Revista de la Facultad de Derecho de México
Tomo LXXIV, Número 290, Septiembre-Diciembre 2024
DOI:http://10.22201/fder.24488933e.2024.290.90066

Analogy and legal reasoning: a cluster of open questions

Analogía y razonamiento jurídico: un conjunto de cuestiones pendientes

Silvia Zorzetto[*]

Abstract: The analysis proposes a minimal concept of analogy that represents a lowest common denominator among the many models that have been proposed by legal theorists and jurists over time. Such a minimal concept is an explanatory tool to navigate the 'jungle' of questions surrounding this argument that hides behind truisms and trends in contemporary jurisprudence. This analysis sets out some of the issues surrounding analogy: (i) at the level of construction and rhetoric, its relationship to exemplarism in law, legal metaphors and fictions; (ii) at the level of interpretation and adjudication, its relationship to other legal arguments, precedent, legal principles, extensive interpretation and the nature of the source/target norm; (iii) at the level of justification, the axiological and practical dimensions of analogy and the relationship with particularism and universalism; and finally (iv) the values and scope commonly associated with analogy.

[*] Profesora Asociada en el Departamento de Ciencias Jurídicas Cesare Beccaria, Universidad de Milán Italia. Obtuvo la habilitación de primer nivel para el sector disciplinar filosofía del derecho. Colabora con másters y proyectos de investigación también extranjera, y es autora de contribuciones en revistas y series de relevancia internacional. . ORCID ID: 0000-0001-9767-3700. Contacto: <silvia.zorzetto@unimi.it>.Fecha de recepción: 01/03/2024. Fecha de aprobación: 30/11/2024

DOI:http://10.22201/fder.24488933e.2024.290.90066

Keywords: analogy; legal reasoning; exemplarism in law; extensive interpretation; particularism and universalism

Resumen: El objetivo del análisis es proponer un concepto de analogía que representa un mínimo común denominador entre muchos modelos que han sido propuestos por teóricos y juristas a lo largo del tiempo. Tal concepto mínimo es una herramienta explicativa para navegar la 'jungla' de cuestiones que rodean este argumento y que se encuentran detrás de truismos y tendencias en la jurisprudencia contemporánea. El artículo explora algunas cuestiones vinculadas a la analogía: (i) a nivel de construcción y retórica, su relación con el ejemplarismo en el derecho, metáforas y ficciones; (ii) a nivel de interpretación y adjudicación, su relación con otros argumentos, precedentes, principios jurídicos, interpretación extensiva y la naturaleza de la norma "source"/"target"; (ii) a nivel de justificación, las dimensiones axiológicas y prácticas de la analogía y la relación con el particularismo y el universalismo; y finalmente (iv) los valores y el alcance comúnmente asociados con la analogía.

Palabras clave: analogía; razonamiento jurídico; ejemplaridad jurídica; interpretación extensiva; particularismo y universalismo.

The mistake lies not in believing something false,
but in looking in the direction of a misleading analogy.[1]

I. Introduction

The literature on analogy arguments (AA for short) is complex. The AA as a legal argument aimed at justifying a particular practical conclusion is also called argumentum *a simili ad similem*, *a pari*, *a similibus ad similia, per analogiam*, argument from analogy, or simply analogy, etc. In the following, I will refer to the AA or analogy and leave aside the other formulations, although the terminological diversity often implies conceptual and substantive differences. The aim of the analysis is to propose a minimal concept of AA that represents a lowest common denominator among the many concepts and models that have been proposed by legal theorists and jurists over time. Such a minimal concept of AA will also be a useful explanatory tool to navigate the "jungle" of issues surrounding this argument. These include, to mention only the most important ones, the nature, foundations and properties of analogy as a form of discovery and/or reasoning in the scientific or cognitive domain; its contested relations to deductive, inductive and abductive methods or approaches in the so-called hard sciences and the humanities; its functions at the level of legal method(ology) and the concept of law. The same thesis that reasoning (in general and in the legal field) is analogical in nature has been a vexata quaestio for millennia, as is well known.

In the next paragraph, I will present some truisms and trends in contemporary jurisprudence and the minimal concept of AA to shed light on them. The third paragraph contains a map of the "jungle" mentioned above. In its subsections, some of the themes

[1] Wittgenstein, Ludwig, *Philosophical Grammar*, tr. Anthony Kenny, Rhees Rush, Basil Blackwell, 1978 [1969], p. 311.

of AA are explored: (i) at the level of construction and rhetoric, the relationship to exemplarism in law, legal metaphors and fictions (see 3.1, 3.2, 3.3); (ii) at the level of interpretation and adjudication, the relationship to other legal arguments, precedents, legal principles, extensive interpretation and the nature of the source/target norm (see 3.4-3.8); (ii) at the level of justification, the axiological and practical dimension of AA and the relationship to particularism and universalism (see 3.9 and 3.10). The last section deals with the values and scope usually associated with AA.

II. Truisms and trends in contemporary jurisprudence

There are some general aspects to the debate about AA as it is conducted in the literature.

Firstly, the legal culture –the historical traditions and the philosophical background ideas, especially on logic, from antiquity to modern logic– influences the theories and models of AA. Over the millennia, these influences are more or less obvious, but they are a constant.

Secondly, there is a debate about whether there are two different approaches: that of common law and that of civil law. This is of course not a geographical problem, but a problem of legal culture(s) and mentalité juridique[2]. The same topic is treated with different methods in the literature, so that the approach is not standardised. There is also a general distinction between propositions that focus on the analogy of statutory provisions and propositions that focus on the analogy of precedents. Common law jurisprudence discusses AA in the context of precedent and views the two problems respectively as closely related, generally neglec-

[2] Gambaro, Antonio V., "Western Legal Tradition", in Peter Newman (eds.), *The New Palgrave Dictionary of Economics and the Law*, London, Palgrave Macmillan, 2002, p. 687.

ting the crucial distinction between *analogia legis*, *analogia iuris* and extensive interpretation. Civil law jurisprudence, on the other hand, concentrates on this triad, even independently of precedent.

Thirdly, the study of analogy continues with a general cyclical continuity over the decades. There are several recurring themes that are proposed in different languages. We can recall the thesis formulated by John Austin at the beginning of the 20th century[3], which is now a common formulation of the problem, as M.A. Eisenberg notes[4].

Fourthly, there are two main currents in the debate. One aims to formalise the argument, the other to emphasise more the qualitative aspects. The following idea by E.H. Levi[5] and C.R. Sunstein[6] is still considered by many scholars to be an essential part of the mainstream.

Fifth, although each AA proposal is often presented as a separate and independent concept, they are not necessarily incompatible. In some cases, the structure of the models changes more than the essential content, and each helps to illuminate some of the many facets.

The analysis must be selective and take into account the general coordinates mentioned above.

Basically, the AA is a legal argument that has a composite character and combines abduction and deduction.[7] Their aim is

---

[3] Austin, John, *Lectures on jurisprudence II*, 5th ed., ed. Robert Campbell, London, John Murray, 1911 [1861], pp. 1005-1006.

[4] Eisenberg, Melvin A., *Legal Reasoning*, Cambridge, Cambridge University Press, online 2022, pp. 82-85.

