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THE ROLE OF ARGUMENTS FROM REASONABLENESS IN THE JUSTIFICATION OF JUDICIAL DECISIONS

In this contribution I develop an argumentation model that can be used for the analysis and evaluation of arguments from reasonableness in a legal context. First, I discuss the legal background of the use of arguments from reasonableness and fairness. I explain the rationale for the use of arguments of reasonableness, I explain the similarities and differences with other forms of legal argumentation and I establish under what conditions arguments from reasonableness form an acceptable justification of a judicial decision. Then I develop an argumentation model for the analysis and evaluation of legal arguments from reasonableness and I describe how the requirements of the argumentation model are specified further in Dutch law. Finally I give an exemplary demonstration of how the argumentation model can be used to analyse and evaluate two examples from Dutch law in which this form of argumentation is used.

Keywords: application of legal rules, legal argumentation, reasonableness and fairness.

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1. Introduction

In this contribution I discuss the role argumentation plays in a specific communicative practice, the justification of legal decisions in a court of law. I explain what the function is of argumentation in the justification of legal decisions and I will describe the rules that regulate the argumentative practice of the justification of legal decisions in special cases in which judges make an exception on the basis of reasonableness and fairness.

In the law arguments from reasonableness play an important role. Judges often refer to reasonableness in 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 a particular case. In such situations judges often use an argument from reasonableness to justify that an exception should be made to a general rule for a particular 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 a particular 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 special cases, 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 proceed as follows. First (2) I discuss the legal background of the use of arguments from reasonableness and fairness. I explain the rationale for the use of arguments of reasonableness, I explain the

similarities and differences with other forms of legal argumentation and I establish under what conditions arguments from reasonableness may form an acceptable justification of a judicial decision. Then (3), I develop an argumentation model for the analysis and evaluation of legal arguments from reasonableness. In Chapter 4 I describe how the requirements of the argumentation model are specified further in Dutch law and I give an exeamplary demonstration of how the argumentation model can be used to analyse and evaluate two examples from Dutch law in which this form of argumentation is used.

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 general legal rule to avoid an unacceptable result in a particular case. 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 yields an unacceptable result. A judge is allowed to correct the law on the basis of "equity" if it yields an unjust result because of its generality. According to Aristotle, in such cases equity amounts to justice to correct the injustice that is caused by strict application of a universal rule in a concrete case.[1] 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 und unlike cases differently. This creates an obligation for the judge not to apply a legal rule if application is incompatible with the rational goal of the rule. A rational legislator can never have intended that the application of a rule yields a result that conflicts with the goal of the rule.

On this view, the argument from reasonableness has two aspects. The first aspect refers to the obligation to treat like cases alike and unlike cases in a different way (implementing the requirement of formal justice) whereas the second aspect refers to the obligation to take into account

[1] See Aristotle, *Ethica Nicomachea* (Book V, X).

the particularities of a particular case in the administration of justice (implementing the requirement of substantial justice).[2] The justification to make an exception to a general rule in a concrete case can be based on the consideration that, although the rule is applicable if taken literally, from the perspective of reasonableness it is unacceptable to apply the rule in the particular case because the case differs in relevant respects from the cases the rule is intended for. It can also be the case that, taken literally, a particular rule is not applicable in a concrete case, but from the perspective of reasonableness and fairness it is unacceptable not to apply the rule in the case at hand because the case is in relevant respects similar to cases the rule is intended for.

In most legal systems it is allowed to make an exception to a legal rule on the basis of reasonableness and fairness if application yields an unacceptable result.[3]

The general idea why it is 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 a particular 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 is unreasonable and unfair (or when the conditions are not fulfilled but application is still 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 a particular 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

[2] See also Perelman 1979, 1980.

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

requirement of fairness that the circumstances of a concrete case should be taken into consideration. The idea behind this is that the legislator would have included a general exception for particular situations if he had thought of them.

When making an exception based on reasonableness and fairness, the judge can refer to the goal of the rule and/or general legal principles and show that the exception 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 an exception.

In modern legal theory arguments referring to reasonableness are considered as a specific 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.[4] From this perspective it can considered as a specific form of 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 leads to an unacceptable result in a concrete case. 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.[5] From this perspective, when a judge uses an argument from reasonableness and fairness, he must justify his decision by arguing that, in light of the personal and social interests involved in a concrete case, application in the strict literal meaning is unacceptable from the perspective of the goals and values the rule is intended to realize.[6]

As I explained, an argument from reasonableness has some characteristics in common with an argument from purpose and an argument from legal principles, but there are also some important differences that have implications for the way in which the judge must account for the way in which he has used his discretionary power to depart from a clear rule.

