IS ANALOGY A DECISION PROCESS IN ENGLISH LAW?

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Since at least the time of Bracton it has been a commonplace to claim either that legal reasoning is typically analogical, or that at the very least argument by analogy plays a significant role in legal reasoning (1). In order to appraise these claims it is necessary to understand what qualifies as an analogical argument.

If the expression 'argument by analogy' is used in its narrowest sense, then analogical arguments seem restricted to a special type of mathematical reasoning which cannot be extended to embrace arguments in law. If, on the other hand, the expression is given its widest sense then it becomes equivalent to '*any* argument' so that it would be a triviality to assert that legal arguments, or for that matter arguments in any field whatever, are 'analogical'. Between these two extremes there are several other recognised formulations of arguments by analogy.

In contrast with the English situation, where this topic still awaits systematic treatment, there are several interesting studies of analogical argument by Continental scholars (2). As guides to the use of analogy in English legal reasoning these texts however are not of major service. Continental authors prepared their texts in an environment where the development of law proceeds for the most part by way of interpretation of legislation and where decided cases have no status beyond that of suggesting directions for interpretation. Because the trend of legislation is to encroach increasingly into the most varied aspects of social conduct the demarcation in English law between argument from case to case and statutory interpretation might eventually disappear and give place to a single process — interpretation of statutes with the aid of decided cases. This, however, would still be a far cry from the Continental system of decision making.

Since many Continental lawyers see 'analogy' in the role assigned to it by Savigny as essentially a means for filling 'gaps' left by legislation ([3]), their discussions of analogy are understandably quite differently orientated from those of English writers ([4]).

We shall examine some of the various senses in which the expression 'argument by analogy' has been used by logicians. The effect of this examination will be to explode a myth — to show that the reasoning which occurs in the process of deciding cases in English law can be said to be 'analogical' only in a special stretched sense, and not in any sense which has historically been applied to 'analogical reasoning' by logicians.

In its strictest sense 'analogy' is a process which operates from a basis which presupposes *equality* or *identity* between quantitative relations. Mathematics is the primary field where this form of analogical argument can successfully function. The related concepts of law do not bear the quantitative equality which is necessary for the type of inference:

> If in respect of weight $a : b : : c : d$ then if a weighs twice as much as b, then c must weigh twice as much as d ([5]).

This mathematical type of analogical argument is linear or deductive; it is an instance of demonstrative or necessary reasoning. By contrast all other kinds of analogical argument answer to Bosanquet's dictum 'analogy is never demonstrative' ([6]).

Because 'analogy is never demonstrative', we must be very wary of discussions which aim at subsuming analogical reasoning into any system of formal logic. Attempts to picture a non-deductive argument as deductive are neither wrong, or what is formalised is something other than what is normally understood by 'argument by analogy' ([7]). Instead of being arguments which proceed from *identity of relations* all non-mathematical forms of argument by analogy base their inferences on *resemblances.* Another fundamental distinction between these two divisions of analogy is that the *resemblances* appealed to by the non-mathematical forms need not neces-

sarily be referable to *relations*, but are instead frequently resemblances between states of affairs or between objects.

Because non-mathematical forms of analogy are not deductive, it makes no sense to talk of a 'valid' or 'invalid' argument by analogy; we can talk only about such an argument's *soundness*, judged against the strength of the reasons advanced in support of it. It is only failure to appreciate this basic point which can naively permit the dismissal of non-deductive processes merely because they are 'not valid', i.e. not deductive ([8]).

Deriving from this naive approach are the allied claims that it is never possible to argue by analogy. When analysed these claims are always reducible to the following simple and harmless tautology: it is not possible to construct *deductive analogical arguments* for this would be as much a contradiction as the construction of a round square.

The wide and seemingly paradoxical claim that *every* argument is an argument by analogy does not demand very serious consideration. As 'argument by analogy' has historically been used to characterise particular kinds of argument, it would from a pragmatic point of view be merely to confuse the issue to call every argument an argument by analogy. Since we could support such an artificial rule of classification only by equating 'analogy' with 'any resemblance' there is no pressure which obliges us to adopt the classification.

Having eliminated the widest and narrowest categories of arguments by analogy, we turn our attention to other categories — explaining them and examining whether they contribute anything to our understanding of legal reasoning.