[5] Levi, Edward H., "An Introduction to Legal Reasoning", in *The University of Chicago Law Review*, 1948, vol. 15, n. 3, pp. 501-574, spec. pp. 501-502.

[6] Sunstein, Cass R., "On Analogical Reasoning", in *Harvard Law Review*, 1993, Vol. 106, No. 3, pp. 741-791, espec. p. 745.

[7] One of the most convincing arguments is that it is an abductive process that can, however, be reconstructed in a deductive syllogistic (enthymematic) form. E.g. Tuzet, Giovanni, "Analogía e interpretación teleológica. Un caso

to draw a practical conclusion, and their conclusion is therefore prescriptive. The starting point is that there seems to be no explicit legal solution to a case centred around target. We can recall, among others, the famous example of Hart on the question of whether a bicycle is (akin to) a 'vehicle', the 2013 Lozman case on the question of whether a houseboat is (akin to) a 'vessel' for the purposes of the relevant laws, or other leading cases such as the 1896 case of Adams v. New Jersey Steamboat Company.[8] So a practical doubt arises: How can the target case T be decided? By arguing by analogy, we proceed as follows. We look for cases that are analogous/similar to T. These can be one or more, and they are potentially infinite. The comparison therefore takes place between homogeneous classes of cases according to the degree of generality, not between a concrete and an abstract case. Since we are dealing with many cases, we usually select the cases that are similar to T on the basis of a number of (conventional) factors to create a universe of relevant cases that have already been decided. Within this universe, there is a particular case that we consider to be a similar case and a reference solution (source) S. This requires at least one criterion and usually a complex set of relevance criteria that have led to the selection of this universe of cases and one

aragonés: ¿palas eólicas como ramas?", in *Isonomía*, 2020, num. 53, p. 109; Posner, Richard, *The Problems of Jurisprudence*, Cambridge (Mass.), Harvard University Press, 1990, p. 89; Brewer, Scott, "Exemplary reasoning: Semantics, pragmatics, and the rational force of legal argument by analogy", in *Harvard Law Review*, 1966, vol. 109, n. 5, p. 923 ff.

[8] See e.g. Brożek, Bartosz, *Rationality and Discourse. Towards a Normative Model of Applying Law*, Warszawa Wolters Kluwer Polska, 2007, p. 140 ff., esp. pp. 140-142; Brożek, Bartosz, "Analogy in Legal Discourse" in *Archiv fur Rechts- und Sozialphilosophie*, vol. 94, n. 2, 2008, pp. 188-201. In addition, see e.g. McBoyle v. United States, 283 U.S. 25 (1931) and Lebach Case. 35 BVerfGE 202 (1973) (German Federal Constitutional Court).

of them as source S.[9] Given the target case T to be matched and the initial case S already selected, the reasoner chooses the decisive relevance element that makes T appear significantly similar to S, whereby all dissimilarities between T and S remain irrelevant.[10] From this it is concluded that the case T must be regulated like the case S, i.e. by imputing the same legal consequences,[11] since this decisive relevant similarity criterion independent of all other possible dissimilarities.[12]

---

[9] See e.g. Brożek, Bartosz, "Is analogy a form of legal reasoning?", in Hendrik Kapein and Bastiaan van der Velden (eds.), *Analogy and Exemplary Reasoning in Legal Discourse*, Amsterdam, Amsterdam University Press, 2018, pp. 49-63, distinguishes between two approaches: the "theory (rule-based analogy" and the "factor-based analogy", in which the relevant similarity is established on the basis of a set of criteria or predetermined factors.

[10] See e.g. Gianformaggio, Letizia, *Eguaglianza, donne e diritto* (a cura di Alessandra Facchi, Carla Faralli, Tamar Pitch), Bologna, il Mulino, 2005, pp. 33-61, 125-161; Gianformaggio, Letizia, *Filosofia del diritto e ragionamento giuridico* (a cura di Vito Velluzzi, Enrico Diciotti, ristampa a cura di Silvia Zorzetto), Torino, Giappichelli, 2018 [2008], pp. 131-172.

[11] See e.g. Bobbio, Norberto, Analogia, *Contributi ad un dizionario giuridico*, Torino, Giappichelli, 2004 [1957], p. xxx; Caiani, Luigi, "Analogia (teoria generale)", in *Enciclopedia del diritto*, II, Milano, Giuffrè, 1958, pp. 348-376; Conte, Amedeo Giovanni, *Ricerche in tema d'interpretazione analogica. Filosofia dell'ordinamento normativo. Studi 1957-1968*, Torino, Giappichelli, 1997 [1957], p. 26, n. 58.

[12] Changing the decisive criterion of relevance can change similarities/dissimilarities, so that an analogous conclusion is an implicit conclusion based on a previously chosen normative premise and is always reversible by choosing a different criterion as the normative premise: see e.g. Golding, Martin P., "Argument by analogy in the law"', in Hendrik Kapein and Bastiaan van der Velden (eds.), *op. cit*, pp. 124-131-133; Id., *Legal Reasoning*, Ontario, Broadview Press, 2001, chap. II-III; Ibáñez Macías, Antonio, "Las lagunas normativas constitucionales: su integración mediante argumentos lógicos y

To summarise, the AA contains an argument that is based on normative grounds and has an axiological dimension.[13] If we see that it is not a logical or even empirical error to say that a blue car is like a blue coat in some respects and not like a red car in these respects, then we need an underlying relevance criterion that explains which features of S and which of T are relevant and which are not. Such a relevance criterion is contingent, even if it has to be justified by judges in the legal decision-making process. The relevant similarity is based on the experience and aims of the reasoner, even if it should always be intentional or deliberate.[14] In fact, AA depends on many factors: (i) the characteristics of legal method and reasoning; (ii) the constraints that are part of the legal and/or social environment; (iii) the prototypes implicit in the legal mentality and legal discourses; (iv) the tendency of judges to consider members of one line of legal precedent or instead members of another line; (v) the common sense influences arising from the man in Clapham Onmibus, transduction and other cognitive biases typical of human thought, and so on.[15]

---

cuasilógicos", in *Cuadernos Electrónicos de Filosofía del Derecho*, núm. 48, 2023, pp. 291-300; 293.

[13] See ATIENZA, Manuel, "Algunas tesis sobre la analogia en el derecho", in *Doxa*, núm. 2, 1985, p. 223 ff.; Id., *Sobre la analogía en el Derecho*, Madrid, Cuadernos Civitas, 1986; Id., "L'analogie en droit", in *Revue interdisciplinaire d'études juridiques* 21(2), 1988, p. 33 ff.; Id., "Sobre los Limites del Analisis Logico en el Derecho", in *Theoria* 7(16/18), 1992, pp. 1008, 1011, 1013.

[14] See e.g. EZQUIAGA, Francisco Javier, "Argumentos Interpretativos y Postulado del Legislador Racional", in *Isonomía*, núm. 1, 1994, p. 75; following the thought of Alexy, see e.g. DORANTES DÍAZ, Francisco Javier, "Algunos argumentos jurídicos especiales. La analogía y la abducción. Los argumentos "a contrario" y "a fortiori" ", in *Alegatos*, núm. 79, 2011, pp. 722-740.

[15] See SCHAUER, Frederick, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, London, Clarendon, 1991; Id., "Why Precedent in Law (and Elsewhere) Is Not Totally (or Even Substantially) about Analogy", in *Perspectives on Psychological Science*, 2008, no.

