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Analogy argumentation in law: A dialectical perspective

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Abstract. In this paper I investigate the similarities between the dialectical procedure in the pragma-dialectical theory and dialectical procedures in AI and Law. I do this by focusing on one specific type of reasoning in law: analogy argumentation. I will argue that analogy argumentation is not only a *heuristic* for finding new premises, but also a part of the *justification* of legal decisions. The relevant criteria for the evaluation of analogy argumentation are not to be found at the logical level of inference, but at the procedural level of the discussion. I will proceed as follows. I start with an outline of Prakken's theory of argumentation frameworks and procedural models. Then, I will discuss Peczenik's analysis of analogy argumentation and try to combine it with the descriptive-normative research of MacCormick and Summers. Finally, I propose a systematization of the criteria for the evaluation of analogy argumentation within the framework of a pragma-dialectical notion of an argumentation scheme.

1. The Rediscovery of Toulmin

In his paper 'From Logic to Dialectics in Legal Argument' (1995) Prakken investigates the relation between declarative and procedural accounts of adversarial legal argument and its relevance for AI and Law. He proposes a three-leveled model, where a formal argumentation framework is built around a logical system and itself embedded in a dialectical procedure for dispute. He observes that this construction of procedural, in particular dialectical models of argumentation is one of the recent developments in AI and Law (Hage et al., 1994; Gordon 1995). These models, Prakken explains, are inspired by Toulmin's theory that the validity of argumentation outside mathematics does not depend on the syntactic structure but on the disputational process in which they have been defended. According to Toulmin an argument is valid if it can stand against criticism in a properly conducted dispute, and the task of logicians is to find criteria for when a dispute has been conducted properly. In agreement with this, the procedural models of adverserial argumentation state criteria for the fair and effective regulation of a dispute. They identify the possible moves of the parties and sometimes also their rights and obligations and they determine when a dispute has been won or lost.

Prakken correctly states that Toulmin himself has not carried out his suggestion of studying the procedural aspects but that his challenge has been taken up by others. Indeed, in the 1970s Frans van Eemeren and Rob Grootendorst, inspired by amongst others Toulmin began to study argumentation. In the *pragma-dialectic* approach they developed, Van Eemeren and Grootendorst aim for a sound combination of linguistic insight from the study of language often called 'pragmatics' and the logical insights from the study of critical dialogue known as philosophical 'dialectics'. Crucial in their theory is the ideal model of a *critical discussion*. The model provides a procedure for establishing methodically whether or not a standpoint is defensible against doubt or criticism. It is, in fact, an analytic description of what argumentation would be like if it where solely and optimally aimed at resolving a difference of opinion. This model specifies the various stages and rules in a disputational process, and the types of speech acts instrumental in each particular stage.

Both the pragma-dialectical theory and certain developments in AI and Law, as Feteris observes in this issue, consider legal argumentation to be a part of a rational discussion aimed at a rational resolution of disagreement. Researchers in these fields try to develop models for a rational resolution of disagreement, and they do this by considering the *critical dialogue* as a means. The resolution process is viewed as a dialogue between a proponent and an opponent which is governed by a set of procedural rules.

In this paper I investigate the similarities between the dialectical procedure in the pragma-dialectical theory and some dialectical procedures in AI and Law. I do this by focusing on one specific type of reasoning in law: analogy argumentation. I will argue that analogy argumentation is not only a *heuristic* for finding new premises, but also a part of the *justification* of legal decisions. I will proceed as follows. I start with an outline of Prakken's theory of frameworks and procedural models and his analysis of analogical reasoning. Then, I will discuss Peczenik's analysis of analogy argumentation and try to combine it with the descriptive-normative research of MacCormick and Summers. Finally, I propose a systematization of the criteria for the evaluation of analogy argumentation within the framework of a pragma-dialectical notion of an argumentation scheme. The aim of this paper differs from the well-known HYPO project (Rissland & Ashley, 1987 and 1989). HYPO *generates* realistic disputes between laywers reasoning analogically. By contrast this paper concerns the reconstruction and evaluation of analogical arguments.

2. Argumentation Frameworks and Procedural Models in AI and Law

Argumentation frameworks give an assessment of argument on the basis of given premises and ordering criteria. According to Prakken they contain five elements. The first two elements are the notion of an argument given an underlying logic. In an argumentation framework the technical meaning of the term 'argument' cor-

responds to a proof or inference in the underlying logic. Prakken illustrates this meaning with the following example. If the underlying logic is standard deductive logic, then 'According to Section 1612 of the Dutch Civil Code selling a house does not terminate an existing lease contract, the house which I lease has been sold, so my lease contract has not been terminated' is an argument, while the same information with 'the house has been donated' instead of 'sold' is no argument in the technical sense of an argumentation framework. However, Prakken proceeds, it can very well be an argument in the *broader* sense: for instance it can be a move drawing an analogy between selling and donating.

