Towards a Typology of Argumentation based on Legal Principles

Hacia una tipología de argumentación basada en principios legales

Harm Kloosterhuis
School of Law, Erasmus University, Rotterdam, The Netherlands
kloosterhuis@frg.eur.nl

Received: 19-07-2011 **Accepted**: 21-11-2011

Abstract: In this paper I analyze argumentation based on legal principles advanced in the justification of legal decisions, explore the criteria for the assessment of this type of argumentation and relate that to the general theory of law and legal argumentation. Starting from Alexy's principle theory and from the reactions some of his critics I will differentiate between various forms of argumentation based on legal principles.

Keywords: Argumentation based on legal principles, interpretative argumentation, reconstruction of argumentation in legal decisions, Alexy.

Resumen: En este trabajo analizo la argumentación basada en principios legales así como se avanza en la justificación de decisiones legales, exploro los criterios de cumplimiento de este tipo de argumentación y los relaciono con la teoría general de la ley y la argumentación legal. Comenzando con el principio teórico de Alexy y de las reacciones de algunos de sus críticos, diferenciaré entre varias formas de argumentación basada en principios legales.

Palabras clave: Argumentación basada en principios legales, argumentación interpretativa, reconstrucción de argumentación en decisiones legales, Alexy.

1. Introduction

In the pragma-dialectical reconstruction of legal decisions, argumentation

is analysed as a critical exchange of arguments and counter-arguments. This analysis aims to give a better account of real life argumentation than the abstract *logical* reconstructions.[1] Until now Eveline Feteris, Henrike Jansen, José Plug and I focused on reconstruction of legal discussions, complex argumentation in judicial decisions and on the reconstruction of pragmatic argumentation, *a contrario*-argumentation, analogy-argumentation and linguistic argumentation in legal decisions. In this paper I want to answer some questions concerning the reconstruction and evaluation of *argumentation based on legal principles*.

Although the role of legal principles has been a focus of legal theory since Dworkin, there is little serious systematic research to the different uses of principles as in the justification of legal decisions. According to Alexy (2003, p. 433) there are two basic operations in the application of law: *subsumption* with legal rules and *balancing* with legal principles. Alexy claims that subsumption has been clarified to a considerable degree, but that many questions about balancing with legal principles are still not answered in a satisfactory way. The most important of these questions is whether or not balancing is a *rational procedure*. According to skeptics like Habermas there are no rational standards for weighing and balancing. Because of this lack of rational standards, 'weighing takes place either arbitrarily or unreflectively'. Alexy does not agree with this position: the *claim to correctness* of legal standpoints also holds for argumentation based on weighing and balancing. In his *principle theory* Alexy tries to demonstrate that it is possible to construct weighing and balancing as a rational form of argumentation. Alexy's principle theory provides a fruitful theoretical framework for the study of principles in legal argumentation and provides also substantial answers to central questions regarding the use of principles in legal decisions, but there are still many problems to be solved. What are legal principles as arguments for legal decisions, what is their legal status,

[1] Characteristic of the logical approach is the abstraction from the communicative and interactional context in which the legal argumentation is used. The argumentation is reconstructed as an abstract argumentative product of just one language user, usually a judge. As a consequence this approach cannot adequately describe and explain the structural complexity of argumentation in legal decisions. Concerning the evaluation of the interpretative argumentation, the logical approach restricts assessment to logical validity and is not systematically related to the legal discussion rules bearing on legal argumentation. The result is that forms of complex argumentation cannot be related to the critical reactions.

how are they identified, and how do they interact with other interpretative arguments in the justification of legal decisions? In this paper I will sketch a typology of argumentation based on legal principles in judicial argumentation. I first give an overview of Alexy's principle theory as a theory of legal argumentation. Starting from Alexy's findings and from the reactions of some of his critics I will differentiate between various forms of argumentation based legal principles.

2. Alexy's analysis of weighing and balancing

In his theory Alexy tries to demonstrate that it is possible to construct weighing and balancing as a rational form of argumentation. According to Alexy (2003, p. 435) this is of great importance because of the dominant role of weighing and balancing in the legal practice of decision making. In *hard cases* there are reasons both for and against a certain decision and most of this collision of reasons has to be resolved by means of weighing and balancing.