III. Open questions

A) Similarity/Exemplarity. AA *versus argumentum ad exemplum*?

The AA is often explained in terms of *argumentum ad exemplum* and history shows countless overlaps and conceptual shifts.[16] Depending on how one understands exemplarism, many questions arise: e.g. as a virtue (of certain actors/judges)[17], as an authority, or as a paradigmatic case. A first set of questions is the following: whether and in what sense the AA is influenced by the fact that the source is an exemplary case (in one of the given senses); under what conditions the subjective dimension is relevant from a theoretical/legal point of view, e.g. whether the consideration of

3, p. 454 ff.; Id., *Thinking like a Lawyer*, Cambridge (Mass.), Harvard University Press, 2009, chap. V; Id., "Analogy in the Supreme Court: Lozman v City of Riviera Beach, Florida", in *The Supreme Court Review*, 2013, p. 405 ff.; Id., "On Treating Unlike Cases Alike", in *Constitutional Commentary* 2018, vol. 33, p. 437 ff.; Schauer, Frederick and Spellman, Barbara A., "Analogy, Expertise, and Experience", in *University of Chicago Law Review*, 2017, vol. 84, pp. 249-268.

16 See e.g. Posner, Richard, *op. cit.*, pp. 89-91; Weinreb, Lloyd L., *Legal Reason. The Use of Analogy in Legal Argument*, Cambridge, Cambridge University Press, 2005, p. 4; Wellman, Vincent A., "Practical Reasoning and Judicial Justification: Toward an Adequate Theory", in *University of Colorado Law Review*, 1985, vol. 57, pp. 80-84; Condello, Angela, "Analogia ed esemplarità nel discorso giuridico", in *Politica del diritto* 2012, n. 2-3, pp. 421-441; Ando, Clifford, "Exemplum, analogy and precedent in Roman law", in Michèle Lowrie and Susanne Lüdemann (eds.), *Exemplarity and Singularity: Thinking through Particulars in Philosophy, Literature, and Law*, London, Routledge 2011, pp. 111-122.

17 See e.g. Amaya, Amalia, "Imitation and analogy", in Hendrik Kapein and Bastiaan van der Velden (eds.), *op. cit.*, pp. 13-31.

who decided the source case is a relevant factor for the judge who has to decide the target case; what significance the authoritative element has for the functioning of AA; how important, if at all, is the hierarchy of authorities/powers behind the possible source/target cases.

One aspect of this problem of exemplarity is the importance of common sense as well as archetypes, prototypes and stereotypes for the purposes of AA; likewise, the importance of categorisation in the construction of similarities/dissimilarities must not be ignored.[18]

The relevance of these elements, which are often anchored in the law, is disputed in the literature. The disagreement is not so much about whether these aspects have or can have an influence on the judge/interpreter's decision-making process. Rather, the disagreement relates to whether AA (a good one) should take these aspects into account or whether it should instead prevent them at the level of the context or process of vindication. In other words, the dispute often centres on whether analogy should be a tool to correct prejudice, for example, or whether it should instead support prototypical aspects, projection, assimilation, etc. [19] The

[18] See e.g. LEVENBOOK, Barbara, "The Meaning of a Precedent", in Legal Theory, 2000, vol. 6, n. 2, p. 185 ff.; BRAMAN Eileen and NELSON Thomas E., "Mechanism of Motivated Reasoning? Analogical Perception in Discrimination Disputes", in *The American Journal of Political Science*, 2007, vol. 51, n. 4, pp. 940-956; POSNER, Richard, "Legal Reason: The Use of Analogy in Legal Argument", in *Cornell Law Review*, 2006, vol. 91, pp. 761-774, who notes the possibility that prejudices affect analogical reasoning and adjudication; POSTEMA, Gerald J., "Law's System: The Necessity of System in Common Law", in *UNC Legal Studies Research Paper* No. 2324438, 2013, pp. 1-29, about archetypes and exemplars; BROWER, Todd, "A Stranger to Its Laws: Homosexuality, Schemas, and the Lessons and Limits of Reasoning by Analogy", in *The Supreme Court Law Review*, 1997, n. 38, pp. 65-152.

[19] E.g. SHERWIN, Erwin, "A Defense of Analogical Reasoning in Law", in the *University of Chicago Law Review*, 1999, vol. 66, p. 1179 ff.; LAMOND, Grant,

battle of values is based on the content of prejudices, prototypes and categorisations that are legitimate or not in the game of infinite similarities and differences.

Some guidelines recognised by logicians and philosophers of science for the evaluation of analogical arguments are of limited relevance in the legal field. Here are some of the most important of them:[20] (a) The more similarities (between two domains), the stronger the analogy; (b) The more differences, the weaker the analogy; (c) The greater our ignorance of the two domains, the weaker the analogy; (d) The weaker the conclusion, the more plausible the analogy; (e) Analogies that involve causal relationships are more plausible than those that do not involve causal relationships; (f) Structural analogies are stronger than those based on superficial similarities; (g) The relevance of the similarities and differences to the conclusion (e.g., for the hypothetical analogy) must be considered; (h) Multiple analogies supporting the same conclusion make the argument stronger. Such common sense guidelines generally work, but are not sufficient to resolve specific cases and legal questions. One is forced to consider the fine boundaries of these guidelines. Moreover, there is no hierarchy between them and their application can lead to different and even opposite results. This fact explains why they should not be overestimated. These common sense guidelines can at best be pragmatic assumptions that may be stronger or weaker depending on the legal context and the styles and approaches of judges and lawyers.

"Analogical Reasoning in the Common Law", in *Oxford Journal of Legal Studies*, 2014, vol. 34, no. 3, p. 567 ff.

[20] The list is quoted by Bartha, Paul, "Analogy and Analogical Reasoning", in The Stanford Encyclopedia of Philosophy, 2022, in <https://plato.stanford.edu/archives/sum2022/entries/reasoning-analogy/, who remembers the classical studies> of Mill, Keynes, Robinson, Stebbing, Copi and Cohen, Moore and Parker, Woods, Irvine, and Walton.

B) Interplay with metaphors, from their etymology to their persuasive power

General philosophy and legal reasoning examine analogy and metaphor and show both metaphors that are based on similarity and metaphors that create similarity.[21] It is common knowledge that the etymology of analogy itself has a metaphorical matrix. The analogy refers to a movement from bottom to top. The bottom-up dynamic reveals a connection between language and analogical thinking and generalisation. A thinking that moves from the singular to the universal. In philosophical literature, which has its roots in the Aristotelian tradition, analogy is associated with the «paradigm». The latter shows something next to something else: This often has a figurative meaning in the sense of a conceptual rather than a spatial overlap.

On the other hand, law, discourse and legal argumentation are full of metaphors. It is therefore a leitmotif to understand the context. Assuming that AA is based on the selection of similarities/differences, the issue is to understand whether this selection is based on metaphors: in other words, whether latent metaphors in the legal world influence the determination of the relevant selection criterion or other aspects of the AA process.

Metaphor and AA have two main differences. Metaphor is not a legal argument (although it can influence the operation of AA). The function of AA as a legal argument is to make the reasons for the decision explicit. The opposite principle is the non-explanation of what is hidden in thought, and this is how metaphor works. In other words, metaphors are unexplained similes.

