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May 15th, 9:00 AM - May 17th, 5:00 PM

Commentary on Feteris

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In Response To: Eveline Feteris's *The Role of Pragmatic Argumentation in the Justification of Judicial Decisions: Independent or Complementary Argumentation?*

At the outset I need to explain that I am not a scholar in the field of pragma dialectics. Indeed I was unaware of the existence of this approach to argumentation until my colleague, Hans Hansen, invited me to act as a 'commentator' on this and another paper at this conference. He also kindly sent me copies of two papers "Argumentation as a Complex Speech Act" (1992) and "Pragma Dialectics and Critical Discussion" (1996) as well as van Eemeren and Grootendorst's book *Studies in Pragma Dialectics* (1994). I must acknowledge that while I have read the papers and dipped into the book, I still only have a nodding acquaintanceship with the ideas in this field.   I am, however, interested in the substance of reasoning and especially judicial reasoning. So I suspect that the invitation to comment on this paper arose as much from its focus on judicial reasoning as its focus on pragmatic argumentation. Hence my general interest, informed somewhat by my brief acquaintanceship with pragma dialectics and persisting curiosity about judicial reasoning, provide the basis for my comments on Eveline Feteris' paper "The Role of Pragmatic Argumentation in the Justification of Judicial Decisions: Independent or Complementary Argumentation."

In her paper Feteris sets out to examine whether pragmatic argumentation can by itself constitute sufficient grounds for the justification of a legal rule or judicial interpretation, or whether pragmatic argumentation can only provide an acceptable defense in combination with other arguments. Her analysis proceeds in three stages: in the first she reviews the three main views respecting the criteria relevant to establishing the validity of a claim–these include the *deontological/moralist* approach where pragmatic argumentation can never constitute a sound defense for a moral or legal decision–here sufficiency of justification requires arguments grounded in moral or legal values; the *consequentialist/utilitarian/teleological* approach where pragmatic argumentation can, on its own, constitute a sufficient defense; and the pluralist approach, which combines elements of the moralist and consequentialist approaches–in this perspective pragmatic argumentation should be complemented by arguments demonstrating that the decision is coherent and consistent with accepted rules and principles.

 In the second stage Feteris extends her conclusion that pragmatic argumentation must always be complemented by other arguments to provide a sufficient defense of a legal decision and leads her to examine two related questions: which other arguments and how are these arguments exactly related to pragmatic arguments? To do this Feteris turns to schema to display both

subordinative argumentation and coordinative argumentation.

In the third stage Feteris applies her thesis to the analysis of a Dutch Supreme Court decision, yielding the conclusion that the dominant model of pragmatic argumentation in the Dutch Supreme Court is akin to an ethical pluralist approach wherein pragmatic argumentation is used in combination with or as a supplement to other arguments, and where judges make their value judgments and the legal bases of their judgments explicit; thereby permitting an evaluation of the desirability of the results.

My brief comments begin by acknowledging that I find Eveline Feteris' exposition lucid, elegant and compelling. I find the juxtaposition of theoretical postulates about pragmatic argumentation and schema analysis to be well integrated and heuristically useful–especially for a novice such as myself in both pragma-dialectics and legal theory. Still and necessarily, I have three questions/observations to raise that may invite discussion or provoke further research (or may simply be deemed irrelevant!).

1. Are law and judicial reasoning culturally constructed and thereby culturally constrained?

It does seem to me that law–however conceptualized–is a cultural artifact both in terms of its legal propositions, explicit norms, forms and structure. What law is in Anglophone Canada, for example, is very much rooted in the English Common Law tradition and so has similarities in that respect with other common law jurisdictions; it is also, however, and increasingly influenced by the impact of the Canadian Charter of Rights and Freedoms as the Charter is invoked and applied in instant cases, and is re-applied and re-interpreted through the judicial process. What is arguably emerging is a distinctive Canadian jurisprudence–influenced by the common law tradition, informed by the U. S. tradition of constitutional interpretation, yet adjudicated by judges who–certainly at the level of the Canadian Supreme Court–strive to interpret and apply the law in a distinctive and culturally sensitive way.

So, Feteris' analysis leads me to ask: do justices in the Supreme Court of Canada use pragmatic argumentation implicitly or explicitly in their reasoning? Frankly, I do not know; I am unaware of any analyses of Canadian Supreme Court decisions that use pragma dialectics as a heuristic. Yet the opportunity for conducting similar analyses of Canadian Supreme Court decisions is clearly provoked by the question and by Feteris' analysis.

2. Is pragmatic argumentation part of a judge's experience and judicial tradition?

I am not a judge; nor have I conducted research on judicial reasoning in Canada with respect to pragmatic argumentation. But, given Professor Feteris' application of schema analysis to the decisions of the Dutch Supreme Court and her conclusion that the Court seems to use an ethical-pluralist

approach in its decision making, I find myself asking these kinds of questions:

Is the propensity to use an ethical pluralist approach part of a distinctively Dutch intellectual and judicial tradition? Is this approach embedded in how Dutch judges come to their role and subsequently discharge their role? Does Dutch legal practice contain normative expectations about judicial practice that predispose the Dutch judiciary in this direction?

3. If not distinctive/exclusive to the Dutch judicial tradition, do we have evidence that English, U.S. or other European judges use an ethical pluralist approach in their decision making?

If such evidence exists, one would be inclined to wonder whether this occurs as a function of a broadly 'western' intellectual and legal tradition in which judges are embedded, or whether such an approach is somehow fundamental to adjudication as a process, which leads to another speculation. Would we find such evidence respecting judicial reasoning in non western societies? In societies with quite different legal systems, norms and judicial traditions? If not, how does judicial argumentation proceed in these societies and cultures?

At root my questions raise the issue of culture and judicial decision making versus the intrinsic character of adjudication, and the role of pragma dialectics in clarifying the way judges in cultures other than the Netherlands reason.

References

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