Starting point in Alexy's theory of weighing and balancing is his analysis of legal principles (Alexy, 1985, 2002). According to Alexy (1985, 2002), legal principles are *optimization commands,* commanding that something be realized to the highest degree possible. They can be fulfilled in different degrees. The degree of fulfillment depends on actual facts and legal possibilities. The *legal possibilities* are determined by other relevant (colliding) principles and by rules. In contradistinction to legal principles, legal rules are *definitive commands*: they are applicable or not. If a rule is valid, it requires that one does exactly what it demands. The form of law application characteristic of rules is subsumption: applying a legal rule on facts. According to Alexy the difference between rules and principles is a difference in *quality* and not only one of degree.[2] Every norm is either a rule or a principle.

[2] According to Dworkin (1978) the difference between legal principles and legal rules is a *logical* distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion legal principles do not. A legal principle states a reason that argues in one direction, but does not necessitate a particular decision.

The difference between rules and principles appears clearly in case of conflicts of rules on the one hand and conflicts (or collisions) of principles on the other. In both types of conflicts two norms separately lead to incompatible results. But the respective solutions to the conflict are different. A conflict between two rules can be solved by either introducing an exception clause into one of the two rules or declaring at least one of them invalid, for instance by using conflict rules like *lex posterior derogat legi priori*. A collision of principles is solved in a different way: weighing and balancing is the basic argumentation pattern in the justification of solutions of conflicts between principles. To illustrate this weighing and balancing Alexy uses a decision of the German Federal Constitutional Court concerning the inability of someone to attend sessions of a court proceeding (Decisions of the Federal Constitutional Court, BVerfGE vol. 51, p. 324). The question in this case was whether a trial may be held in the case of an accused who would be in danger of suffering from a stroke or heart attack because of the stress of the trial. The colliding principles are the constitutional right to life and the inviolability of one's body on the one hand and the rule-of-law principle on the other. The court does not solve this problem by declaring one of the principles invalid or by introducing an exception, but by determining a *conditional priority* of one of the colliding principles over the other. The basic right to life and to the inviolability of the body shall have priority over the principle of a functioning system of criminal justice where 'there is a clear and specific danger that the accused will forfeit his life or suffer serious bodily harm in case the trial is held' (BVerfGEvol. 51, 234, p. 346). Under these conditions the basic right has greater weight and therefore takes priority. The priority of the basic right implies that its legal effects are mandatory. The fulfillment of the conditions of priority brings about the legal effects of the preceding principle. Alexy summarizes this form of argumentation as the general *Collision Law:*

This implies according to Dworkin a second difference between legal rules en legal principles. Legal principles have a dimension of weight or importance. When principles intersect, anyone who must resolve the conflict has to take into account the relative weight of each. According to Dworkin rules do not have this dimension of weight. If two rules conflict, one of them cannot be a valid rule.

> The conditions under which one principle takes priority over another constitute the operative facts of a rule giving legal effect to the principle deemed prior.

A more technical version of this law is:

> If principle P_1 takes priority over principle P_2 under conditions C: (P_1 P P_2) C, and if P_1 under conditions C implies legal effect R, then a rule is valid that comprises C as the operative facts and R as legal effect: C→ R. (Alexy, 2000, p. 297).

It is important to notice that the Collision Law amounts to a valid *rule* as a basis for the final decision. This is consistent with Alexy's rules of internal justification: that every legal decision must contain at least one universal norm and that every decision must follow logically from a universal norm, together with other premises. In Alexy's analysis of weighing and balancing the final decision meets the criteria of logical validity and universalizability. The judgment follows logically from a universal norm together with further statements.

According to the Collision Law the rule with priority relations between the principles is not absolute but only *conditional* or *relative*. The task of optimizing legal principles is to determine correct conditional priority relations for concrete cases. In order to conceptualize a rational way of this balancing of colliding principles Alexy introduces the *Law of Balancing*:

> The greater the degree of non-satisfaction of, or detriment to, one right or principle, the greater must be the importance of satisfying the other. (Alexy, 2003, p. 436)

In applying the *Law of Balancing*, Alexy differentiates three steps in the reasoning. The first step is establishing the degree of non-satisfaction of or detriment to the first principle (in other words: the abstract weight of the first principle and the importance of the infringement of this principle), the second step is establishing the importance of satisfying the colliding principle (in other words: the abstract weight of the colliding principle and the importance of applying this principle) and the third step is establishing whether the importance of satisfying the latter principle justifies the

detriment to or non-satisfaction of the former. Alexy tries to show that his theory of weighing and balancing is adequate, by analyzing examples of German constitutional law and by formalizing the argumentation of weighing and balancing in an abstract argumentation scheme.

