ANALOGIA LEGIS. ANALOGY FROM STATUTES IN CONTINENTAL LAW

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I

The norm "dogs are not to be taken on a streetcar" can be applied to dogs only, to all *canidae* including wolves and foxes, or by analogy to all troublesome animals like bears, apes, elephants, etc. This example illustrates lawyers' tradition concerning different *spheres of application of a norm*. The first one is established by natural linguistic reading of the norm (1). The second sphere of application is determined by juristic interpretation, using many technical methods and revealing "the proper meaning" of the norm. The third sphere of application is established by other intellectual operations, exceeding the proper meaning of the norm, e.g., by frank utilitarian evaluations.

Establishing a sphere of application of a *single* norm must be distinguished from inferential processes, deductive or not, that assume formulating a statement (resp. a norm) on ground of at least one *other* statement (resp. norm) (2). For example, from the above mentioned norm (and from some additional premises) one can infer the norm "Fido is not to be taken on a streetcar".

Discussed in abstract terms, the above distinctions are not precise. First, when interpreting a norm, one starts from the legal text and produces a *different* formulation called The Same Norm After Interpretation. Why is it merely a new version of the norm, not a new norm informally inferred from it ? Second, the concept "proper juristic meaning of a norm" is unclear, too. However, one certainly can try to answer what the lawyers *call* linguistic reading, proper interpretation and "something more than interpretation", and what they *call* inference. De-

tailed studies of judicial method can help to define those categories of intellectual operations *by examples.*

II

Legal tradition concerning *analogia legis* can be explicated, as follows. There is a "gap" in law. Some cases ought to be regulated by law but are not. As a rule, one can say it only on the ground of moral evaluations. But sometimes the gap is "technical": A statute says that one has a duty or a right to act in a given way but he cannot do it because this assumes another legal rule which does not exist ([3]). For example, the Polish constitution says that judges ought to be elected but no procedure is established.

"Gaps" can be filled by analogy. Let us assume that no legal norm regulates a given case C. But a given norm *n,* intuitively read or properly interpreted, requires or permits to decide some other cases in a given way W. The case C is similar to all these cases or at least to some of them, regarded as typical. The similarity concerns persons, or acts, duties, rights, place, time, etc., and is evaluated as essential. *Hence,* the case C is also decided in the way W or similarly. The same conclusion is drawn when the decision of the case C would cause similar social effects as decisions of the cases regulated by *n* do. But only some effects are taken into account, evaluated as the proper function of the norm.

Although I will discuss only similarity of cases, the same comments can be made about *analogia* relying upon the similarity of function.

The case C falls outside the *mögliche Wortsinn* of the norm. *Analogia* is something more than interpretation, even extensive ([4]).

III

Let us assume that a given legal norm (intuitively read or properly interpreted) says that all the cases belonging to the

class (= "category") M ought to be decided in a given way W. All those cases are similar to one another. Another case, C does not belong to M but is also similar in the same respect, regarded as essential. Let the abbreviation "P" mean "decided in the way W". Let "S_M" mean "essentially similar to M". Then, *analogia legis* can be expressed in two ways.

1) *Direct version*

M ought to be P (a legal norm quoted)
C is S_M

Hence: C ought to be P.

This is not a deductive, logically infallible reasoning (*quaternio terminorum*).

2) *Indirect version*

The class of cases X is assumed. They fall outside M. But all the cases belonging to X and all the cases belonging to M are similar to one another in the same respect.

Now, Indirect Version of *analogia* consists of the following operations:

Operation 1 — formulating a general principle

M ought to be P
X is S_M

Hence: X and M ought to be P (a general principle)

Operation 2

X and M ought to be P
C belongs to X

Hence: C ought to be P ([5])

Operation 2 is deductive, logically infallible but *Operation 1* and hence *analogia* as a whole is not.

By replacing "ought to be" by "is" — Operation 1 can be

transformed into *induction* from some similar cases to all of them. Therefore the question "Is Indirect Version of *analogia* more fundamental than Direct Version ? reminds the old controversy (e.g., Jevons versus Mill) concerning priority of induction resp. analogy.

In any case, *analogia* is a *rhetorical* argument in Perelman's sense, connected with the following Principle of Justice: essentially similar objects ought to be treated in a similar way. Rhetorical arguments are indispensable in legal thinking among others because the judge is bound to decide a case even if the law is unclear (e.g., Code Napoléon, § 4, prohibition of *denegatio justitiae*).

