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The Soundness of Pragmatic Argumentation: Does the End Justify the Means?

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THE SOUNDNESS OF 'PRAGMATIC' OR 'CONSEQUENTIALIST' ARGUMENTATION: DOES THE END JUSTIFY THE MEANS?

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Abstract:
This paper addresses a specific form of argumentation, *pragmatic argumentation*, in which a certain action, choice or decision is justified by referring to the favourable consequences of the action (and the unfavourable consequences of the alternative action). The paper starts with a survey of the ideas on legal argumentation developed in argumentation theory, analytical philosophy and legal theory. The various ideas are brought together in a pragma-dialectical perspective in order to give a systematic survey of the various conceptions of pragmatic argumentation and to decide which further lines of research must be developed.

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Introduction

When justifying a moral, legal or political decision, we often use pragmatic argumentation in which we refer to the consequences of the decision. One example taken from a political context is the discussion about the referendum. A preference for the referendum is defended by referring to the positive consequences, that it leads to a greater involvement of citizens with politics. An example from a legal context where a decision is defended by referring to the consequences of a certain choice, is the case of 'Sun courtyard' (High Court, September 20 1986, NJ 1986, 260). The issue in this case was whether the provisions for tenant protection in the Dutch Civil Code were also applicable to a rental contract for individual rooms in a complex of rooms in a building. The High Court ruled that since these provisions are aimed at protecting the tenant, it could be deduced that they were also applicable to rental contracts for individual rooms in such a complex. According to the High Court, a different interpretation would have led to an unacceptable result, namely that different rules would apply to rental contracts for the complex and subletting agreements for the rooms.1

What can we say about the soundness of this kind of argumentation? Are there any hidden assumptions underlying such arguments? If so, what kind of assumptions are they, and which kind of critique is relevant? Are there any contexts in which these arguments are sound, and other contexts in which they are not? Is such a form of argumentation sufficient in itself, or is it only acceptable if it is accompanied by other kinds of arguments? In other words: how should a rational judge proceed in assessing the quality of pragmatic argumentation?

I will address these questions here with a view to exploring the kind of argumentation referred to as 'pragmatic argumentation' or 'consequentialist argumentation', argumentation in which the (un)desirability of an act is defended by referring to the negative or positive consequences of an act.2 Other terms which are used are 'instrumental argumentation', 'consequentialist arguments', 'goal reasons', 'goal-based reasons', 'goal-oriented reasons', 'policy arguments', 'teleological reasoning'.

The fields in which this form of argument is studied are argumentation theory, legal theory, ethics, and political

philosophy. I will start by drawing up an inventory of the ideas developed in two of these fields, argumentation theory and legal theory about what I will call 'pragmatic argumentation'. I will examine the ideas developed on the analysis and evaluation of pragmatic argumentation.

Various descriptions of pragmatic argumentation

In *argumentation theory*, Van Eemeren and Grootendorst (1992) and Schellens (1984) discuss the analysis and evaluation of pragmatic argumentation.[3]

Van Eemeren and Grootendorst (1992:97,102) characterize what they call 'instrumental' or 'pragmatic' argumentation as an argumentation scheme based on a causal relationship. In it the argument refers to a consequence of what is mentioned in the standpoint. The standpoint recommends a particular course of action or a particular goal, and the argumentation mentions the favourable effects or consequences. Pragmatic argumentation can also be used to advise against some course of action or efforts to achieve some goal.

Schellens characterizes pragmatic argumentation as argumentation which refers to the consequences of a certain act, measure, policy, or a rule, such as a legal rule. The standpoint can consist of advice about a course of action defended by argumentation referring to positive consequences or advice against a course of action defended by argumentation referring to negative consequences.

In *legal theory*, Alexy (1989), Golding (1984), MacCormick (1978), and Summers (1978) also discuss the analysis and evaluation of pragmatic argumentation.

Alexy discusses pragmatic argumentation in the context of the interpretation of legal rules. A judge uses what I will call pragmatic argumentation to defend an interpretation of a statutory rule by showing that the consequences of this interpretation are in accordance with the aim of the rule. When using *genetic* argumentation, a judge defends the interpretation of a legal rule by referring to the intention of the legislator, and establishing that the rule is intended as a means to reach a certain end. In using *teleological* argumentation, a judge would defend an interpretation by demonstrating that the interpretation is acceptable, given the purposes of the rule. The *negative* form of pragmatic argumentation is called the *argument of unacceptability*. The standpoint that a particular rule is not acceptable is defended by demonstrating that if this rule is applied, a certain undesirable consequence will follow.