The third element in an argumentation framework is a definition of conflicting arguments. And because debates ideally do not end with conflicting arguments, there is a fourth element in an argumentation framework: methods for comparing or ordering of conflicting arguments. The fifth element of an argumentation framework is a determination of the outcome of the debate. Prakken distinguishes between 'justified', 'defeated' and 'defensible' arguments. One of the problems in constructing and applying argumentation frameworks is that, except for priority rules like *Lex Specialis*, there are not many clear rules (or metaprinciples) in legal debates about interpretation of rules. In most legal systems the ordering of interpretation criteria is not clearly defined, which leaves room for debate.[1] As Prakken observes, these debates are particularly frequent if the conflict concerns the interpretation of *open textured* concepts: if for solving such conflicts any legal guidelines are available at all, they are of such a diverse and tentative nature that there is ample room for debate.[2]

Let us now look at Prakken's analysis of analogical reasoning (or analogy argumentation). Prakken's central question is whether a nondeductive form of reasoning like analogical reasoning must be regarded as an argument in the sense of an argumentation framework or as a heuristic for finding new premises. Prakken argues for the latter option, since there is nothing in the *form* of analogy argumentation that justifies accepting their conclusion over not accepting it.[3] Even the most specific,

[1] Cf. Hart (1961: 123): 'Canons of interpretation cannot eliminate, though they can diminish, these uncertainties; for these canons are themselves general rules for the use of language, and make use of general terms which themelves require interpretation. They cannot, any more than other rules, provide for their own interpretation.'

[2] Cf. Alexy and Dreier in *Interpreting Statutes* (1991: 74): 'The openness of statutory law would pose no serious problems, if there was a juristic method that in each case led to one single answer. However, there is no such method. First, both aims and rules of legal methodology are deeply controversial. Second, neither aims nor rules always yield a single answer. All hard cases of interpretation are characterized by the fact that an answer cannot be found in the mere wording of a statute by applying the rules of logic and of legal methodology. On the contrary, value-judgements are necessary and these are themselves not derivable with certainty form the authoritative material. (. . .) Disputes about the right interpretation are therefore often disputes about the true conception of justice and its correct application.'

[3] Cf. Alexy (1978) who points out that analogy-argumentation would never have attracted so much attention if it would have dealt with a simple logical deduction rule. See also Wróblewski (1974) for the difference between simple deduction rules and systematic legal inference rules such

or most on point analogy will always have a counterargument that stresses the differences and that therefore is at least as specific. Prakken illustrates his view with the above example, where 1612 BW says that selling a house does not terminate an existing lease contract and the house has not been sold but donated. Then, according to Prakken, a 'logic' for analogical reasoning would not only give rise to the analogy that both selling and donating are a transfer of property, but also to the distinction that selling is not the same as donating. This means that stating only the analogy and not the distinction is in fact a decision to regard the similarities as outweighing the differences. And a decision is fundamentally different from an inference relation.

However, as Prakken points out, the *procedural* and *dialectical* view on argumentation gives a new perspective. Authors like Van Eemeren and Grootendorst (1982, 1992) and Rescher (1977) argue that the strength of argumentation cannot be determined in isolation but should be evaluated in a dialectical context. So, from a dialectical perspective the acceptability of analogy argumentation depends on a testing procedure of argument and counterargument. If the dialectical procedure gives a party a fair opportunity to produce counterarguments to an analogy, but he fails to do so, then it is fair to say that the analogy is acceptable. In Prakken's perspective the relation between an argumentation framework and the dialectical procedure is as follows. Analogy is as mode of reasoning part of the *dialectical procedure*, outside but connected to an argumentation framework. The acceptability of analogy argumentation depends on the outcome of the dialectical procedure. From the perspective of an argumentation framework they can be seen as 'black boxes', connected to the argumentation framework in such a way that only their output matters: each time a black box produces a new premise, the input state of the argumentation framework changes and the status of arguments has to be redetermined.

Prakken illustrates the determination of the acceptability of analogy argumentation with two exemples related to 1612 BW, both based on *priority rules*. In his second example the proponent states that there is an analogy between selling and donating a house: both are a transfer and therefore also donation does not terminate the existing lease contract. The opponent rebuts this argument by saying that although this analogy is acceptable, in this case there is an exception, since the tenants earlier agreed by contract that selling the house would terminate the lease contract; then clearly the same holds when the house has been donated. Since this is a rebutting argument, priorities should be invoked. An appeal to *Lex Specialis* would give the opponent the justified argument.