IV

Using the same symbols, one can formulate *argumentum a contrario,* as follows:

M ought to be P
C does not belong to M

Hence: It is not the case that C ought to be P.

This conclusion is not deductive unless the first premise is replaced by "M *and only* M ought to be P" ([6]).

Now, let us assume the following premises:

M ought to be P
C does not belong to M
C is essentially similar to M.

Using *analogia legis,* one can conclude that C ought to be P. But may one use *argumentum a contrario* and draw just the opposite conclusion ?

Fredom of choice between *analogia* and *argumentum a contrario* ([7]) can be restricted by doctrine. Sometimes, pragmatic standards are suggested. For example, in the case of "two opposing rules which are competing for room", "values and principles embodied in modern statutes should be given more

weight than the values and principles of past days" ([8]). Sometimes the legislative history is quoted and even purely linguistic arguments can be found. This can be illustrated, as follows. The Contract Acts of Denmark, Sweden and Finland, Sec. 32, contain the following provision:

A party who has made a promise which due to miswriting or other mistake has obtained a content other than that intended is not bound by its content, if the promisee knew or had reason to know of the mistake.

"As the legislative history clearly indicates, this provision was supposed to justify a conclusion *e contrario*. A mistake is as a rule no excuse when the other party does not know, nor has reason to know of the mistake" ([9]). But besides, one can argue, as follows: The words "if the promisee knew or had reason to know of the mistake" can mean two things. First, "if *and only if* the promisee knew...". Second, "*for example* if the promisee knew...". However, the last interpretation seems to violate linguistic rules of using the word "if" in this kind of context. Hence, only the first version is justified, giving *argumentum a contrario* deductive character and excluding *analogia* ([10]).

Generally speaking, "the question is always whether or not to apply a rule in view (...). The old technique relies upon the principle that the judge should never create norms which are altogether new" ([11]).

Analogia can be prohibited. For example:

1) The principle *nulla poena sine lege* is expressly formulated in many legal orders. It is forbidden to punish anybody for any act if no criminal statute — properly interpreted — qualifies the act as punishable. Consequently, it is forbidden to punish anybody on the ground of *analogia legis* from a criminal statute, since *analogia* exceeds the proper interpretation of the statute ([12]).

2) According to the principle *singularia non sunt extendenda,* norms that constitute exceptions should not be applied extensively, e.g., by analogy. Generally, the more detailed is a legal formulation, the more careful is extensive interpreta-

tion of it. Besides, *analogia* is used still more carefully than extensive interpretation.

VI

Like *analogia*, extensive interpretation also leads to applying a norm outside of limits established by its linguistic reading. But two differences can be formulated according to lawyers' traditions. First, extensive interpretation does not exceed the "proper juristic meaning" of the norm. Second, extensive interpretation is not necessarily justified by similarity.

Both distinctions can be criticised, nevertheless. First, the concept "proper juristic meaning" is unclear, since it depends on many controversial rules of interpretation; the primary function of those rules is the same as the function of *analogia*; it consists in adapting the law to requirements of justice and "life" in general. Second, extensive interpretation assumes some connection between a legal norm and a case C to which the norm is extensively applied. Otherwise, the decision of applying the norm to C would be determined by free moral evaluations, not by interpretation. But can this connection consist in something else than similarity between C and the cases directly regulated by the norm — or at least similarity of function performed by deciding those cases ?

Besides, the fundamental principle of the famous teleological method is the following one: "One must assume the statute to be applicable to the 'certain' cases referred to earlier and ask oneself what function the statute performs in the legal system with regard to *those* cases. Then one passes to the 'uncertain' cases which are under adjudication. The statute must be applied to cases of this category, if that would contribute to the achieving of the above-mentioned purpose" ([13]). Thus, deciding the "certain" and "uncertain" cases in the same way is justified by similarity of function performed by the decisions. This principle, similar to the functional version of *analogia*, is applicable to the construction of statutes in general ([14]).

Some authors have identified *analogia legis* with extensive interpretation ([15]). This opinion, natural in view of the above

arguments, is controversial. First, it is not logically necessary. In spite of all the theoretical difficulties, *analogia* can be distinguished from extensive interpretation in an admissible way, namely *by examples* (see Section I). Second, identifying *analogia* with extensive interpretation can cause practical difficulties. Traditionally one could say that *analogia* was used to fill gaps in law, was inadmissible with regard to *singularia,* inadmissible in Penal Law of many countries, etc. Taking into account such general formulations as well as evaluations concerning justice, utility, etc., the courts decided many cases and thus delimited the border between admissible and inadmissible *analogia.* Independently, they established also a border between admissible and inadmissible extensive interpretation ([16]). One can doubt whether those borders are identical. If not, then by calling *analogia legis* extensive interpretation one can influence the courts. They can start to use *analogia* always when extensive interpretation is permitted. This is scarcely acceptable. Any new, non-traditional conceptual apparatus ought to be completed by detailed directives, eliminating exactly the same examples of reasonings as before. Only pragmatic, not philosophical arguments can lead to replacing the old restrictions by the new ones ([17]).