---

[21] E.g. Posner, Richard, *op. cit.*, p: 92; Weinreb, Lloyd L., *op. cit.*, pp. 166-167; Kapein, Hendrik, "Undoing damage by analogy", in Hendrik Kapein and Bastiaan van der Velden (eds.), *op. cit.*, pp. 137-164; Indurkhya, Bipin, "Rationality and reasoning with metaphors", in *New Ideas in Psychology*, 2007, vol. 25, pp. 16-36; Gilbert, Paul, *Sapere e sperare. Percorso di metafisica*, Milano, Vita e Pensiero, 2003, p. 84.

However, the persuasive power of analogical reasoning in law is an important factor. At this point, the power of metaphors in creating expressive effects that influence the degree of persuasion towards the addressees/relevant audience is well recognised.

C) *Fictio iuris* and counterfactuals: analogous judgements *as if* they were legislative

Another important figure for the legal world are legal fictions, whose relationship to analogy and metaphor has been discussed time and again.[22] As I said before, the core of AA is the similarity relation, which is reflexive and symmetrical, but not transitive, i.e. it cannot be reduced to an equivalence relation. Since its result equates sequences, it has a fictitious function: to treat different cases as if they were the same. AA differs from *fictio juris* precisely in that it brings to light the relevant similarity that forms the bridge of the conclusion; *fictio juris* inherently goes in the opposite direction by obscuring and concealing the fictitious character and its origin, which is not necessarily given by equality, similarity or analogy. It cannot be excluded that, as in the case of metaphor, legal fictions also have an influence on the use of AA, but the possible overlaps between these figures are contingent and deserve special consideration. The fictional nature of the use of AA is, of course, a different issue altogether, with fiction referring not to a *fictio iuris* but to an abusive, spurious or arbitrary use of AA. An important link between AA and legal fiction is the counterfactual reasoning that the interpreter must apply in choosing the appropriate similarity criterion or relationship. A legal fiction is usually a counterfactual element deliberately adopted or created by the courts to apply, modify or extend a legal norm; a legal technique to make a norm applicable to new or unforeseen situations

[22] E.g. Posner, Richard, *op. cit.*, pp. 92-93; Riofrío Martínez-Villalba, Juan Carlos, "Alcance y límites de la interpretación analógica", in *Prudentia Iuris*, 2015, vol. 79, pp. 203-204.

without restating it. Let us consider the analogous incorporation of the law when the interpreter is called upon to determine a legal norm qua legislation: that the legislator would have ordered as if the gap had been taken into account. Famous in this respect is Article 1 of the Swiss Civil Code, according to which, in the event of a gap, the court has the power to create the rule applicable to the specific case as if it were the legislature.[23]

D) The criterion of relevant similarity: *ratio (legis)*, *telos* and some possible *alter ego*

What role do the *ratio legis*, the *ratio decidendi*, the principles of law, justice, the nature of things, consequences and other specific values play in this context? Can these candidates be the criterion to distinguish between relevant similarities/irrelevant dissimilarities? This is one of the cruxes of the matter. In contrast to those who restrict the idea that the criterion of relevant similarity is the *ratio legis* in the case of legislation[24] and the *ratio decidendi* in the

[23] A similar provision is found in art. 10.3 of the Portuguese Civil Code. See Tuzet, Giovanni, "«Se mia nonna avesse le ruote…» Controfattuali e ragionamento giuridico, discutendo due libri di G.B. Ratti", in *Diritto & Questioni pubbliche*, 2016, vol. 16, no. 2, pp. 446-448.

[24] The ratio (in the teleological sense) is not the property that the circumstances have in common, but the criterion that makes a certain similarity relevant (or irrelevant). This is illustrated by Tuzet, Giovanni, *Analogia e ragionamento giuridico*, Roma, Carocci, 2020, pp. 59-60; Id., "Analogía e interpretación teleológica. Un caso aragonés: ¿palas eólicas como ramas?", in *Isonomía*, 2020, n. 53, pp. 109-110: "en general (...) el argumento analógico requiere una interpretación teleológica de los textos normativos pertinentes, para determinar una regulación con su ratio y luego proceder a una posible integración analógica del derecho (...) la interpretación teleológica es necesaria para la analogía". See also Kaufmann, Arthur, "Analogy and "the nature of things": a contribution to the theory of types", in *Journal of the Indian Law Institute*, 1966, vol. 8, no. 3, pp. 385, 388. According to Velluzzi, Vito, "Ana-

case of case law or customary law, there are those who broaden the possibilities. A long tradition represented, among many, by Puchta and Esser links analogy and the nature of things.

In any case, the ideas of AA on the one hand and the theories and doctrines of the other families of juridical arguments – teleological, consequentialist, axiological, based on justice or the nature of things, etc.– have a double meaning and relationship. - have a double meaning and relationship. It should be remembered that only in imaginary cases is a single argument used. Even in simple cases, legal reasoning is complex and given by a chain of legal arguments. Consequently, the AA, like any other legal argument, does not stand alone.

More importantly, the identification and construction of different rationes (the criteria for distinguishing between relevant similarities/irrelevant dissimilarities) can lead to the construction of different analogies and thus to a situation where there are potentially contradictory analogies. In such situations, where analogues are available that lead to different outcomes, the choice between them cannot be resolved simply by saying that the case in question is more similar to one set of analogues than another. In such situations, courts use alternative reasoning techniques to resolve cases.

---

logia giuridica e razionalità dell'ordinamento. Note a margine", in *Ragion pratica*, 2006, n. 2, p. 377 ff.; see also Id., "L'analogia "occultata" e l'analogia "negata": spunti giurisprudenziali per l'analisi del ragionamento analogico", in *Persona e amministrazione*, 2018, no. 2, p. 515 ff.; Id., "L'analogia giuridica presa sul serio. Osservazioni su Cass., Sez. Un. Penali, 17.3.2021, n. 10831", in Discrimen online – *Criminalia*, 2021, p. 1 ff.), the criterion for assessing the relevance (or irrelevance) of similarities is usually determined in a teleologically orientated ratio. The determination of the ratio is at the discretion of the interpreter, who can often identify several plausible legal rationes, all of which are acceptable. Two questions arise: a) how to conceptualise and determine the ratio; b) how to use it to assess the relevance/irrelevance of similarities.

A striking example is the Latin maxim *ubi eadem ratio, ibi eadem juris dispositio*. It is considered a form of reasoning from the intention of the legislator (usually read in its original sense, but not necessarily). This maxim, taken literally, is precisely the guideline of analogy, which consists in applying the same norm when there is a case (i.e. the target) that fits the same ratio of another case (source).

E) Legal precedents and *argumentum ex auctoritate*

Both in civil law and in the common law tradition, there is a wide variety of positions on the relationship between AA and precedent. The diversity of positions is so great that it is impossible to imagine a spectrum or linear ordering of the many visions. Any binary classification or categorisation is inadequate, however useful it may be. Thus, some present AA and precedent as mirror images.[25] Others see them as autonomous instruments of decision-making.[26] According to one line of thought, AA is a part of precedent.[27] Analogy-based jurisprudence is a particular form of legal reasoning that contributes to the courts' approach to individual cases.[28]

To counter the various theses, it is useful to distinguish between theoretical possibilities and practise. Legal practise is characterised by a general indeterminacy, which is partly due to the lack of clear and reasoned argumentation. The picture that emerges from practise is a puzzle in which precedents are extended or

[25] Eisenberg, Melvin A., *The Nature of the Common Law*, Cambridge (Mass.), Harvard University Press, 1988, p. 87.