An example involving the collision of principles is the Federal Constitutional Court's 'Lebach sentence'. The court had to decide whether a TV station could broadcast a documentary film about a criminal case that happened years ago, in which one of the convicts was identified and thus his resocialization endangered. The court stated that:

> there was a collision between the general right to personality granted in Art. 2 (1) in connection with Art. 1 (1) Basic Law and the broadcasting station's right of freedom of coverage granted by art. 5 (1) second sentence Basic Law (BVerfGE 35, 202 (219).

This conflict was resolved by weighing:

> The weighing has to consider the intensity of the interference with the personal realm brought about by such a programme on the one hand ; on the other hand the concrete interest such a programme could satisfy must be judged; one has to decide whether this interest can also be satisfied without or with a less drastic interference with the protection of the personality. (BVerfGE 35, 202 (219).

The court concluded that, under the conditions of the Lebach case, the protection of the right to personality is more important than the station's right of freedom of coverage. These conditions establish the operative facts of a rule, which expresses the legal consequence of the principle of protection of personality in the Lebach case:

> A rebroadcast of a TV-feature on a major crime no longer justified by an acute interest in information, is not permitted at least when it jeopardizes the convict's resocialization. (BVerfGE 35, 202, (237).

According to Alexy the analysis of examples shows that rational judgments in weighing and balancing are possible. Of course, weighing and balancing - just as subsumption - starts from premises which themselves are not the result of weighing and balancing. Neither a formal representation of

subsumption, nor such a representation of weighing and balancing contributes anything directly to the content of these premises. But in both types of argumentation a set of premises can be identified from which a result can be inferred. Both representations are formal, but these formal representations identify the necessary elements of subsumption on the one hand and weighing and balancing on the other. Alexy (2003, p. 448) concludes that subsumption and weighing and balancing are two *dimensions* of legal reasoning: a classifying and a graduating one 'which can and must be combined in many ways in order to realize as much rationality in legal argumentation as possible'.

3. The various uses of argumentation based on legal principles

Alexy's theory has been very influential in the study of legal principles, it has been refined and elaborated, but it has also been criticized. Schauer (2009) for instance is of the opinion that the claim that every norm is either a rule or a principle is excessively reductionist:

> (…) the ubiquity in legal reasoning of, for example, analogical reasoning, various forms of coherence-type interpretation, and, certain non-subsumption forms of reliance on authoritative sources suggest that little is to be gained by attempting to reduce all of legal reasoning to only two forms.

According to Ávila (2007) the principle theory presents 'some' doubts:

> Is it so that all normative species behave as principles or rules? Is it so that rules cannot be weighed? Is it so that rules always set forth definitive commands? Is it so that the conflicts of rules are only solved if one of the rules is invalid or if an exception is made to one of them?

So, although the principle theory provides a fruitful theoretical framework for the study of principles in legal argumentation, there are still many problems to be solved. In my sketch of a typology of argumentation based on legal principles, I will only discuss some of these problems.

Now, which uses of arguments based on legal principles are to be distin-

guished? Let us in answering this question start with the well known statutory interpretation model of MacCormick and Summers (1991). Their model is based on a categorization of 11 types of interpretative arguments into 4 groups: linguistic arguments, systematic arguments, teleological-evaluative arguments, and transcategorical (intentional) arguments. According to the interpretation strategy developed by MacCormick and Summers, any justification of an interpretation of a statutory norm starts with a linguistic interpretation. If that does not produce a satisfactory result, systematic arguments must come into play. If these arguments do not produce an acceptable result either, one chooses teleological-evaluative arguments:

1. In interpreting a statutory provision, consider the types of argument in the following order:
   (a) linguistic arguments;
   (b) systemic arguments;
   (c) teleological/evaluative arguments;

2. Accept as *prima facie* justified a clear interpretation at level (a) unless there is some reason to proceed to level (b); where level (b) has for sufficient reason been invoked, accept as *prima facie* justified a clear interpretation at level (b) unless there is some reason to move to the level (c); in the event of proceeding to level (c), accept as justified only the interpretation best supported by the whole range of applicable arguments.