[4] See MacCormick & Summers (1991: 524 ff.) and MacCormick (2005: 132 ff.)

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

[6] For a more extensive description of such a model see Feteris (2004, 2005).

Arguments from purpose and arguments from principle are intended to justify the interpretation of the meaning of a general rule – of which the meaning is not completely clear for a concrete case – on the basis of goal the rule is intended to realize. The aim is to establish for the cases that are supposed to be covered by the rule what the general meaning of the rule exactly is and how the general meaning of the rule can be justified by referring to the goals and values the rule is supposed to realize. In applying the rule the judge refers to the purpose of the rule to justify that the rule is applicable in a concrete case.

Arguments from reasonableness, however, are intended to justify an exception to a general rule – of which the meaning is clear – for a concrete case. In justifying the exception, a judge can, among other things, refer to the goal of the rule to argue that a concrete case is in relevant respects different from the cases the rule is intended for. This can be done by showing that the results of applying the rule in the strict sense leads to an unacceptable result in a concrete case that would be incompatible with the intention of the legislator in light of certain legal principles underlying the branch of law.

On the basis of these considerations, in what follows, I develop an argumentative model of the burden of proof in cases in which judges make an exception to a rule on the basis of reasonableness. I will do this by reconstructing the complex argumentation underlying the claim that application of a particular rule is unreasonable and unfair in a concrete case because application leads to an unacceptable result that is incompatible with the goals and values of the rule in light of the circumstances of a particular 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 a particular case is unacceptable because application is incompatible with reasonableness does this in the context of a dispute in which one party argues that the rule R must be applied and the other party argues that in the context of a concrete case the rule R must not be applied because an exception is justified, so that the rule is not applicable to a 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 a concrete case an exception must be made to rule R.

Starting from the burden of proof of the judge described in the previous section, the burden implies that the standpoint must be supported with argumentation in which the judge specifies why application of the rule without an exception is unreasonable in the circumstances of a concrete case. In order to do justice to the specific character of the argument from reasonableness (that distinguishes it from an argument from purpose and an argument from principles) it must both be shown that the exception to the rule for a concrete case is coherent with certain legal goals and principles, that it is compatible with the intention of a rational legislator and that the exception is reasonable in the circumstances of a concrete case. 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:

1 In the circumstances of this case an exception to rule R is desirable

1.1 Application of R without an exception is unreasonable in the circumstances of this case and an exception to R is reasonable in the circumstances of this case

1.1.1a An exception to rule R is in line with the intention of the legislator

1.1.1a.1 An exception to rule R is coherent with the goal of the rule and/or certain general legal principles underlying the relevant branch of law

1.1.1b An exception to rule R leads to an acceptable result in this case from the perspective of the goal of the rule and/or certain general legal principles

1.1.1b.1 Statement of the special circumstances of this 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 the complex nature of his argumentative obligations. It makes clear that the burden of proof is more complex than in the case of an argument from purposes since it obliges the judge to account for the special circumstances that justify the exception to the rule.[7] 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. In the next section I use the model to give an analysis and evaluation of two examples from Dutch law of the use of an argument from reasonableness and fairness.

4. The Use of Arguments from Reasonableness and Fairness in Dutch Civil Law

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

The general idea behind the possibility of the judge to make an exception to a legal rule on the basis of reasonableness and fairness (also called the "derogating function" of reasonableness and fairness) is that the judge must have the discretionary power to make an exception in special circumstances if strict application of a legal rule leads to an unacceptable

[7] See Feteris (2004, 2005) for an argumentation model and an analysis of examples of arguments from purposes.

result from the perspective of the purpose of the rule. In the Dutch Civil Code it is specified when the judge is allowed to make such an exception and what the relevant considerations to make such an exception are.

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

> 6:248, 2 An arrangement that is valid between the creditor and the debtor on the basis of the law, a custom or a legal act, does not apply if this is unacceptable from the perspective of the standards of reasonableness and fairness.

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

> 3:12 When establishing what reasonableness and fairness require, generally accepted legal principles, legal convictions that are generally accepted in the Netherlands, and social and personal interests in a concrete case, should be taken into account.