Foremost among arguments which have been called arguments by analogy are those patterns of reasoning which are said to lead scientists to the framing of hypotheses. When an argument by analogy is used for framing an hypothesis ([9]), there is a 'leap' from what is known to the unknown — something is discovered or added to the storehouse of knowledge. Is law a science where the hypothesis-framing type of analogical argument is either fruitful or possible ?

A law suit, reduced to its simplest elements, is a clash between the points of view of the litigants as to what rule or

principle should regulate the conduct in question. Assuming that there is no issue as to the facts the judge is invited to classify those facts under a particular legal category — the parties suggesting different categories. The judge does not necessarily settle the issue by favouring one party's classification — he may classify the issue under a category which was not within the contemplation of the parties or he might avoid all known legal categories and declare the case to be a special one for which a new category has to be invented. This new category was not stored in some Platonic heaven for the judge to discover by the application of his reason; rather it was his own creation fashioned and regulated by prevailing social conceptions. As analogical reasoning can only be heuristic, the creation of a rule of law must be explained in terms other than analogy ([10]).

When, however, as is most often the case, a judge decides to classify the issue before him as belonging to an established legal category, in what sense can he be said to be framing an hypothesis in order to discover something ? It is clearly not the task of a judge to 'discover' the law. Rather than discover anything, the judge *classifies*; and classification is not a process which is in any direct way dependent upon argument by analogy — it merely depends on making a *decision* on the basis of similarities assumed to be of significance.

Unless we permit the expression 'argument by analogy' to assume its widest and most useless sense of 'any argument' then argument by analogy does not play a role in legal classification.

We now turn to what has for long been regarded as the standard type of argument by analogy. From the fact that *a* and *b* resemble each other in certain respects a conclusion is drawn that *b* also resembles *a* in some further respect — in possessing a characteristic known only with respect to *a*. If this basic type of analogical argument does not frequently occur in legal reasoning then we might reasonably suspect that no type of argument by analogy has a significant application in law.

Let us consider the conditions which permit argument by

analogy. Above all else, the *number* of respects in which two things resemble each other is not a sufficient condition for permitting analogical argument. If they resemble each other in every respect then, of course, there is no argument by analogy — indeed no argument at all. But even if they resemble each other in dozens of respects we are not always authorised to draw a conclusion that they might resemble each other in a further respect, particularly if we know that in at least one major respect they differ. Rather than the *number* of similarities, it is the *weight* of the similarities that we must make our guide in analogical reasoning ([11]). In order to determine the weight to be given to similarities we must rely upon our previous knowledge and on our mental outlook, and above all upon our knowledge of how closely the inferred feature is tied to those features which the analogates are known to share in common.

Those who wish to see in this first requirement a permissive rule for admitting orthodox argument by analogy into law might point out that no two cases are ever identical, that even if the factual situations are alike in every respect one case has already been decided and so has the additional 'property' of having been placed in a definite legal category. The case before the court has not this 'property' and it is exactly this which is inferred by means of an argument from analogy. Such an approach is vitiated by a major fallacy. To have placed a decided case within a legal category is very much like giving it a name ([12]); it is not to have extracted an unknown feature from its 'essence' or to have added some property to it.

A further argument that might be urged against the advocates of orthodox analogy as a decision process in English law is that although the classification of natural kinds is objectively controlled by guiding criteria, this feature does not extend to the classification of legal issues ([13]). Two cases might present themselves with no differences in material facts yet opposite decisions are given by the courts. This occurs most strikingly when a previous decision is over-ruled but also frequently when cases are distinguished. Whereas argument by analogy is a more or less mechanical procedure decision processes in

law are primarily teleological ([14]). This aspect is sometimes obscured by judges who may not articulate the social pressures guiding their decisions but pretend instead that they are giving an objective interpretation of what a particular statute or precedent is intended to encompass.