[26] Posner, Richard, *op. cit*., pp. 90-91; Núñez Vaquero, Alvaro, *Precedentes: una aproximación analítica*, Madrid, Marcial Pons, 2022.

[27] Walton, Douglas, "Similarity, precedent and argument from analogy", in *Artificial Intelligence and Law*, 2010, vol. 18, n. 3, pp. 217-246.

[28] Larry, Alexander, "The Banality of Legal Reasoning", in *Notre Dame Law Review*, 1998, vol. 73, pp. 523-533.

discarded by the AA due to significant differences. But they are also applied or not applied for different reasons: for example, moral beliefs,[29] functionalist approaches,[30] prevailing legal principles[31]. In addition, applicability of precedent may be justified because of a decisive similarity and/or the doctrine of stare decisis (if recognised) or other reasons such as exemplarity/authority.

Another controversial issue is the importance of the principle of authority (argumentum *ex auctoritate*) in the construction of analogies and in the use of precedents both in the case of analogical application (stare decisis) and in the case of distinction. A related sub-question is that of the relationship to the argumentum *ex auctoritate per se*. The distinction can be found in the basic argumentation: Authority vs. a relevant analogy/similarity. However, the situation is often complicated. Indeed, it has an ambiguous status: sometimes it is reduced to an aspect of analogical reasoning in the version of authoritative exemplarism, while other times it is reduced to the argument from legal precedents.

F) *Analogia legis/iuris* and legal principles

The link between AA and legal principles is another long-standing topic of debate, and for good reason: analogy and legal principles have been linked in various ways to guide judges in the application of the law. The meta-rules of analogy followed in many legal systems show that.[32] Apart from this fact, which depends on po-

[29] See e.g. Johnson v. Calvert, 851 P.2d 776, 789 (Cal. 1993); Belsito v. Clark, 644 N.E.2d 760, 763-64 (Ct. Com. Pl. Ohio 1994); In Re Marriage of Buzzanca 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

[30] See e.g. Stewart v Dutra Construction Company 543 US 481 (2005).

[31] For instance, principles such as reasonableness, see e.g. Donoghue v. Stevenson1932 AC 562; Haseldine v. CA Daw & Son Ltd. 1941 2 KB 343; Farr v. Butters Brothers & Co. 1932 2 KB 606.

[32] See e.g. Spanish Civil Code, articles 1.1, 1.4., 1.6 and 4; Italian Civil Code, prel. articles 12 and 14; Portuguese Civil Code articles 8 and 10; art. 1 Swiss

sitive law, the main points of discussion seem to be: (i) whether there is only a difference of degree or a qualitative difference between the analogy that proceeds from a norm (*analogia legis*) and that which invokes principles (*analogia iuris*)[33]; (ii) whether legal analogy is something different from reasoning based on legal principles[34]; (iii) whether AA can therefore have its own place among jurists' argumentation techniques, alongside others, including principle-based arguments; (iv) the relationship between AA and deliberative principles.[35] On the other hand, many seek to emphasise the essential continuity between analogical reasoning from a particular legal norm and analogical reasoning from principles, where all possible criteria for distinguishing between norms/principles are conventional and contingent.[36] With regard

---

Civil Code; art. 4 of the Law for Introduction of Standards of Brazilian Law; art. 12 Colombian Procedural General Code; art. 19 El Salvador Code of Commercial Civil Procedure; art. 12 Costa Rica Civil Code; art. 4 Venezuelan Civil Code; art. 16 Uruguay Civil Code.

[33] See e.g. Walton, Douglas, Macagno, Fabrizio, Sartor, Giovanni, *Statutory interpretation: pragmatics and argumentation*, Cambridge, Cambridge University Press, 2021, pp. 226-227.

[34] For instance, Larry, Alexander, "The Banality of Legal Reasoning", in *Notre Dame Law Review*, 1998, vol. 73, p. 529 ff. thinks that analogical reasoning can explain immanent legal principles.

[35] Posner, Richard, *op. cit.*, p. 96 and 44 detaches that reasoning by analogy is not a technique for striking the balance among rules, standards, principles, or precedents, as by analogy we cannot decide how much weight such legal entities. According to Brożek, Bartosz, "Analogy and balancing A reply to David Duarte", in *Revus*, 2015, vol. 25, pp. 163-170, the problem of analogy and especially the most pressing problem of relevant similarity can be transformed into the problem of balancing principles.

[36] See e.g. Duarte, d'Almeida Luis and Michelon, Claudio, "The Structure of Arguments by Analogy in Law", in *Argumentation*, 2017, vol. 31, n. 2, pp. 359-393, whose framework underlying the distinction between particular and general questions, sub-questions and uniform answers allows for a bet-

to the latter, the question should be asked: (i) whether the balance between principles follows an analogical pattern or whether the weighting or balance is not analogical; (ii) whether the analogy always consists of a balance between principles and at what level. In practise, there are very often ambiguous situations where it is not clear whether judges are balancing or reasoning by analogy.[37] This does not mean, however, that the mixture of the two is a form of legal argumentation. As can be seen from the previous models, AA has to do with principles that are understood as possible rationes that can contribute to the final decision. At this meta-level, there may be a balance between the principles or rationales that leads to the final ratio principle, which is the relevant criterion for determining similarities and dissimilarities.

Given the metaphorical nature of balance (the metaphorical image of justice), the assumption of an analogue scale where the principles are balanced in an analogical way is an oblique way of saying that the ultimate criterion of balance is a criterion of justice. The idea of an analogue scale or balancing of principles by analogy is of course reminiscent of the tropes of analogy as Aristotelian proportion or distributive justice.

G) "Extensive interpretation", "cases", and "gaps"

The distinction between "extensive interpretation" and "analogy" is a fundamental open issue, especially in the context of civil law. The distinction between "extensive interpretation" and "analogy"

ter understanding of the interplay between AA in its two faces analogia iuris and legis, even beyond precedents; Salguero Salguero, Manuel, "Proporcionalidad y elaboración suareciana de la atribución intrínseca como fundamento filosófico de la analogia iuris y de la analogia legis", in *Anales de la Cátedra Francisco Suárez*, vol. 51, 2017, pp. 101-128.

37 Among many leading cases, e.g. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 727 (1996) which is also relevant for the different opinions expressed by the judges.

is a fundamental open issue, especially in the context of civil law. The problem stems primarily from the fact that in many legal systems, analogy is prohibited in certain cases –criminal law,[38] exceptions, constitutional issues, etc.– in which an extensive interpretation is systematically practised. Here, too, opinions differ. On the one hand, some are in favour of the distinction between extensive interpretation and AA as a form of integrating legal loopholes[39] and creating legal norms.[40]

Those who defend the distinction try to determine criteria that allow us to talk about a comprehensive interpretation. The problem lies both at the beginning (comprehensive in relation to what?) and at the end (to where is it legitimate to extend?).[41] The

[38] It should be remembered that the prohibition of analogy has a positive character; it is not derived from a logical impossibility or inherent limits of analogy. Many decades ago, Sax made it clear that the so-called teleological interpretation procedure has the structure of analogy and that there can be no prohibition that excludes any use of analogy in criminal law that leads to a new or increased penalty: see e.g. Sax, Walter, *Das strafrechtliche Analogieverbot. Eine methodologische Untersuchung über die Grenze der Auslegung im geltenden deutschen Strafrecht*, Gottingen, Vandenhoeck & Ruprecht, p. 35, 152 ff.

