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Eveline Feteris

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Commentary on Ana Laura Nettel's "Arguing for Principles in Different Legal Cultures"

EVELINE T. FETERIS

*Department of Speech Communication, Argumentation Theory, and Rhetoric
University of Amsterdam
Spuistraat 134
1012 VB Amsterdam
Netherlands
e.t.feteris@uva.nl*

Dr. Nettel proposes an account of the argumentative function of legal principles as *topoi*, that is as argumentative items that convey values accepted by a particular legal community. In her view, legal principles are used to balance or give priority to certain values in designing legal institutions. In this way they determine the way in which these institutions are meant to resolve a particular problem. Since in this conception legal principles are culturally dependent, the solution to a particular legal problem with the aid of the principles will give rise to different legal solutions in different legal cultures. For this reason Dr. Nettel argues that the transfer of institutions from one legal culture to another may be disruptive for the function of a society because each legal culture gives its own meaning, weight and balance to a particular legal principle and will therefore give different outcomes.

On the basis of this general account of the argumentative function of general legal principles, she gives an analysis of the function of the general legal principle of *legal certainty* that constitutes the basic principle of the institution of Law and forms the basis of the institution of Law in modern states governed by the law. This general principle of legal certainty is based on the need to avoid arbitrary action of governmental power. It means that coercion should be applied on the basis of existing rules, and in accordance with an established procedure.

Dr. Nettel explains that this basic idea of legal certainty may lead to different conceptions of the institution of a procedural system of law, depending on the culture in which this system of law functions. As an example, she takes the adversary legal procedure of criminal law as developed in Anglo-American systems and the inquisitorial legal procedure of criminal law as developed in continental legal systems. She argues that in the Anglo-American system the principle of certainty is interpreted in such a way that priority is given to the position of the defendant and his right to self-defence with the consequence that these individual rights are given priority over the search for truth, thus resulting in an adversary system of criminal law with a passive judge. In the continental system the principle of certainty is interpreted in such a way that priority is given to a search for the truth, thus resulting in an inquisitorial system of criminal law with an active judge.

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From this explanation of the way in which different conceptions of the principle of certainty may result in different institutions of a criminal procedure, Dr. Nettel concludes that the implantation of a particular system of criminal law may give rise to serious problems, as is demonstrated by the introduction of the adversarial system by American governments in Latin-American nations. In her view, this forced introduction has led to a disfunctionality of the administration of justice in countries where insecurity is at stake.

In my view Dr. Nettel has given a very systematic and interesting theoretical analysis of the role of general legal principles as culturally dependent values in interpreting and weighing the way in which legal institutions resolve particular legal problems. I agree with her theoretical analysis of the argumentative function of legal principles in general, and the principle of certainty in particular. However I have two questions regarding some details of the way in which she applies the theoretical analysis to concrete cases.

1. My first point concerns the analysis of the way in which legal certainty leads to a preference for a passive judge in an adversary system of criminal law and an active judge in an inquisitorial system of criminal law. In the analysis of Dr. Nettel I miss an explanation of the way in which the principle of certainty is used in weighing the choice for a particular role of the judge in both systems from the perspective of the goal of the principle: the need to avoid arbitrary action of governmental power by a guarantee of a procedure according to existing rules. Given the fact that the weighing and balancing on the basis of the principle leads to different institutions in different cultures it would be interesting to know which cultural factors influence the preference for a choice for the different procedures of criminal law. For example, why does the Anglo-Saxon culture give priority to the individual rights of the defendant and why does the continental culture give priority to the finding of the material truth?

Furthermore, in her discussion of the continental criminal procedure, it is not completely clear how the principle of certainty is served by the respect for the defendant's right to self-defence, the privilege against self-incrimination and the right to remain silent.

In my view the analysis would profit if she could specify how various specific cultural factors influence these choices.

2. My second point concerns her claim resulting from the conception of legal principles as culturally determined *topoi* that the transfer of an institution from one legal culture to another may be disruptive for the function of society. In her conclusion Dr. Nettel mentions an example of a situation in which such a transfer of a legal institution, i.e. the American adversary model imposed on Latin-American nations, has caused big difficulties. In my view the analysis of the role of the principle of legal certainty would profit if she could clarify which consequences this transfer has had on the legal culture in particular countries and in which way a more inquisitorial (or mixed accusatorial-inquisitorial) system based on continental law systems of criminal law would have been more suitable, given the legal culture in these countries.

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