Summers develops a model for the rational reconstruction of legal decisions. In it, one of the ways to defend a decision is to use what he calls 'goal reasons'. He describes a 'goal reason' as an argument which derives its justificatory force from the fact that the decision supported by the argument has consequences which serve a good social goal. The goal can, but need not be legally recognized.

Golding discusses pragmatic argumentation, which he also calls a 'goal oriented' type of reasoning, in the context of practical argumentation, argumentation used to defend a particular act. In a legal context the act consists of rendering a decision which takes account of certain rights. It is shown that the decision constitutes a necessary means to achieve a certain desirable legal goal. Golding also distinguishes a *negative* form of pragmatic argumentation, which he calls the *reductio ad absurdum* argument. In this form of argument, a judge shows that a decision is undesirable because it hinders the achievement of a desirable legal goal.

MacCormick discusses pragmatic argumentation, which he calls 'the consequentialist mode of argument', in the context of justifying an interpretation of a legal rule. In using pragmatic argumentation, a judge defends an interpretation by showing that the chosen alternative has desirable consequences (and the rejected alternative has undesirable consequences). MacCormick makes a distinction between argumentation referring to the possible factual consequences of a rule and argumentation referring to the logical consequences of the rule, especially the hypothetical consequences which can follow if the rule is applied in similar circumstances.

Given these descriptions of pragmatic argumentation, what can we say now regarding the various forms of pragmatic argumentation, and regarding the nature of the standpoint and the argument? Authors approaching pragmatic argumentation from the perspective of argumentation theory characterize pragmatic argumentation as a specific kind of argumentation scheme. Van Eemeren and Grootendorst consider pragmatic argumentation to be a scheme which is based on a causal relationship between the argument and the standpoint, Schellens considers it to be a scheme which is based on (causal) regularity, or on the evaluation of rules or rules of conduct. The authors try to develop a model for describing the structure of pragmatic argumentation and specify the relevant critical questions for the evaluation.

The authors approaching pragmatic argumentation from the perspective of legal theory tend to approach pragmatic argumentation as an argumentation scheme underlying the justification of an interpretation of a legal rule. When justifying a teleological interpretation, a judge weighs the consequences of the preferred alternative and the consequences of the less preferred alternative, and defends his final decision by referring to the goals of the legal rule.

In the various descriptions, we can distinguish two variants. In what we could call the 'positive variant', the acceptability of an act, decision, interpretation, etc. is defended by referring to the positive consequences. In the 'negative variant', the unacceptability of the act is defended by referring to the negative consequences.

With respect to the nature of the *standpoint*, we see that the standpoint can refer to various matters. It can involve a course of action, a proposal, or a plan. In general, it is a *normative utterance*. In a political context, it can involve a certain *policy*. And in a legal context it involves either a *decision* (which can be considered as a normative utterance, an act or course of action) or the *interpretation of a legal rule*.

With respect to the nature of the *argumentation*, it involves the *consequences* of the proposed course of action or decision. In a legal context, the acceptability (or unacceptability) of the consequences is often defended by means of pragmatic argumentation, which refers to the goal of the legal rule used to defend a decision. Often it also refers to the goals of the legal system or the system of rules to which the rule belongs. In such cases, the argumentation becomes more complex in that it establishes a relationship between the consequences of the interpretation of the rule and the purpose of the rule.

With respect to the *consequences* to which the argumentation refers, some legal authors, such as MacCormick and Summers, maintain that the consequences at stake are those of a possible future application of the rule in similar circumstances and not those of applying it in the case at hand. According to MacCormick, pragmatic argumentation in a legal context concerns the consequences of the universal rule underlying the decision. Thus, it is not limited to the specific consequences of the decision for the individual parties. Other authors such as Van Eemeren and Grootendorst, Schellens, Alexy, and Golding do not specify the nature of the consequences.

Analysis and evaluation of pragmatic argumentation

The authors I have discussed here have made concrete proposals for models for the analysis and evaluation of pragmatic argumentation. Based on these proposals, I will begin by describing a basic model for pragmatic argumentation. I will then go on to discuss the different aspects of the analysis and evaluation of pragmatic argumentation.

The model for pragmatic argumentation presented here draws on the ideas developed by the various authors. It also specifies the *basic structure* of pragmatic argumentation:

Standpoint: Act X is desirable
Because: Act X leads to consequence Y
and: Consequence Y is desirable

The standpoint refers to a particular act (decision, interpretation) X. In the most simple case, where the consequences are not specified, the argumentation consists of 1) a normative statement stating that consequence Y is desirable; and 2) an empirical statement stating that act X leads to consequence Y. The model can be developed further, depending on the criticisms to which the arguer chooses to respond. Later, I will discuss various additions to the argumentation in dealing with methods to support or add to pragmatic argumentation.