[39] See e.g. Larenz, Karl, *Methodenlehre der Rechtswissenschaft*, Universität München, Olching, Springer-Verlag, 1960, p. 287.

[40] According to Tarello, Giovanni, *L'interpretazione della legge*, Milano, Giuffrè, 1980, p. 350, the AA is a meta-rule on legal production and precisely that requires the production of rules that have the effect of obtaining for the target the discipline that a pre-existing rule imposes at the source.

[41] The interpretation that is taken as the reference term is for many the literal or prima facie interpretation, for others any other interpretation of the normative formulation: see e.g. Guastini, Riccardo, *L'interpretazione dei documenti normativei*, Milano, Giuffrè, 2004, p. 158; Chiassoni, Pierluigi, *La giurisprudenza civile. Metodi d'interpretazione e tecniche argumentative*, Milano, Giuffrè, 1999, p. 631. According to Velluzzi, Vito, "Opinioni a confronto. Tra analogia e interpretazione estensiva a proposito di alcuni casi

spatial metaphor underlying the term (which resembles the Aristotelian root, the paradeigma) is a clear indication of the need to get to the bottom of the assumptions about the nature of interpreting that every interpreter makes. On the other hand, many try to emphasise the essential continuity between comprehensive and similar meanings by considering the indeterminacy of legal language and law. In the absence of binding elements enforcing a conceptual distinction, considering one in continuity with the other would have the advantage of effectively recognising the fluidity and homogeneity of the activity of lawyers.[42]

This idea of AA as something that serves to regulate cases that are otherwise not regulated is influenced by the background concepts of law.[43] Different perceptions of the completeness of legal systems play a decisive role in this. There are those who assume that the order is already complete and gapless, so that the analogy

problematici tratti dalla recente giurisprudenza", in *Criminalia*, 2010, p. 376, the comprehensive interpretation refers to an interpretative product, i.e. the determination of a more comprehensive meaning for a normative statement than the meaning previously determined for the same normative statement. The 'extension' can be achieved through various techniques of interpretation. Tuzet, Giovanni, "La storia infinita. Ancora su analogia e interpretazione estensiva", in *Criminalia*, 2011, pp. 507-519, distinguishes three meanings of extensive interpretation: in the broadest sense, any interpretation that is more extensive than another; in the broadest sense, any interpretation that is more extensive than another among the permissible interpretations; in the narrowest sense, any interpretation that is more extensive than the standard literal interpretation.

[42] See e.g. Trujillo, Isabel, "Pensare e ragionare da giuristi: interpretazione e ragionamento giuridico", in *Ragion pratica*, 2010, pp. 70-71; Pino, Giorgio, "Interpretazione cognitiva, interpretazione decisoria, interpretazione creativa", in *Rivista di Filosofia del Diritto*, 2013, p. 90.

[43] An excellent reconstruction of the analogy from a hermeneutic perspective can be found in Carlizzi, Gaetano and Omaggio, Vincenzo (a cura di), *L'ermeneutica giuridica tedesca contemporanea*, Pisa, Ets, 2016, pp. 151-218.

lies in interpretative activity in the broadest sense. There are those who believe that the legal system can be completed with the help of a variety of conceptual strategies, including the AA.[44]

A derived problem that affects the way the analogy is understood and used concerns the gaps. It is usually assumed that the analogy refers to technical and axiological gaps, but this is also controversial. From a more legalistic point of view, judges must apply the existing rules, even if they do not correspond to the values that the judge holds. Therefore, AA, which serves to fill axiological gaps, is illegitimate. It should not exist because judges should not create axiological gaps and consequently there would be no reason to fill them at all.

Another related problem concerns the notion of "case". The models analysed have also shown that the various differences in approach and views depend on the consideration of the case (source and/or target), such as: (i) the real individual case (unrepeatable unique); (ii) the class of cases constructed from the real individual case (unrepeatable unique); (iii) the rule of the case established in this case; (iv) the case in terms of "raw facts"; (v) the case already qualified sub specie iuris. In addition, the picture is complicated by the fact that, depending on the theories, AA may only be admissible in so-called hard cases or in doubtful or obscure cases. [45] The trigger for analogical thinking is a situation in which something is unknown. To confirm this, the extensive interpretation is often explained as a simpler analogy, i.e. it refers to simple cases in which the relevant similarities are already considered in some sense obvious and clear.

[44] Wróblewski, Jerzy, *The Judicial Application of Law*, Kluwer Academic Publishers, 1992, pp. 103 and 223-227.

[45] Carcaterra, Gaetano, "Analogia (teoria generale)", in *Enciclopedia giuridica italiana II*, Roma, Treccani, 1988, pp. 8-9.

H) Sources/targets and the nature of norms

In jurisprudence, two further questions arise in relation to the source rule (the starting point) and the target rule (the result of the AA). Regarding the starting rule, there is a debate as to whether every rule is eligible for analogical application or whether there are instead limits set not by positive law but by the nature of legal norms and analogy itself. This question is mainly analysed in connection with the exceptions or the problem of the contestability of legal norms. The problem is often analysed as the other side of the coin: that is, a contrario argument.[46] It should be remembered that, assuming that both are applicable in the abstract, since there is no prohibition of one or the other or impossibility of their application, there is no standard meta-criterion for choosing between the application of AA or the opposite argument. There is also no automatism that excludes the application of the AA instead of a contrario argument. As soon as the application of a contrario argument is excluded, there is no obligation to proceed according to AA, and vice versa. Legal practise shows that although the two arguments are logically complementary, they are not always used "in pairs". In cases where there are competing analogues, opting for one of the two arguments means arguing in favour of one analogy argument and against the other analogy argument. In addition, there are many other argumentation techniques that compensate for the absence of one analogy without referring to the other.[47]

As for the goal, an issue that has received less attention, but which subliminally leads to misunderstandings is the nature of the norm created by AA.

---

[46] See e.g. Sartor, Giovanni, "Defeasibility in Law", in Giorgio Bongiovanni, et al. (eds.), *Handbook of Legal Reasoning and Argumentation*, Dordrecht, Springer, 2018, par. 10.

[47] See e.g. Iturralde, Victoria, "Argumentacion y Razonamiento Judicial", in *Theoria*, 2014, 7(16/18), p. 1062.