An additional feature said to characterise argument by analogy is that it is a process of reasoning from particular to particular. If sustained, this feature alone would have the effect of eliminating argument by analogy as a form of reasoning appropriate in law which is an area where reasoning from particular to particular is extremely rare. It is often said that the common law develops by means of argument from case to case. This however is very different from saying that analogical inferences are drawn from one particular to another. The process of case law is rather the application of a general principle enunciated in an earlier case (or constructed from the decision of that earlier case) to the fact situation presenting itself in a subsequent case. Nearly always courts argue from particular to general or from general to particular. The first is exemplified whenever a principle is extracted or developed from a decided case; the second when a principle is applied to a case before a court: "When we extend to a new case some general principle ... we have passed beyond analogy" ([15]). This is a very powerful argument which is sufficient to dismiss many of the claims that argument by analogy plays a key role in legal reasoning. It however needs some amendment: analogical argument need not be restricted to reasoning from particulars to particulars; it also encompasses reasoning from the general to the general ([16]). Even with this amendment, however, argument by analogy is seen as 'same-level reasoning' and if legal reasoning is essentially 'different-level reasoning' then little scope is allowed for argument by analogy in the law.

There remains to be considered a further type of reasoning which has been claimed to illustrate the use of arguments by analogy in law — reasoning based on circumstantial evidence ([17]).

Reliance on circumstantial evidence is most common in criminal trials. One writer attempts to sustain the thesis that

'circumstantial evidence ... is essentially reasoning by analogy' ([18]) by selecting a case from criminal law: the hypothetical murderer and the person arrested resemble each other in having property of the deceased in their possession, in having been seen near the scene of the crime at about the time it was committed and possessing a weapon like that with which the victim was killed. From this it is concluded that it is highly probable that the accused person is the murderer. But this author deceives himself for he continues: 'resembling the hypothetical person in so many respects X must resemble him in having committed the deed — must be *identical* with him'. What the prosecution is looking for is *identity* so that bare resemblances have no place.

If it is to have weight then circumstantial evidence, as admitted in criminal proceedings, is not analogical reasoning but reasoning to an identity.

In those cases where proof does not have to go beyond a preponderance of probabilities, e.g. civil actions such as those which daily arise from motor accidents, could circumstantial evidence perhaps sometimes take the form of an argument by analogy ? That various clues are available could be accepted as sufficient for making the leap to a person's guilt in driving negligently. The leap however would be from particulars of one sort to a conclusion of a type that is different from these — to expand a suggestion we have already made, to say that one has committed an offence is merely to attach a name to certain actions; this does not in any way exploit the *intension* of that with which we started, something which always happens whenever an argument by analogy is used.

We have examined the various standard types of analogical arguments recognised by logicians. Legal reasoning does not fit into the patterns of any of these; but this should hardly be a matter of great surprise. Legal reasoning is not, as distinguished from arguments by analogy, a quest for probable new knowledge, but is rather a process of decision. It is thus to a logic of decision rather than one of discovery that we must appeal for an understanding of legal reasoning.

This is not the place for a general discussion of decisional

logics. Our aim is more restricted. What remains is to suggest what legal theorists might mean when they say that legal reasoning is 'analogical'.

A primary meaning of 'analogy' in law appears to be associated with a wide use of this word to indicate vaguely 'any resemblance' — or 'a resemblance deemed pertinent by a court'. This usage can be best illustrated by considering how concepts have been developed by what lawyers have called 'analogy'. At random let us select the concept 'charitable trust'. Courts have frequently claimed overtly that in order to decide whether a purpose is charitable reference must be made to the preamble of the *Charitable Uses Act 1601,* and that only objects there listed or those 'which by analogies are deemed within its spirit and intendment' are charitable. As the list of charitable objects increased courts said that all new charitable objects should also be looked to, so that if a gift is 'analogous' to one not listed in the 1601 preamble but rather to one accepted as 'analogous' to these, then that gift is also charitable:

> The method employed by the court (for deciding whether a particular institution is or is not a charity) is to consider the enumeration of charities in the *Statute of Elizabeth,* bearing in mind that the enumeration is not exhaustive. Institutions whose objects are *analogous* to those mentioned in the statute are admitted to be charities; and, again, institutions which are *analogous* to those already admitted by reported decisions are held to be charities ([19]).

If we were to accept pronouncements of the courts as to their behaviour when faced with deciding whether or not a charitable trust has been created, we would have to conclude that their method is a reasonably objective one in which new cases are compared with decided ones in an effort to see whether or not they are 'analogous', i.e. reflect 'the spirit and intendment' of the original 1601 statute. If instead we ignore what the courts have said about their efforts to make sure that cases are 'analogous' and concentrate rather on empirically examining lists of what have been held to be, and not to be,

charitable trusts we readily see that mere likeness or 'analogy' between cases would in no way help us to give coherence to the decisions: "When one takes gifts which have been held to be charitable, and compares them with gifts which have been held not to be charitable, it is very difficult to see what the principle is on which the distinction rests" ([20]).