With respect to the *aim* of an analytical model for pragmatic argumentation, some authors such as Van Eemeren and Grootendorst, and Schellens maintain that a model scheme must form the starting point for the critical questions relevant to the evaluation. There is no need to distinguish variants of the scheme if they do not correspond to different critical questions. Summers develops a model, which is only intended for the construction of pragmatic argumentation and not for the analysis. He describes the steps a judge has to take in constructing a pragmatic argument. Summers develops a separate model for the evaluation in which he specifies the requirements pragmatic argumentation must meet.

Some authors, such as Van Eemeren and Grootendorst, Schellens, and MacCormick formulate questions for the *evaluation*. Van Eemeren and Grootendorst, and Schellens focus on argumentation in general, whereas MacCormick concentrates exclusively on legal argumentation. These questions concern various parts of the argumentation: 1) the normative statement that maintains that consequence Y is desirable; and 2) the empirical statement that establishes that act X leads to consequence Y.

The *normative statement* is evaluated by determining whether the consequences are acceptable. Furthermore, if the consequences involve a certain social goal, we can ask whether the subordinate argumentation used to support the statement demonstrates sufficiently that the expected consequences would help to achieve that goal and whether that goal is desirable in the light of the relevant social values.

The *empirical statement* can be evaluated by determining whether the consequences actually occur as a result of the proposed course of action, whether there is a causal relation between act X and consequence Y, whether X necessarily leads to Y.

There are also authors who pose some other critical questions. Some authors, such as Schellens, formulate a question relating to the standpoint itself: whether the proposed course of action X is feasible and allowed. Other authors ask whether the proposed course of action X is the most efficient and profitable way to attain consequence Y.

MacCormick also arranges the different questions in a certain order. The first question concerns the normative statement, namely that of whether the goal is desirable. If the answer is positive, a second question follows, concerning the empirical question: does the means lead to the end. And the final question is whether the means — given all possible side-effects — is desirable.

Supporting arguments and additional arguments in relation to pragmatic argumentation as part of a complex justification

Often, pragmatic argumentation is part of a more complex argumentation in which the desirability of the consequences is examined in the light of the desirability of certain goals. Those goals, in turn, can be defended by referring to certain values and principles. In such cases, pragmatic argumentation is supported by or complemented by other arguments.

In a legal context (as well as in a general context) an argument referring to the desirability of consequence Y should be supported or complemented by an argument demonstrating that consequence Y is a means to goal Z. In such cases, the argumentation becomes more complex because an extra argument is put forward, which, in principle, can form a part of an argumentation scheme. This scheme can be reconstructed as follows:

standpoint: consequence Y is desirable
because: consequence Y leads to goal Z
and: goal Z is desirable

Such a subordinate argument is, in its turn, also a pragmatic argument.

In a legal context pragmatic argumentation is often used to defend a *teleological interpretation*, an interpretation that establishes the meaning of a legal rule by determining the *goal* of the rule. Thus, the argumentation must demonstrate explicitly that the consequences are desirable in the light of the goals of the legal rule. In the example offered earlier, the goal of the system of provisions for tenant protection was to protect the interests of the tenant.

According to some authors, a full justification of a legal decision requires justification demonstrating why goal Z is desirable. Such justification should refer to relevant legal decisions, the intention of the legislator (genetic interpretation), goals of the legal system, relevant general legal principles, etc. Thus, the task of justifying a pragmatic argumentation often requires a chain of *subordinate* arguments that refer to the goals of the rule and to general legal values and principles. In the example given earlier, the Dutch High Court referred to the fact that other parts of the law contain regulations protecting the interests of the tenant.

Pragmatic argumentation can also form a part of a more complex argumentation if a choice has to be made between two or more alternatives. Argumentation to support the alternative chosen must demonstrate that it is desirable and that the rejected alternative is undesirable. In such a case, pragmatic argumentation is complemented by other arguments and forms a part of *coordinative* argumentation.

Norms for the choice and application of pragmatic argumentation

When does pragmatic argumentation offer sufficient support for a choice in itself, and when should it be complemented by other arguments? Generally speaking, there are two approaches in legal theory to the question whether pragmatic argumentation offers a sound defence for a moral or legal decision.

Many of the authors who adhere to the first approach think that pragmatic argumentation (sometimes in combination with other arguments) can constitute a sound justification of a legal decision. Authors, such as Summers, maintain that pragmatic argumentation can, in principle, offer sufficient defence for a legal standpoint. Other authors, such as Golding and MacCormick, feel that pragmatic argumentation should be complemented by arguments demonstrating that the decision is coherent and consistent with accepted rules and principles.