These articles contain rules that specify under what conditions an argument from reasonableness and fairness is an acceptable argument to justify an exception to a legal rule. The articles also specify to what factors a judge should refer to justify the exception. These articles can be considered as an implementation for Dutch law of the argumentation model formulated in the previous section. It is stated that the judge is obliged to formulate the generally accepted legal principles and the social and personal interests in a concrete case that justify an exception. In the following examples we will see that the judge has extended the possibility to make an exception as specified in article 6:248 to a case in the field of succession law. For this reason the judges have a very heavy burden of proof to explain why the possibility to make an exception is also allowed in this field of law.

The first example is from a famous Dutch case of the "Unworthy spouse".[8] In 1990 the Dutch Supreme Court must answer the question whether a male nurse L who has taken care of a 72 year old lady, mrs. van Wylick, and has married her, is entitled to his share in the community of property if he kills her five weeks after the marriage. In 1985 L is convicted of murder with an imprisonment of 12 years. After this conviction L claims from the inheritors of mrs. van Wylick his part in the marital community of property to which he claims to be entitled on the basis of article 1:100 of the Dutch Civil Code. The inheritors are of the opinion that the claim must be dismissed. Both the court of appeal and the Supreme Court decide that the claim must be dismissed because L is not entitled to his share in the community of property because he is "unworthy" since he has killed his wife.

The central question the courts must answer in this case is whether an exception must be made to application of the legal rule of article 1:100 of the Dutch Civil Code that a spouse has a right to his share in the marital community of property so that the claim of L must be dismissed, and if so, how this exception must be justified. The Supreme Court answers this question positively and justifies the exception with an argument from reasonableness and fairness, the application of which is, in the opinion of the Supreme Court, in its turn based on the application of the legal principles and the special circumstances of a concrete case (for the relevant parts of the decision by the Supreme Court see the text of the decision attached at the end of this contribution). The argumentation in this case can be analysed as follows in terms of the argumentation model (the relevant part of the text is attached at the end of this contribution):[9]

1 The claim of the plaintiff, stating that he is entitled to his share in the marital community of property, must be dismissed

[8] HR 7 december 1990, NJ 1991/593.

[9] In 1999, the Dutch succession law has been changed. The articles from book 3 and 4 which were applied in this case and which are mentioned in the example and in the analysis are changed in the new succession law and can be found in book 4 of the Dutch Civil Code. The article regarding unworthiness can now be found in article 4:3 of the Dutch Civil Code.

1.1 In the special circumstances of this case an exception to the legal division of the marital community of property on the basis of article 1:100 of the Dutch Civil Code is justified on the basis of reasonableness and fairness as specified in clause 6:2 section 2 of the New Dutch Civil Code

1.1.1a In the special circumstances of this case an exception to the legal division on the basis of article 1:100 of the Dutch Civil Code is justified on the basis of the following two legal principles:

1.1.1a.1a He, who deliberately causes the death of someone else, who has favoured him, should not profit from this favour

1.1.1a.1a.1 Article 3:959 of the Dutch Civil Code and article 4:1725 sub 2e of the Dutch Civil Code

1.1.1a.1b One should not profit from the deliberately caused death of someone else

1.1.1a.1b.1 Article 3:885 sub 1e of the Dutch Civil Code

1.1.1b Reference to the exceptional circumstances of this case and the social and personal interests as established by the district court: that the marriage between mrs. van Wylick and L was a marriage of convenience, that L had only married mrs. van Wylick with the intention to take possession of her property, that he had the intention to kill mrs. Van Wylick if she does not die within a short period after the marriage, and that L had killed her 5 weeks after the marriage

Here the Supreme Court advances an argument from reasonableness and fairness to justify an exception to the rule in the special circumstances of this case. As a justification the Supreme Court (following the court of appeal) advances as subordinate argumentation that the exception can be

justified on the basis of the two legal principles (reconstructed as the arguments 1.1.1a1a and 1.1.1a.1b) and the special circumstances of a concrete case (1.1.1b). Because the court of appeal has already given a final decision regarding the facts of the case and the Supreme Court is not allowed to decide on the facts, the Supreme Court must refer to this decision about the facts of the court of appeal. The Supreme Court, following the court of appeal, stresses that these facts constitute special circumstances that justify the exception to the rule.

In this case in its argumentation the Supreme Court makes clear that it does not want to justify the exception to this rule on the basis of general principles as the main argumentation, but clearly presents the argumentation as argumentation based on reasonableness and fairness in this case, supported by general legal principles. By choosing for this form of argumentation the Supreme Court makes explicit that it does not want to use the general legal principles as a general exception to a rule of inheritance, but wants to limit the exception to exceptional cases.