3. Take account of arguments from intention and other transcategorical arguments (if any) as grounds which may be relevant for departing from the above *prima facie* ordering.

Arguments based on legal principles belong to the category of systemic arguments: 'the governing idea here is that, if any general principle or principles of law are applicable to the subject matter of a statutory provision, one ought to favor that interpretation of the statutory provision which is most in conformity with the general principle or principles, giving appropriate weight to the principle(s) in the light of their degree of importance

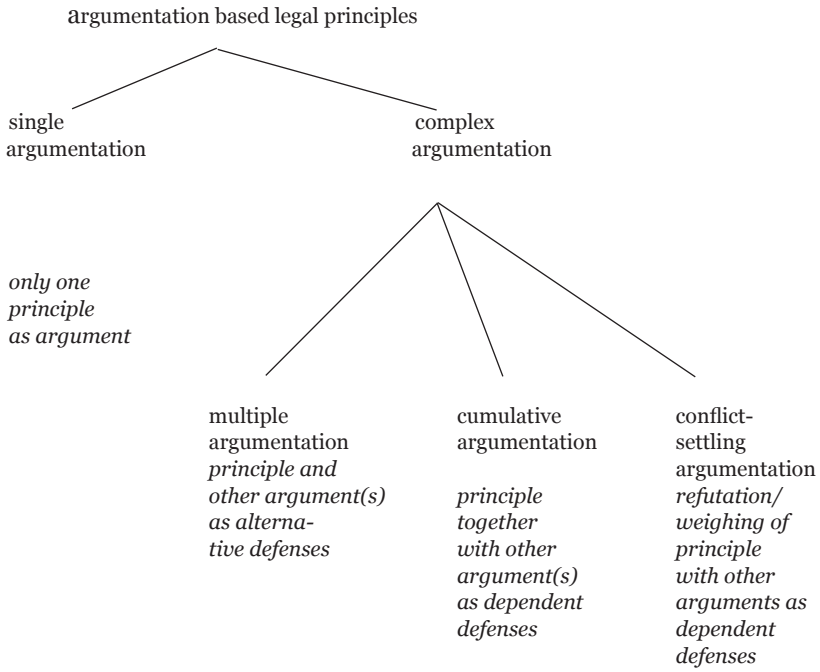
both generally and in the field of law in question' (MacCormick and Summers, 1991, p. 524). The argument from an accepted general principle derives its force not only from its essentially authoritative character, but also from systemic considerations of substantive (or procedural) coherence and harmony. At least three senses of 'principles of law' are distinguished:

a. substantive moral norms previously invoked by judges when interpreting statutes or otherwise (independently or as presumptions of legislative intention: for example, *no person shall profit from his own wrong*) ;
b. general propositions of substantive law widely applicable within a particular branch of law: for example, *nulla poena sine lege* in criminal law, 'no liability without fault' in tort law and good faith in contract law ;
(3) general propositions of law, substantive and procedural, widely applicable throughout the entire legal system. Procedural principles: requiring fair notice and a fair hearing before an official may take adverse action against a citizen. Substantive principles : protection of rights to freedom of association and speech and of freedom of discrimination on racial or religious grounds.

Because of the possible positive or negative *interactions* between arguments and other arguments, the application of argumentation based on legal principles varies from simple to complex argumentation structures. The simplest *single-argument* pattern of argumentation is based on one legal principle that justifies an interpretation of a legal rule. But legal principles are also often part of *complex forms* of argumentation. MacCormick and Summers distinguish between three forms of complex argumentation in interpretative decisions. The first form can be described as a *multiple argumentation*, a set of completely separate arguments (mutually independent) leading to the same conclusion. The second form is called *cumulative argumentation*, the argumentative force of the whole being much stronger than that of the constituent parts. The third form of complex argumentation distinguished by MacCormick and Summers is the *conflict settling pattern of justification*, involving a confrontation or weighing of conflicting arguments.