Regardless of differing views, AA leads to a practical outcome. Therefore, we must inevitably ask ourselves some questions at the level of reasoning/application. What is the outcome of AA? Is it a concrete decision, which as such is unique and unrepeatable? Or is it a legal norm that becomes part of the law? And what kind of norm? Does it remain contingent and limited to one case or similar cases? Is it generalisable and under what conditions? Derived questions: Does it therefore have the status of an implicit norm? The answer to these questions depends on many factors, from the concept of law to the concept of norm to the concepts of (deontic) logic from which one starts. The problem is particularly complex because AA does not entail a compelling logical conclusion. Consequently, one cannot say that the rules created by AA are logical consequences of the entire legal system.[48]

I) Proportionality and justice as equality or *equitas*

The conventional wisdom is that AA refers to equality as a double Janus: formal equality/generality/universalisability vs. equality as suum cuique tribuere/equitas/epikeia.

In this context, it is first important to distinguish between AA as a process and as a result. AA as a result leads to equality in the sense that the same legal consequences are applied to the target case as to the initial case.[49] Apart from this, AA necessarily presupposes the non-identity of cases, which, moreover, is given in nature, since each case is an unrepeatable individual. When considering the process, it is important to emphasise that the conclusion leads from similarity to identity. And it is precisely this leap from the similarity of cases/issues to the identity of legal consequences

[48] See e.g. Ratti, Giovanni Battista, "An Analysis of Some Juristic Tecniques for Handling Systematic Defects of the Law", in Thomas Bustamante and Dahlman Christian (eds.), *Argument Types and Fallacies in Legal Argumentation*, Dordrecht, Springer, 2015, pp. 151-177.

[49] See e.g. Kaufmann, Arthur, *op. cit.*, pp. 380-381.

that is the black hole of AA. This black hole is also the cause of the complex debate about the link between AA and equality.

The link to equality is controversial and intertwined with that of justice and proportionality.

One of the reasons for the inconsistencies and misunderstandings in the debate is precisely the frequent divergence between the concept of equality and proportionality proposed in the literature. Note that proportionality presupposes a measure (justice) conceived as *equitas* and a certain degree of equality/generality. Ideally, there is a continuum from *equitas* (unique and unrepeatable) to universality. And the function of proportionality is precisely to organise each point of the spectrum between the extreme poles. The gradation of proportionality is neither linear nor quantitative, it is rather value-laden and goes from one (dis) similarity to the next, potentially ad infinitum. In this sense, the AA is an argument *a proportione*.

In the legal field, the AA leads to similar cases being granted the same rules - and not similar cases. When applying the AA, one therefore loses an element of justice (*equitas*) if one considers the specificity of the concrete case, while one gains an element of justice (equality/generality) if one considers the possibility of generalisation. Many models disagree on precisely this problem, i.e. on whether one should ultimately opt for justice as equality (in the sense of a generalised relevant similarity) or for justice as *equitas* (understood as a decision tailored entirely to the individual case). Only *equitas* theoretically leads to similar cases receiving similar (proportionate) regulation. Proportionality plays a key role in the chain of AA to treat the successive cases of the bicycle, the scooter, the skateboard, the tricycle, the toy car, etc. appropriately in relation to the whole class of vehicles.

AA and equality/fairness are thus linked on a philosophical level, which defies analysis, but also on the level of justifying the

procedure from a theoretical-legal perspective.[50] If one assumes that the law has to do with equality and justice, understood in a formal sense, then analogy is a derivative process within the law as argumentation. To understand analogy in terms of equality as relevant similarities and irrelevant dissimilarities requires a tertium quid. This is a meta-criterion of relevance and at this level the content of the criteria requires a decision in terms of justice. This time not formally, but in terms of content, i.e. through the choice of a specific regulatory/value content.[51]

The possible criteria of justice are, as we know, manifold. Or rather, what they are is another contentious point in this matter. A connection that leads precisely to the question of what the ratio is and how it is to be determined. Beyond and related to this is the problem of selecting the relevant similarities and, above all, the question of how to delimit the relevant universe. Even before the relevant criterion is selected, there is a preparatory process of delimiting the discourse within a relevant universe in which the criteria of relevance/fairness are selected. Regardless of what is being compared, given the unlimited properties covered by the terms and the infinite external criteria for analysis, anything can be used as similarity/comparability.[52]

---

[50] See e.g. Postema, Gerald J., "A Similibus ad Similia: Analogical Thinking in Law", in Douglas E. Edlin (ed.), *Common Law Theory*, Cambridge, Cambridge University Press, 2007, pp. 102-133.

[51] See e.g. Alexy, Robert, Teoria dell'argomentazione giuridica, Milano, Giuffrè, 1998 [1978], p. 221; Dickinson, John, "The Law Behind Law II", in *Columbia Law Review*, 1929, vol. 29, pp. 289-290; Burton, Steven J., *An Introduction to Law and Legal Reasoning*, Boston, Little, Brown & Co., 1985, pp. 83-84.

[52] Peczenik, Aleksander, "Jumps and Logic in the Law", in *Artificial Intelligence and Law*, 1996, vol. 4, no. 3-4), pp. 297-329.

J) Particulars and universalizability

What is the essence of the conclusion by AA? The question is unresolved and develops along two main lines of enquiry: the first concerns the logical and methodological sphere, the second the practical dimension and meta-ethics.

First, one of the many contested aspects of AA is whether it is an abductive, inductive and/or deductive inference, or how these three aspects interact in legal application. A derived question is the defeasibility of analogical reasoning. Even if one can formulate the question differently by saying that the analogy is always inherently revisable or defeasible: for it is always possible to identify a more relevant difference because of a different criterion of selection.[53] In other words, AA is 'a *pro tanto* reason' argument and being *a pro tanto* reason is a property defined in relation to an argumentative context. The AA is a so-called pro tanto reason, since it transfers the justification from the premises (similarity/sameness) to the conclusion (equal legal judgement), thus making the premises a reason for the conclusion. However, there may be other reasons against it. Therefore, the AA as a pro tanto reason cannot be the decisive reason in favour of a particular course of action.

The same applies to the argument a fortiori, which is based on 'a "stronger reason". According to a certain view, "argumentation by equality of reasons" can be seen as a response to actual or possible refutations and "argumentation by equality of weights" as a response to actual or possible refutations. This theoretical distinction between refutations and counterarguments does not correspond to legal practise, but it clarifies the difference between

[53] Bermejo-Luque, Lilian, "A Unitary Schema for Arguments by Analogy", in *Informal Logic*, 2012, vol. 32, no. 1, pp. 1-24, reaches the conclusion that certain analogical arguments can be said to be deductive, and yet, defeasible by starting from an approach that relies on the theory of the argument of S. Toulmin.

analogia legis (equality of reasons, equal relationship) and analogia juris (equality of weights in relation to values, principles).

Secondly, the question of whether analogy is a particular or universal form of argumentation runs through the history of philosophy and legal thought.[54] Or rather, there is an eternal debate about whether analogy is a form of reasoning that is necessarily particularist, that presupposes a conception of particularism in ethics and meta-ethics; or whether AA is a form of argumentation that lends itself to generalisation or rather to universalisation. It is about the relationship between the particular and the universal, and the way in which this pair of concepts is implicitly conceived influences the way in which AA is considered.