In a similar way the district court of Haarlem decides in a case called the "Unworthy Grandson" from 2001.[10] In this case the district court in Haarlem uses an argument from reasonableness and fairness to justify that the legal rule of article 4:889 of the Dutch Civil Code about the right of a heir to his legal part of the inheritance should not be applied in this case.[11] The central question is whether someone who has been condemned to life imprisonment in Australia because he has killed his father and the wife of his father, has a right to his fathers legal part of the inheritance of his grandmother. (This example resembles the famous example used by Ronald Dworkin of the Riggs v. Palmer case in which the court denies the grandson Elmer who has killed his grandfather his inheritance on the basis of the principle that no one should profit from his own wrong.)[12]

The Court decides that the rule of article 4:889 and article 4:960 of the Dutch Civil Code that give a child as a substitute a right to the

[10] See Court of Justice Amsterdam, August 15, 2002, nr. 1304/01, NJ 2003, 53.

[11] In 1999, the Dutch succession law has been changed. The articles from book 4 which were applied in this case and which are mentioned in the example and in the analysis are changed in the new succession law and can be found in book 4 of the Dutch Civil Code

[12] See Dworkin (1986: 15–20).

legal part of the inheritance of a deceased parent, is not applicable in this case because it leads to an unacceptable result from the perspective of the underlying principle regarding unworthiness in the law of inheritance.[13]

The discussion takes place between the plaintiffs, the other inheritors, and the defendant, the grandson. The plaintiffs ask the court to deny the defendant, the grandson, his right to the inheritance because a strict application of clause 4:889 in the exceptional circumstances of this case is, from the perspective of reasonableness and fairness, so contrary to the purpose of the rule, that it leads to an unacceptable result. The court honours the claim and decides that this exceptional case has not been foreseen by the legislator and that for this reason in these exceptional circumstances it can be justified not to apply the rule on the basis of the derogating function of reasonableness and fairness because application results in an unacceptable consequence that is not compatible with the purpose and purport of the rule (for the relevant part of the decision see the text of the decision attached at the end of this contribution). On the basis of the general legal principle expressed in the famous case of the murder marriage, the unworthy spouse, of (HR 7 December 1990) (discussed above) someone should not profit from the intentionally caused death of someone else. In the light of this principle, in the circumstances of this particular case according to the standards of reasonableness and fairness it would be an unacceptable result if the defendant could exercise his right of legal heir on the basis of clause 4:889. (The relevant parts of the decision are attached at the end of this contribution.) An analysis according to the model is as follows:

1 The claim of the plaintiffs, stating that the defendant is not entitled to his father's share of his inheritance must be honoured

1.1 In the special circumstances of this case an exception to the legal rule of article 4:889 of the Dutch Civil Code about the right of a heir to his legal part of the inheritance is justified on

[13] 4:889 DCC: 1. Replacement in the direct downward line takes place infinitively. 4:960 DCC: The legitimate part of the legal inheritance is part of the goods that legal heirs in the direct line are entitled to on the basis of the law and which the deceased has not been allowed to change by means of a gift or testament.

the basis of reasonableness and fairness as specified in clause 6:2 section 2 of the New Dutch Civil Code

1.1.1a This exception is compatible with the general legal principle underlying the law of inheritance, that someone should not profit from the intentionally caused death of someone else

1.1.1b.1 This principle is also formulated by the Supreme Court in his decision of December 7 1990 (Unworthy spouse)

1.1.1b An exception to article 4:889 of the Dutch Civil Code is compatible with the personal interests of the parties involved in this case, implying that it is in the present circumstances compatible with the sense of justice that the will of the testatrix is obeyed

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

1.1.1c An exception to article 4:889 of the Dutch Civil Code leads to the acceptable result in th case that the son who has murdered his father does not profit from the intentionally caused death of his father

Also here the main argument is an argument from reasonableness and fairness that is, in its turn, supported by reference to general legal principles. The justification in both cases makes clear that an argument from reasonableness and fairness is intended to limit the exception to this case in which it is unacceptable from a legal and moral perspective to apply the rule.

