rules and principles may be institutionalized, but often they must be reconstructed from legal practice. So in general practical discussions, we could say, that arguers will have to reconstruct the underlying goals and principles and they will have to argue that these are acceptable in order to justify their proposals.

Bibliography

Aarnio, A. (1987). *The rational as reasonable*. Dordrecht etc.: Reidel.

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

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

Broad, C.D. (1930) (Ninth impression 1967) *Five types of ethical theory*. London: Routledge.

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

Dworkin, R. (1978). *Taking rights seriously*. (First edition 1977). Cambridge (Mass.): Harvard University Press.

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

Eemeren, F.H. van, R. Grootendorst (1987). 'Fallacies in pragma-dialectical perspective'. *Argumentation*, 1, p. 283-301.

Eemeren, F.H. van, R. Grootendorst (1992). *Argumentation, Communication, and Fallacies*. New York: Erlbaum.

Feteris, E.T. (1998) 'The soundness of 'pragmatic' or 'consequentialist' argumentation: does the end justify the means?'. In: H. Hansen en C. Tindale (eds.). Proceedings of the OSSA conference on argumentation and rhetoric. (CD rom)

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

Feteris, E.T. (2000). 'The role of pragmatic argumentation in the justification of legal decisions: independent or complimentary argumentation?'. In: H. Hansen en C. Tindale (eds.). Proceedings of the Third OSSA conference on Argumentation. (CD-rom)

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.

Hare, R.M. (1952). *The language of morals*. Oxford: Oxford University Press. (Reprint 1972)

MacCormick, N. (1978). *Legal reasoning and legal theory*. Oxford: Clarendon Press. p. 262-263

N. MacCormick (1983). 'Legal decisions and their consequences: From Dewey to Dworkin'. *N.Y. University Law Review*, 58, p. 239-58.

MacCormick, N. (1995). 'Argumentation and interpretation in law'. *Argumentation*, Vol. 9, nr. 3, p. 467-480.

MacCormick, N. en R. Summers (1991). *Interpreting statutes*. Aldershot etc.: Dartmouth.

Peczenik, A. (1983). *The basis of legal justification*. Lund.

Peczenik, A. (1989). *On law and reason*. Dordrecht etc.: Reidel.

Plug, H.J. *In onderlinge samenhang bezien.* Dissertation University of Amsterdam. Amsterdam: Thela Thesis.

Snoeck Henkemans, A.F. (1992). *Analysing complex argumentation. The reconstruction of multiple and coordinatively compound argumentation in a critical discussion*. Dissertation University of Amsterdam. Amsterdam: SicSat.

Summers, R.S. (1978). 'Two types of substantive reasons: The core of a theory of Common-Law justification', *Cornell Law Review*, 63, p. 707-788.

Twining, W. en D. Miers (1991). *How to do things with rules. A primer of interpretation*. London etc.: Butterworths.

Walton, D.N. (1990). *Practical reasoning*. Savage (Maryland): Rowmand & Littlefield.

Walton, D.N. (1996). *Argumentation schemes for presumptive reasoning*. Mahwah, N.J.: Erlbaum.

Walton, D.N. (1999) 'Historical origins of *Argumentum ad consequentiam*'. *Argumentation*, Vol. 13, No. 3, p. 251-264.

Er moet ook nog een stukje over uitzonderingen komen in de Nederlandse versie, zie Burg p. 40, MacCormick weighing principles against each other die tot uitzonderingen kunnen leiden, zie samenvatting