Two cases or individuals and thus two classes (regardless of their universality) are "equal" because a relevance criterion ensures that some characteristics (at least one) count and all others do not. This criterion is used to determine what is the same and what is not the same (i.e. dissimilar or different/dissimilar). But similarity is also associated with sameness, provided that a relevant similarity is found between an individual or a particular object and another individual or a particular object. It is possible to imagine both the one and the other: AA as an instrument of justice as equality/generality and as an instrument of justice as *equitas*. In fact, the one is the other side of the other. The conceptualisation of juridical thinking as various infinite possibilities of combining and grading similarities and differences is another equivalent way of expressing the particular/universal pair of concepts. The particular and the universal are the poles of a potentially infinite spectrum which, since it concerns human finitude, is also factually incommensurable. In other words: I can be like you, independent of all other considerations and generalisations, and therefore I can also be treated like you. But I can also be like you in another sense, if I consider you as a representative of a class and myself as another individual who can be included in the same class, because

[54] See e.g. Weinreb, Lloyd L., *op. cit.*, p. 163.

everyone is similar to the other members of the same class in a relevant way and dissimilar in an irrelevant way. This form of reasoning contains an element of universalisation. In light of the above, AA can be used as an instrument of just reasoning or rather as an instrument of equality/generality (at a certain level or to a certain degree). Whenever AA is used as a particularist tool, it does not lose its potential universalisability. It is precisely this property that makes it possible to go from case to case, from one analogy to the next, and to collect proportionate sets of legal norms.

IV. Organon of the Courts or cacophony?

The AA, like any other legal argument, is porous in relation to the pragmatic context in which it operates. Its concepts and models are, whether its proponents realise it or not, influenced by an embedded notion of law and values. The AA demonstrates this truism very clearly thanks to its proximity to the concept of logos on the one hand and justice on the other. The main reasons for disagreement over the analogy are both value-based and conceptual. AA is affected by the eternal debates about the values that law should pursue or possess. Depending on a wide and heterogeneous range of values and ideals or purposes of legal policy, its use becomes mythologised or rather the target of scepticism.[55] We can limit ourselves to an example of the most common ones. Depending on the point of view, the following virtues or vices are attributed to AA: (i) To convey equality/justice, often understood in the sense of Aristotelian proportion;[56] (ii) To contribute to the

[55] See e.g. Nerhot, Patrick (ed.), *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics*, Dordrecht, Springer, 1991.

[56] See e.g. Sunstein, Cass R., *op. cit.*; Gianformaggio, Letizia, *op. cit.*, pp. 33-61, 125-161; Id., *Filosofia del diritto e ragionamento giuridico… op. cit.*, pp. 131-172.

dynamism/change of the law according to the law itself;[57] (iii) To exert a conservative pressure or creative force; To contribute to the innovation of the legal system;[58] (iv) To support innovation in continuity and evolutionary decision-making;[59] (v) To be essential to the systematics of law and a means of discursive equilibrium in the legal community;[60] (vi) To contribute to the completeness of law;[61] (vii) To create consistency in order to allow for uniformity of plan;[62] (viii) To preserve integrity of law;[63] (ix) To eliminate or rather create under- and over-discrimination and (non-)vicarious

[57] See Colloca, Stefano, *L'analogia nella dinamica del diritto. Un'indagine filosofica*, Roma, Carocci, 2023 who points out the contribution of analogical reasoning to the production of existing law in a perspective of division/delegation of powers; Colloca considers AA as a tool that can increase or decrease legal certainty.

[58] Mikryukova, Viktor Alekseevich, "The Creative Function of the Analogy Method in Civil Law Practice", in *International Journal of Innovation*, Creativity and Change, 2020, vol. 12, n. 4, pp. 272-289.

[59] Gianformaggio, Letizia, *op. cit.*, p. 160.

[60] Postema, Gerald J., *op. cit.*; Reale, Miguel, *Lições preliminares de direito*, 27 ed., São Paulo, Saraiva, 2022 [1973], p. 296.

[61] A theoretical-comparative overview is provided by Koszowski, Maciej, "The Scope of Application of Analogical Reasoning in Statutory Law", in *American International Journal of Contemporary Research*, 2017, vol. 7, no. 1, pp. 16-34.

[62] See Cardozo, Benjamin, *The Nature of the Judicial Process*, New York, Yale University Press, 1921, who emphasized also many other virtues of analogy: e.g. certainty, equity, fairness.

[63] Postema, Gerald J., *op. cit*.

discrimination;[64] (x) To ensure replicability and coherence;[65] (xi) To create certainty as predictability, stability as well as the opposite, that is to increase uncertainty as unpredictability;[66] (xii) To reduce vagueness;[67] (xiii) To decrease indeterminacy;[68] (xiv) To increase general agreement in legal practise; encourage reasonable disagreements;[69] (xv) To combine formalism and realism;[70] (xvi) To overcome the principle of legality and the rule of law in matters of criminal law or reserved to the legislature,[71] *etc*.

---

[64] Hellman, Deborah, "Two Types of Discrimination: The Familiar and the Forgotten", in *California Law Review*, 1998, vol. 86, no. 2, pp. 315-361; Kelso, Randall R., "Considerations of Legislative Fit Under Equal Protection, Substantive Due Process, and Free Speech Doctrine: Separating Questions of Advancement, Relationship and Burden", in *University of Richmond Law Review*, 1994, vol. 28, pp. 1279-1310.

[65] MacCormick, Neil, *Legal Reasoning and Legal Theory*, Oxford, Clarendon, 1978, pp. 152-194.

[66] According to Guastini, Riccardo, "Conoscere il diritto. Un inventario di problemi", in *Diritto & Questioni pubbliche*, 2013, n. 13, p. 535 analogies are obstacles to knowledge of existing rules.

[67] See e.g. Guastini, Riccardo, Interpretare e argomentare, Milano, Giuffrè, 2011, p. 56.

[68] E.g. Marmor, Andrei, *Should Like Cases Be Treated Alike?,* 2004, <http://dx.doi.org/10.2139/ssrn.618382> underlines that the assumption of analogy is the indeterminacy (under-determinacy) of the reasons that is filled with the analogy.

[69] See e.g. Lamond, Grant, "Analogical Reasoning in the Common Law", in *Oxford Journal of Legal Studies*, vol. 34, Issue 3, 2014, pp. 567-588; Sherwin, Erwin, *op. cit.*.

[70] See e.g. Huhn, Wilson, "The Stages of Legal Reasoning: Formalism, Analogy, and Realism", in *Vill. L. Rev.*, 2003, vol. 48, p. 305 ff., esp. pp. 379-380.

[71] See e.g. Vogliotti, Massimo, *Dove passa il confine? Sul divieto di analogia nel diritto penale*, Torino, Giappichelli, 2011; Ferrajoli, Luigi, "Contro il creazionismo giurisprudenziale. Una proposta di revisione dell'approccio ermeneutico alla legalità penale", in *Ars interpretandi*, 2016, no. 2, p. 23 ff.

The AA can be a driving force for legal change, but it does not have to be. The gradualness of innovation or the way in which inertia is maintained do not depend on the structure of the argument itself, which is neutral in this respect. Rather, they depend on the content, the criteria of relevance and the cases and situations to which they apply. This can be repeated for all the other values or characteristics of a legal system mentioned above. Their application can increase or decrease coherence, consistency, certainty, indeterminacy, stability, etc. Ideally, it would promote all of these values. But in the real world, AA can lead to all sorts of variations. Even if AA is ideally a pillar of the rule of law, it can suffer the cracks and notches of human history and eventually erode and become a force against the rule of law itself.