VII

A legal *philosopher* tries to state explicitly all the premises of *analogia* and then asks, e.g. the following questions: Does *analogia* assume a general principle ? Is analogia identical with extensive interpretation ? After discussing such questions one can ask further ones, belonging to *jurisprudence.* For example: What practical consequences follow from identifying *analogia* and extensive interpretation ? Can the restrictions of using *analogia,* accepted in legal practice, be formulated precisely and in general terms ? Legal philosophy leads to jurisprudential questions. Jurisprudence helps doctrinal study of law which helps practical lawyers. This is a long way. Can we find it ?

NOTES

(1) See A. Ross, *On Law and Justice*, London, 1958, p. 149.

(2) Comp. K. AJDUKIEWICZ, *Klasyfikacja rozumowań (Classification of Reasonings)*, in *Studia Logica* II, 1955, pp. 278 ff.

(3) Comp., e.g., H. KELSEN, *Reine Rechtslehre*, Wien 1960, p. 254.

(4) Comp. e.g, K. ENGISCH, *Einführung in das juristische Denken*, 4 ed., Stuttgart-Berlin-Mainz 1968, p. 146. The minority of authors identified *analogia* with any legal reasoning based on similarity. Comp. the literature quoted by J. NOWACKI, *Analogia legis*, Warsaw, 1966, p. 45 ff.

(5) Operation 2 corresponds in everything what interests us with the formula $\{(\alpha \subset \beta) \,\&\, [\beta \cup \gamma) \subset \delta]\} \rightarrow (\alpha \subset \delta)$, elaborated by U. KLUG, *Juristische Logik*, Berlin-Göttingen-Heidelberg, 1958, p. 125. Namely, $(\alpha \subset \beta)$ means "α eine Teilklasse von β ist" — comp. our second premise, while $[\beta \cup \gamma) \subset \delta]$ means "die Vereinigung von β und γ eine Teilklasse von δ ist"; δ ist further interpreted as the class of cases to which a given norm "Anwendung findet"; consequently, those cases ought to be decided according to that norm — comp. our first premise. I have no place to discuss logical problems connected with understanding the symbols "$\ldots \subset \delta$" in such a way.

(6) Comp., e.g., O. WEINBERGER, *Rechtslogik*, Wien-New York, 1970, p. 337.

(7) T. STRÖMBERG, *Inledning till den allmänna rättsläran*, Lund, 1970, 4 ed., p. 144-5, has written that *analogia* and *argumentum e contrario* are merely labels used after the legally-political evaluations or interpretative operations are already done. Comp. also Ross, *o.c.*, p. 151 ff.

(8) F. SCHMIDT, *Construction of Statutes, Scand. Studies in Law*, 1957, p. 195-196.

(9) F. SCHMIDT, *Model, Intention, Fault. Three Canons for Interpretation of Contracts, Scand. Studies in Law*, 1960, p. 184.

(10) ROSS, *o.c.*, p. 150 has written that in some cases "conclusion *e contrario* is merely a part of general linguistic interpretation".

(11) SCHMIDT, *Construction*, p. 195.

(12) In Sweden the principle *nulla poena* is held to be in force as customary law, comp. H. THORNSTEDT, *The Principle of Legality and Teleological Construction of Statutes in Criminal Law, Scand. Studies in Law*, vol. 4, 1960, p. 219. But the Swedish Supreme Court accepts *analogia* in penal law, if there are very strong pragmatic reasons to do it, comp. Nytt Juridiskt Arkiv, 1959, p. 254.

(13) P. O. EKELÖF, *Teleological Construction of Statutes, Scand. Studies in Law*, 1958, p. 84.

(14) *Ibid.*, p. 85.

(15) See, e.g. ROSS, *o.c.*, p. 149.

(16) E.g., on ground of the principle *"in dubio pro libertate"*, see ENGISCH, *o.c.*, p. 102.

(17) Comp. e.g., the restrictions in Penal Law discussed by THORNSTEDT, *o.c.*, p. 209 ff.