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Commentary on Feteris

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Commentary on Eveline Feteris: "The Pragma-Dialectical Reconstruction of Teleological-Evaluative Argumentation in Complex Structures of Legal Justification"

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This is a very nice paper dealing with an issue in the analysis of legal argumentation. It seeks to to give an analysis of the role and place of *teleological evaluative* argumentation in the justification of judicial decisions.

What is meant by teleological evaluative (T-E) argumentation?

As I understand it, T-E arguments come into play when there is some ambiguity or unclarity, in the rules or statutes that judges must base their decisions upon. When this happens judges must decide upon an interpretation of the law – a particular rule, perhaps – and their interpretation must have "desirable consequences in relation to the purposes and values the rule is intended to realize". This seems to presuppose that although some particular rule might admit of different interpretations, judges may know, nevertheless, what was meant by those who made the rule.

T-E argumentation is one kind, perhaps a rare kind, of argumentation used in legal decisions. There are other kinds of which Feteris mentions two: linguistic and systemic argumentation. The analysis of T-E argumentation that Feteris proposes has two parts: (a) it reveals the content and structure of T-E argumentation and (b) the relation of T-E argumentation to the other kinds of argumentation that play a role in legal decision making. Let's review these important points in turn.

THE FORM OF *T-E* ARGUMENTATION

Notice that Feteris never says "form of argument". That might be mistaken for "*logical form of argument*", something altogether different.[1] Whereas the form of consequentialist argumentation might be that it turns on what the anticipated consequences of an action might be -- and supports a conclusion thus – T-E argumentation is a form of argumentation that "refers to the consequences of the application of *a legal rule in light of the goals and values that underlie the branch of law the rule belongs to*." In other words, from the point of view of argumentation form, T-E argumentation is a kind of argumentation that appeals to the consequences of doing something (even where the doing may be applying a certain interpretation).

[1] Still, *reductio ad absurdum* seems to me to be a logical form of argument: its unique identity is entirely independent of its content and purpose.

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THE CONTENT OF T-E ARGUMENTATION

The content of T-E argumentation is a function of its form: it specifies which consequences are desirable when legal decisions have to be made on the basis of rules that admit of multiple interpretations. The consequences that are desirable are the "purposes, goals and values the rule is intended to realize". Again, we must assume that judges have access to this information.

We can now say more fully what T-E argumentation is. It is a complex form of argumentation involving both a teleological (consequentialist) component and an evaluative component. It involves two steps: first it specifies a goal, and second, given that goal, it recommends an interpretation of a rule in need of interpretation.

SOME OBSERVATIONS

Having reviewed the groundwork for Dr. Feteris's analysis, I would like to mention some of the points on which I remain uncertain.

- It is to be expected that people who study the philosophy of law and legal argumentation have familiarity with terminology and standard cases that are unknown to the general reading public. So, although the sentence, "the judge must show that the application of the proposed interpretation *makes sense in the world and in the context of the legal system*" is a mystery to an epistemologist, it will likely make sense to the legal scholars.

- Nevertheless, it is not clear what is meant by "the legal order" or system. Does it mean valid law, i.e., what is in the law books + the intentions of the law makers insofar as we can make them out? Or does the legal order also include moral principles of the society? It makes a difference since laws are often out of harmony with social values (e.g., same-sex marriages, recreational drugs, euthanasia, etc.).

- "making sense" whether "in the world" or "in the context of a legal system" is very unclear. Does it mean more than "is consistent with" and "can be understood"? Is there another way of making sense than making sense in the world?

- The discussion throughout is on a very abstract level without any example to illustrate what is meant. A rule in need of interpretation? An example of making sense in the world? An example of not making sense in the context of the legal system. I think the paper would be improved by reference to soem actual instances.

- Can the rationality and interpretative models ever yield different results?

- I should mention the asymmetry of consequentialist argumentation. I'm sure Feteris is well aware of this. In the pattern she describes as

  Application of rule R with interpretation I(r) leads to consequence Y
  Consequence Y is (un)desirable
  Hence, application of rule R with interpretation I(r) is (un)desirable

The major premiss here, can be recast as a conditional sentence. Then we have:

> If rule R is given interpretation I(r) then applications of R will lead to consequence Y
> Consequence Y is (un)desirable
> Hence, application of rule R with interpretation I(r) is (un)desirable

The asymmetry consists of this: whenever the end is deemed *UNdesirable*, the argument will take the form of modus tollens and be deductively valid; but whenever the end is *desirable* it will take the form of affirming the consequent and not be deductively valid. This is worth pointing out: just because an interpretation leads to a favourable result that does not mean that adopting that interpretation is a good idea.

For example, consider a rule like this: *R = Citizens have a legal obligation to vote in elections*. What does this rule mean? Suppose we identify the end that all citizens should vote in elections as desirable, and interpret the rule as intending to bring this end about. Then we have

I(r) = Citizens who will not vote in the elections may be killed.

Then following the above form of argumentation we have

> If the rule *Citizens have a legal obligation to vote in elections* is given the interpretation *Citizens who will not vote in the elections may be killed* then all (remaining) citizens will vote in the election
> It is desirable that all citizens vote in the election
> Hence, application of the rule *Citizens have a legal obligation to vote in elections*, given the interpretation, *Citizens who will not vote in the elections may be killed*, is desirable

Far fetched as this example is, it does show something, which is that we care about means as well as ends. In connection with this, it may be worth remarking that none of the three models Feteris has identified, shows much concern for which means might be used. But isn't this of interest to judges? and shouldn't the models be adapted to show this concern?

link to paper