The basic pattern here is that arguments are presented in support of different interpretations, following which the various arguments are discussed resulting in a settlement of the difference of opinion about these interpretations in the judicial decision. When an interpretative argument conflicts with another, one argument may be given preference over the other on any of the following grounds. Firstly, it may appear on closer examination that an interpretative argument is *unavailable* because the interpretative conditions do not exist. Secondly, an interpretative argument is *cancelled,* which means that it is deprived of its prima facie force by the prevailing argument. Cancellation of a linguistic argument occurs for instance when there is a strong contextual-harmonization argument for a special meaning of a word in a legal norm. Thirdly, an interpretative argument is mandatory subordinated as a result of a priority-rule like *lex posterior*.

Finally an interpretative argument is *outweighed* by another interpretative argument. A linguistic argument is outweighed when the reasons behind that argument are not as strong as those behind a competing argument. These situations require a *weighing* of arguments. MacCormick and Summers (1991, p. 528) use this latter argumentation pattern in particular to illustrate the dialogical nature of argumentation used to justify interpretative decisions. Conflict-settling argumentation related to interpretative argumentation will result in complex argumentation consisting of a refutation/weighing of an interpretative argument together with one or more other interpretative arguments. Often this will result in a discussion on the level of legal principles or on the level behind the different interpretative arguments. Behind linguistic interpretation lies an aim of preserving clarity and accuracy in legislative language and a principle of justice that forbids retrospective judicial rewriting of the legislature's chosen words; behind systemic interpretation lies a principle of rationality grounded in the value of coherence and integrity in a legal system; behind teleological/deontological interpretation lies respect for the demand of practical reason that human activity be guided either by some sense of values to be realized by action or by principles to be observed in it. Schematized these distinctions result in the following uses of argumentation based on legal principles:



Let us as an example look at a reconstruction of complex argumentation where there is a complex *mixed* conflict-settling pattern of justification of interpretative arguments with the refutation of the relevance of a legal principle. The example is taken from a decision of the Supreme Court of the Netherlands in a wrongful birth case. A 'wrongful birth' action is a claim made by the parents for financial loss and emotional injury suffered by them when a child is born as a result of negligence. The classification of 'birth' as wrongful has aroused considerable ethical debates over the justification for allowing such claims. The courts in many European countries have had to confront the ethical dilemma's surrounding these claims. The Supreme Court of The Netherlands (the 'Hoge Raad') first argues on the basis of formal arguments that compensation is justified according to the law as it is, arguing as follows: The decision fits in with the system of the law, because the cost of education and care must be considered as financial damage and this damage is attributable to the doctor and the legal obligations of the parents as to the education and care of a child would not stand in the way of awarding damages.

Then the court proceeds with discussing substantial argumentation:

> '3.8 It must be examined further whether there are other objections against awarding in principle compensation for damage consisting in the expenses incurred in the care and education of the child. Such objections have been raised in the Netherlands as in other countries. To state it briefly, it has been alleged that the award of compensation for such expenses in a case as the present one, which concerns a normal and healthy child, can only be based on the conception that the child itself must be regarded as damage or a damage factor, and that in any event such an award is contrary to the human dignity of the child, since its right to exist is thereby negated.

