A normative reconstruction of arguments from reasonableness in the justification of judicial decisions
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In this contribution I develop an argumentation model that can be used for the analysis and evaluation of arguments from reasonableness. First I discuss the legal background of the use of arguments from reasonableness and fairness and I establish under what conditions they form an acceptable justification of a judicial decision. Then I develop an argumentation model for the analysis and evaluation of legal arguments from reasonableness.

1. Introduction

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

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

In this paper I will proceed as follows. First in (2) I will discuss the legal background of the use of arguments from reasonableness and fairness and I will establish under what conditions they form an acceptable justification of a judicial decision. Then, in (3) I will develop an argumentation model for the analysis and evaluation of legal arguments from reasonableness.

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

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

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

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

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

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

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

In modern legal theory arguments from unacceptable consequences referring to reasonableness are considered as a form of teleological-evaluative argumentation, that is argumentation in which an interpretation is justified by referring to the goals and values the rule is intended to realize.

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

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

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

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

(1)

1 Application of rule X in the amended meaning X' is reasonable and fair
   1.1 Application of rule X in the amended meaning X’ leads to an acceptable result

and

2 Application of rule X in the strict meaning X" is unreasonable and unfair
   2.1 Application of rule X in the strict meaning X" leads to an unacceptable result
This reconstruction of the complex standpoint and the main argumentation does justice to the fact that the judge has a burden of proof for defending a complex standpoint consisting of a preference for the amended interpretation and a rejection of the strict interpretation.

Starting from the burden of proof of the judge described in the previous section, the burden implies that the standpoint must be supported with subordinative argumentation in which the judge specifies why the preferred interpretation 1.1 is coherent with certain legal goals or values which can be reconstructed from certain general legal principles underlying the relevant branch of law, as well as with the personal and social interests involved in the concrete case, and why the rejected interpretation 2.1 is incompatible with them. These considerations, in their turn, must be supported with arguments that specify the legal and factual background of these arguments. A schematic reconstruction of the complex argumentation in support of the standpoint can be modelled as follows:

(2)

1 Application of rule X in the amended meaning X' is reasonable and fair in the concrete case
   1.1 Application of rule X in the amended meaning X' leads to an acceptable result in the concrete case
       1.1.1a Application in the amended meaning X' is compatible with the goals and values the rule is intended to realize of the rule
           1.1.1a.1 The amended meaning X' is compatible with the general legal principle R that is underlying the rules r1, r2,...rn
       1.1.1b Application in the amended meaning X' is compatible with the circumstances of the concrete case (the social and personal interests of the parties involved in the concrete case) C
           1.1.1b.1 Statement about the social and personal interests in the concrete case (...)

In a similar way, the standpoint 2, that application of rule X in the strict meaning X" leads to an unacceptable result implying that application is unreasonable and unfair in the concrete case should be justified.
This reconstruction of the burden of proof from the perspective of a complete justification in the ideal case shows that the argumentation must consist of at least three levels of argumentation. The 'core' of this justification is formed by the argumentation on the second and third level where he must specify why the amended meaning is coherent with the law and with the circumstances of the concrete case.

This reconstruction of the burden of proof into a model for the argumentative burden of proof of a judge who uses an argument from reasonableness clarifies his argumentative obligations. It makes clear under what conditions a judge lives up to his formal burden of proof from an argumentative perspective. Whether the arguments are acceptable from the material perspective depends on the criteria of acceptability in a specific field of law.

4. Conclusion

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