Authors who adhere to the second approach tend not to think that pragmatic argumentation can form a sound justification of a legal decision. In his 'rights model' Dworkin (1978:294-330) defends the standpoint that a judge must take account of the rights of the individual and not focus on evaluating the consequences of the decision for society in general.4

Most legal authors feel that pragmatic argumentation can offer sound justification, if used in combination with other arguments demonstrating that the interpretation is coherent and consistent with legal values and principles.5 After all, a legal decision should not only be rational from the viewpoint of morality in general (by referring to the consequences for society), but should also show that it is coherent and consistent with legal rules and principles.

An instrument for the analysis and evaluation of pragmatic argumentation

Let us return now to the question at the beginning of this talk: how can a rational judge proceed in assessing the quality of pragmatic argumentation? I will attempt to offer a provisional answer here, using the ideas of the authors I have already discussed. I will demonstrate the importance of an instrument for analyzing and evaluating pragmatic argumentation to rational evaluation.

In assessing the quality of pragmatic argumentation adequately, we should begin by *analyzing* the argumentation. We should determine which elements comprise the argumentation and whether there are implicit arguments underlying the argumentation. This is a task that requires an *analytical model* which specifies the basic elements needed for a successful defence.

It should also specify which additional elements can occur in reaction to or anticipating certain forms of critique. A model suitable for legal argumentation should specify various argumentation schemes which refer to the goals underlying the rule, as well as argumentation schemes which defend these goals by referring to certain principles and values of the legal system.

Finally, it should determine which elements play a role in the additional coordinative argumentation used to demonstrate that the decision is coherent and consistent with legally accepted values. The basic elements of such argumentation schemes should be specified, like the elements of the basic scheme.

The *evaluation* should establish whether the arguments which are reconstructed as parts of a pragmatic argumentation are acceptable.

The question to be addressed is whether pragmatic argumentation is an acceptable way to defend a certain standpoint. Taking into account the various approaches in the literature on pragmatic argumentation discussed

here, we should establish norms for making correct choices of pragmatic argumentation.

Our second question is whether the argumentation is applied correctly in the concrete case. In this context, several relevant critical questions must be answered. These are questions relating to the acceptability of the normative statement about the desirability of the consequences. In this context, there can be further questions concerning the acceptability of the goals which are achieved, etc. There are also questions relating to the acceptability of the empirical statement which states that the proposed course of action leads to the desired results (or the rejected course of action leads to undesirable results). Finally, there are questions on how to weigh alternative courses of action which specify why one course of action is preferable to others.

In answer to the question posed in the title of this talk, 'does the end justify the means?', we can now answer with a 'yes'. That is, provided that the argumentation has been reconstructed according to an analytical model sketched here and the answers to the various critical questions are answered satisfactorily.

Notes

1. In Dutch law, pragmatic argumentation is often used in a situation in which a judge does not apply a statutory rule literally, but chooses a teleological interpretation. This interpretation is often justified by showing that a literal interpretation of the rule would lead to unacceptable, unreasonable and unfair consequences. In these cases, the judge often uses formulations such as 'reasonable application of the law', 'reasonable interpretation of the law', etcetera. 

2. The term 'pragmatic argumentation' is used by Van Eemeren and Grootendorst (1984) and Schellens (1984). In their terminology, they follow Perelman and Olbrechts-Tyteca (1969:266) who have introduced the term 'pragmatic argument' for argumentation 'which permits the evaluation of an act or an event in terms of its favourable or unfavourable consequences'. 

3. In my discussion here of proposals for the analysis and evaluation of pragmatic argumentation, I do not deal with authors such as Bell (1983), Hastings (1962), Perelman and Olbrechts-Tyteca (1969) who devote attention to pragmatic argumentation, but do not develop a model for analysis and evaluation . 

4. For a critique on Dworkin's ideas, see Bell (1983:15-17) and MacCormick (1978:262-264) who argue that Dworkin's argumentation, which is based on principles, can also be based on an evaluation of the consequences of a certain decision in the light of the goals underlying these principles. 

5. The idea that sound justification of a legal decision must consist of 'consequentialist' arguments and arguments of 'coherence and consistency' is, in essence, what Twining and Miers (1991:139-140) call a form of 'ethical pluralism' in the context of the justification of actions and of rules prescribing action. This approach combines aspects of what they call a 'consequentialist' view and a 'deontological' or 'moral' view. According to them, it is quite usual in a legal context to use consequentialist criteria as well as moral criteria to determine the correctness of rules and of their interpretation. 

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