Decisions on whether a gift is charitable or not present no harmonious pattern so that no lawyer can be certain that a document he has drafted will survive a challenge in the courts as to whether a charity has been established or not. Just as we must reject many claims by judges that they are applying deduction in particular situations so also must we reject many of their claims to be classifying charitable trusts by 'analogy' for this word as used by them appears to mean nothing else but that the classification is an axiological one made on the basis of what they consider is, or ought to be, the prevailing public policy.

Our example began with a list which the courts expanded. More commonly however a court is presented either with a general statement in a statute and is required to decide whether a particular case falls within that general rule, or alternatively it accepts a particular decision and adds to it so that eventually a general principle is built up from a series of individual decisions, e.g. the development of what is known as the *Rule in Rylands v. Fletcher.*

It is sometimes said that courts decide their cases by selecting between 'competing analogies'. This means no more than saying that parties litigate only because they suspect that they have some chance of victory. In presenting their arguments the parties will, of course, draw the court's attention to prior decisions which might lend support to their case. These decisions are not *analogies* but *decisions* aimed at swaying the court.

To talk of 'competing analogies' is merely to say that litigants present their cases with as much conviction as possible so that it is for the court to make the decision when parties are not satisfied with the arguments advanced by the opposing side. In the minds of the parties there is no picture of 'com-

peting analogies' but only pictures of a decision and of 'bad arguments' against their own 'good arguments'.

A final use of 'analogy' in law is in the sense of what some writers call 'extensive interpretation' ([21]). A statute might, for example, intend to deal with benefits to be granted to members of the armed services, but might instead refer only to soldiers and sailors. A court decides that these benefits apply also to airmen who did not exist at the time of passing the statute. If one knows that the latter is meant, there is no harm in using 'analogy' instead of 'extensive interpretation'; but nothing is gained from this odd usage.

Extensive ('analogical') interpretation is not limited to making provision for new technicalogical advances. Virtually every statute is framed in general language as it would be impracticable to draft legislation to cover specifically every conceivable individual type of fact situation. The question is always whether the statute 'intended' to embrace the particular situation before the court. No process of deduction can lead to a decision in circumstances such as these, but it is equally improper to suggest that argument by analogy can dictate a decision. Decisions are made by reference to such factors as the purpose of the legislation and the foreseeable consequences of the decision.

In penal statutes rules of construction require strict literal interpretation and this situation has given rise to a voluminous literature by Continental lawyers as to whether 'analogy' may be applied to the interpretation of them ([22]). All that is wrapped in this usage of 'analogy' is whether actions not specifically declared punishable should attract sanctions by reason of their resemblance in some features to actions that do attract penalties, i.e. this 'analogy' is equivalent to what is more commonly known as 'extensive interpretation'.

The main business of a court is to classify fact situations. In most cases the court is readily able to decide that the case before it should be placed within an established legal category, but in other cases a new category has to be invented. The process of classification is carried out under the shadow of the consequences of making a particular classification. Simi-

larity of factual situations is not sufficient reason for following a prior decision. Every technique of classification is used by the courts and 'analogy' in the sense of 'similarity' is one of these, but this is not a feature which automatically makes reasoning by analogy an element of legal argument. The structure of analogical arguments is such that these arguments, even if applicable, could be of but minimal use in legal reasoning' (*).

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[1] R. Cross, *Precedent in English Law* (1961) 19 ff; John C. H. Wu, *Jurisprudence* (1958) 595.

[2] N. Bobbio, *L'analogia nella Filosofia del diritto* (1938); U. Klug, *Juristische Logik* (1951), 2nd ed. (1958). My references are to the Spanish translation Logica Juridica (Caracas University, Venezuela, 1961).

[3] William G. Hammond, *Legal and Political Hermenuetics* (3rd ed. 1880), Appendix G. "On Analogy and the Ratio legis" at 278.

[4] An expression of the extreme Continental attitude is to be found in W. W. Fearnside and W. B. Holther, *Fallacy, the Counterfeit of Argument* (1959).

[5] H. W. B. Joseph, *An Introduction to Logic* (2nd ed. 1925) 532.