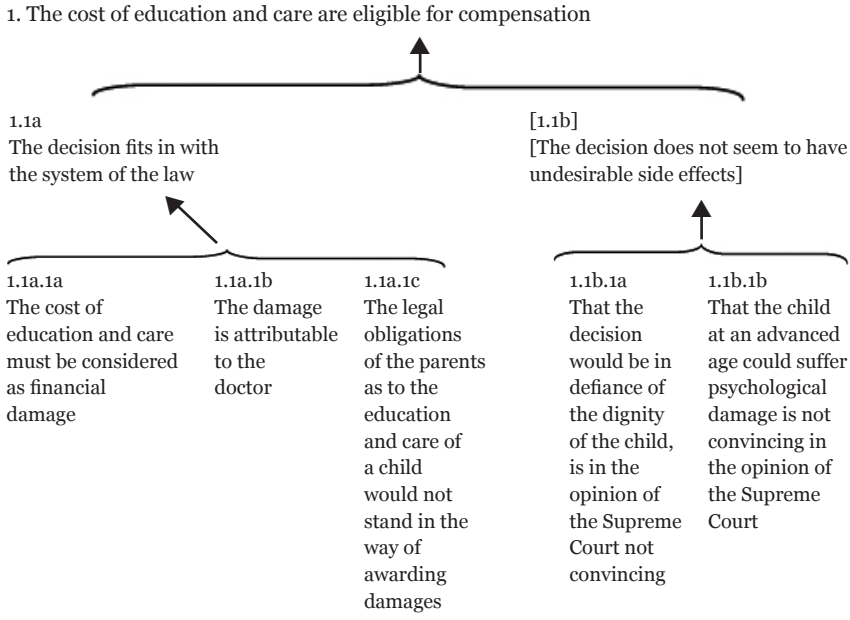
The Hoge Raad does not regard these objections to be convincing. The line of argument developed above (...) takes as a point of departure that the parents, having accepted the child and the new situation, are asking compensation for the impact it has on the family income (...). This line of thinking does not necessarily entail the conception that the child itself is seen as damage or a damage factor. (...). Nor can this line of thinking be said to be inconsistent with the human dignity of the child or to negate its right of existence. For indeed, it is also in the child's interest that the parent should not be refused the possibility of compensation on behalf of the whole family, including the new child.

Nor does the Hoge Raad regard convincing the argument that an award may result in the child being confronted later in life with the impression that it was not wanted by its parents:

> 3.9 (...) In the first place, the argument interferes with the relationship between parent and child on a point, which must, in principle, be left to be decided by the parents themselves. In the second place, to prevent an enlargement of the family is a wholly different matter than the issue of acceptance of a child once it becomes an individual. The claim for compensation relates exclusively to the first, and not to the second point. (...) In the third place, it may be assumed that parents are in general able to make it clear to the child that such an impression of rejection is incorrect, even apart from the fact that they themselves may contradict such an impression by raising the child with loving care.'

This argumentation can be reconstructed as an example of conflict-set-

tling complex interpretative argumentation in the form of formal pro-argumentation (argument 1.1a 'The decision fits in with the system of law' justified by the argumentation 1.1a.1a. – 1.1a.1c) and the refutation of substantial contra-argumentation based on a principle and consequential argument (the implicit argument 1.1b 'The decision does not seem to have undesirable side effects' justified by the argumentation 1.1b.1a. – 1.1b.1b):



Analysis of the Wrongful birth decision (NJ 1999, 145)

4. Conclusion

One of the conclusions of the study of MacCormick and Summers (1991) is that many questions about the weighing and balancing of interpretative arguments are unanswered. That is true. But their analysis shows that the use of argumentation based on legal principles is not limited to the type of cases Alexy analyzes. First, principles can operate as a single argument. Second, principles do not always operate in interaction with other prin-

ciples, but also with other interpretative arguments. Third, this interaction is not always a form of a conflict.

Works Cited

Alexy, R. *A Theory of Constitutional Rights*. Oxford: Oxford University Press, 1986.

Aexy, R. *A theory of legal argumentation. The theory of rational discourse as theory of legal justification*. Oxford: Clarendon Press, 1989.

Alexy, R. "On the Structure of Legal Principles." *Ratio juris* 13 (3) (2000): 294-304.

Alexy, R. "On Balancing and Subsumption. A Structural Comparison." *Ratio juris* 16 (4) (2003): 433-449.

Alexy, R. and Dreier, R. "Statutory Interpretation in the Federal Republic of Germany." In MacCormick, D. and Summers, R. (eds.), *Interpreting Statutes. A Comparative Study* (pp. 73-121). Aldershot: Dartmouth, 1991.

Avila, H. *Theory of Legal Principles*. Dordrecht: Springer, 2007.

Dworkin, R. *Taking rights Seriously*. Cambridge: Harvard University Press, 1978.

Habermas, J. *Between Facts and Norms*. Trans. William Rehg. Cambridge: Polity, 1996.

MacCormick, D. and Summers, R. (eds.). *Interpreting Statutes. A Comparative Study*. Aldershot: Dartmouth, 1991.

Schauer, F. "Balancing, Subsumption, and the Constraining Role of Legal Text." In Klatt, M. (Ed.), *Institutional Reason: The Jurisprudence of Robert Alexy* Oxford: Oxford University Press, forthcoming.