The two analyses demonstrate that the courts, from the formal perspective, live up to their burden of justification as specified in the model for the argumentative burden of proof when using an argument from reasonableness. The exception is justified by a complex argumentation

specifying that the exception is in accordance with the law and with the personal interests of the persons involved in these cases. Whether the justification is acceptable from the material legal perspective depends on the question whether the arguments supporting 1.1.1a are acceptable. When the supporting arguments constitute generally accepted legal principles that are relevant for this case they can be considered as acceptable from a legal perspective. Given the comments given by the annotators of these cases, the commentators agree with the line followed by the courts.

This analysis and evaluation of two examples from Dutch law show that the argumentation model makes it possible to reconstruct the underlying argumentation and to clarify the argumentative obligations of the judge that have to be met for the justification to be acceptable. In my analysis I have demonstrated how the requirements of the argumentation model are specified further in Dutch law with respect to the way in which judges must account for the factors that play a role in deciding whether it is justified to make an exception on the basis of reasonableness and fairness. I have described how the argumentation in the two cases can be analysed in terms of this model. If an argument from reasonableness can be reconstructed in terms of the complex argumentation specified in the argumentation model and if a judges lives up to his formal and material burden of proof, an argument from reasonableness can be considered as an acceptable contribution to a rational legal discussion.

4. Conclusion

In this contribution I have developed a model for a rational reconstruction of arguments from reasonableness 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 thus applying the instrument to examples from legal practice the gap between normative descriptions of forms of legal reasoning and

legal interpretation on the one hand, and actual legal practice on the other hand can be bridged.

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Appendix 1: The Unworthy Spouse

Supreme Court of the Netherlands, December 7, 1990. Nr. 14036

The Court of appeal:

5.10 The court *(of appeal E.F.)* answers this question, in a similar way as the district court, negatively. In light of the very special circumstances of this case both general legal principles as well as the requirements of reasonableness and fairness according to which L must behave as a spouse in the community of property, are to be taken into consideration.

[...]

5.13 Since the district court – not or insufficiently contested in appeal – has taken as a starting point that mrs. Van Wylick envisaged with the marriage (that also according to L was a marriage of convenience) a financial favouring of L, the district court rightly states that on the factual situation the general legal principle is applicable that he who deliberately causes the death of someone else, who has favoured him, should not profit from this favour.

[...]

5.16 In this context it is furthermore important that the abovementioned legal principle is closely related to another legal principle, that one should not profit from the deliberately caused death of someone else.

[...]

5.18 Also an examination of the claims of L in light of the requirements of reasonableness and fairness according to which he is supposed to behave in the community of property, [...] leads to the conclusion that L should not profit from the community of property. [...] Also when applying the most heavy standard the court is of the opinion that the circumstances described above and also considered in light of the general legal principles mentioned above, the claims of L are so unreasonble and unfair, one could even say contrary to the sense of justice, that the exertion of these rights must be denied.

The Supreme Court:

3.1.3 The court of appeal and the district court decided that the question whether the plaintiff has a right to half of the matrimonial community of property must be answered negatively.

3.2 The court of appeal has stated in r.o. 5.10 that in answering this question in light of "the exceptional circumstances of this case' general legal

principles as well as the requirements of reasonableness and fairness according to which L must behave in the community of property apply.

[...]

3.3 [...] The court of appeal has rightly stated that an exception to article 1:100 of the Dutch Civil Code can only be made in very exceptional circumstances, in the context of which the court speaks of a "heavy standard". In the circumstances mentioned above which the court has taken as a starting point, the court has rightly decided that strict application of the rule of 1.100 of the Dutch Civil Code that gives each spouse a right to half of the community of property, is – in terms of article 6:2 of the New Dutch Civil Code – unacceptable according to standards of reasonableness and fairness.

[...]

Appendix 2: The Unworthy Grandson
District Court Haarlem, July 24, 2001, nr. 68989 (Court of Justice Amsterdam, August 15, 2002, nr. 1304/01, NJ 2003, 53)

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

5.8 The Court is of the opinion that in this case such circumstances obtain. The Court holds that the defendant acts in this special case as inheritor and statutory heir of his grandmother because he has killed his father, the inheritor in the first line.

[...]

5.10 The rules regarding unworthiness in the law of inheritance make explicit the underlying general legal principle to which the decision of the

Supreme Court of December 7 1990 also refers, i.e. that someone should not profit form the intentionally caused death of someone else. In the light of this principle the right of the defendant to exercise his right to his legal share of the inheritance on the basis of clause 4:889 of the Dutch Civil Code leads, according to the standards of reasonableness and fairness in the circumstances of this case, to an unacceptable result.

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

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