[6] B. Bosanquet, *Logic* (2nd ed. 1911), ii, 100.

[7] The best-known formalisation is that of I. M. Bochenski: *On Analogy*, a paper reprinted from 'The Thomist' 1948 and included in A. Menne (ed.): *Logico-Philosophical Studies* (1962), 97-117. This, however, is a formalisation of the interpretation of Scholastic analogy proposed by Cajetan in his De Nominum Analogia. It has no bearing on 'argument by analogy' as used in the present paper. Klug, *op. cit.*, offers a formalisation of what he calls 'analogy'.

[8] See generally P. F. Strawson, *Introduction to Logical Theory* (1952), Ch. 9. For examples of the improper labelling see J. Hospers, *Introduction to Philosophical Analysis* (1956), 354 and N. Rescher, *Introduction to Logic* (1964), 277.

[9] It is sometimes claimed that these 'analogies' are not 'arguments', e.g. J. D. Carney and R. K. Scheer, *Fundamentals of Logic* (1964), Ch. 5.

[10] E. Ehrlich, *Die juristische Logik* (1918), 229 claims that argument by analogy is a *creative* process. A. Kaufmann also asserts this — Analogy and the Nature of Things, Australian Society of Legal Philosophy,

(*) This paper is a summarised version of a paper read to the Australian Society of Legal Philosophy. The summary was prepared by Miss Helen Gamble of the Law School, Australian National University.

Paper 25 (1965). Kaufmann, however, makes no distinction between creation and discovery as may be seen from his statement: "Analogy has a creative cognitive value. This consists in the discovery of something previously unknown" (p. 19).

[11] BOSANQUET, *op. cit.*, ii, 92. Cf. R. CARNAP, *Logical Foundations of Probability* (1950), 569 for a discussion of the concept of 'width' for use in weighing resemblances.

[12] Mere appeals to the consequences of assigning a name in law cannot be used to deny that this in fact is the procedure of law. See J. WISDOM, *Philosophy and Psychoanalysis* (1953), article entitled "Gods" — the relevant extract is included in D. LLOYD: *Introduction to Jurisprudence* (1959) at 439.

[13] This is one of the central theses sustained by Edward H. LEVI, *An Introduction to Legal Reasoning* (1949). Even with natural kinds, of course, our 'similarities' may be dictated by our method. Thus, for example, Felix S. COHEN, *The Legal Conscience* (1960) shows with an exaggerated example that six persons making their first contacts with an elephant described it respectively as "like a wall, a spear, a snake, a tree, a fan and a rope". (p. 152).

[14] L. BAGOLINI, *La scelta del metodo nella giurisprudenza,* "Atti del III Congresso Nazionale di Filosofia del diritto" 1957, 24ff argues that teleology dictates the choice of direction ('analogy') taken by judges. Cf. P. OERTMAN, *Interests and Concepts,* in *The Jurisprudence of Interests* (20th Century Legal Philosophy Series) (1948) at 69; BOSANQUET, *op. cit.*, ii, 95 ff. See also KAUFMANN, *op. cit.*, 10.

[15] J. E. CREIGHTON & H. R. SMART, *An Introductory Logic* (5th ed. 1932), 313.

[16] E. Garcia MAYNEZ, *Logica del raciocinio juridico* (1964) 155; KLUG, *op. cit.*, 164, citing Ziehen; KAUFMANN, *op. cit.*, 18.

[17] S. H. MELLONE, *An Introductory Textbook of Logic* (19th ed., 1950), 228-9.

[18] D. S. ROBINSON, *Illustrations of the Methods of Reasoning* (1927), Ch. VI, 137-163, at 138.

[19] *Re Foveaux* [1895] 2 Ch. 501, per Chitty J. at 504.

[20] *Re Tetley* [1923] 1 Ch. 258, per Lord Sterndale, M.R. at 262.

[21] KLUG, *op. cit.*; S. SIMITIS, *The Problems of Legal Logic,* "Ratio" 1960, 60-94; A. ROSS, *On Law and Justice* (1958) s. 29; HAMMOND, *op. cit.* But see BOBBIO, *L'analogia nella filosofia del diritto* (1938), Ch. XI p. 132ff.

[22] See, for example, BOSCARELLI, *Analogia e Interpretazione Estensiva nel Diritto Penale* (1955).