One of the Prakken's observations is that in his examples the evaluation of the acceptablity of analogy argumentation is based on priority rules like *Lex Posterior* or *Lex Specialis.* As I said above, one of the problems in evaluating nondeductive reasoning like analogy argumentation, is that except of priority rules *Lex Specialis*,

as the analogy-argumentation. Wróblewski assumes that the application of simple deduction rules is not regulated by legal standards, whereas the application of systematic legal inference rules is.

there are not many explicit and clear interpretation rules about the correct interpretation of primary rules. And in most legal systems the ordering of interpretation criteria is not clearly defined, which leaves room for debate. Prakken concludes that if from philosophy or AI research certain systematic patterns of good nondeductive reasoning emerge, also these can be incorporated in the standards for comparing arguments. This is why Prakken and Sartor (1996) plea for an integration of normative research on of into to dialectical criteria and descriptive research on actual reasoning practice.

I agree with this conclusion and with the need of an integration of normative en descriptive research. In the case of analogy argumentation little systematic research has been devoted to evaluation criteria and standards about the sound use of analogy argumentation to solve a particular interpretative problem, and to factors that determine whether this kind of argumentation is acceptable. As far as I know, there is no detailed survey of standards to evaluate the correct use of analogy argumentation based on normative and descriptive insights. In the next sections I propose a systemisation of the criteria for the correct use of analogy argumentation, based on the theoretical research of Aarnio, Alexy, Peczenik a.o. and the descriptive-normative research of MacCormick and Summers.

3. Peczenik's Analysis of Analogy Argumentation

Within the framework of legal theory, analogy argumentation is traditionally analysed mainly from a logical perspective, with the aim to check whether the conclusion is justified on formal grounds. Authors such as Tammelo (1969) and Klug (1982) consider analogy argumentation as a specifically legal argumentation *form*, which on the face of it does not meet the requirements of logical validity, but which can be reconstructed as a logically valid argumentation. This traditional approach of analogy argumentation can be characterised as *monological* and *product-oriented*, because the reconstruction abstracts from the discussion context and aims at the final product of the discussion process. In order to overcome the well-known disadvantages of this approach, authors such as Aarnio, Alexy and Peczenik have analysed judicial argumentation from a *dialogical* perspective. This approach regards argumentation as part of a discussion. The acceptability of the argumentation is made to depend on formal and procedural requirements applying to the discussion process in which a standpoint is defended.[4] Since Peczenik gives the most elaborate analysis of analogy argumentation, his findings will serve as a starting-point for the discussion of the dialogical approach.

Peczenik's definition of (statutory) analogy argumentation reads as follows: 'One applies a statutory rule to a case which, viewed from the ordinary linguistic angle, is included in neither the core nor the periphery of the application area of the statute in question, but resembles the cases covered by this statute in essential

[4] Cf. Aarnio, Alexy and Peczenik (1981) who, in a collection of three articles, develop a theory on legal argumentation.

respects.' (Peczenik 1989: 392) The application of statutory analogy is needed as a result of a gap in the law. This is Peczenik's reconstruction of statutory analogy:

1. If the fact F or another fact, relevantly similar to F, occurs, then obtaining of G is obligatory
2. *H is relevantly similar to F*
3. If H occurs, then obtaining of G is obligatory

In this analysis the analogy argumentation has been reconstructed as a logically valid argumentation, as it is done in the traditional reconstruction. The relevant similarities between F and H are crucial in this argumentation and the use of analogy argumentation is justified on the principle of similar cases being treated in a similar way. The use of the counterpart of analogy argumentation – *a contrario*-argumentation – is justified on the grounds that the law must be obeyed and the principle of legal certainty. Peczenik argues that the choice between analogy and *a contrario* is decided by weighing two aspects of legal certainty: predictability and other moral considerations. To facilitate the process of weighing, Peczenik proposes ten *reasoning norms* as a guideline for choosing between analogy argumentation and *a contrario*-argumentation.

1. If an action is not explicitly forbidden by a statute or another established source of law, one should consider it as permitted by the interpreted valid law, unless strong reasons for assuming the opposite exist. In other words, one should, as a rule, interpret prohibitions *a contrario*, not by analogy.
2. Only relevant similarities between cases constitute a sufficient reason for conclusion by analogy.
3. One should not construe provisions establishing time limits by analogy. Neither should one construe them extensively, unless particularly strong reasons for assuming the opposite exist. (. . .) Ratio legis of the time limits is to assure fixity of the law, whereas analogy and extensive interpretation tend to lower fixity.
4. One should not construe provisions establishing sufficient conditions for not following a general norm extensively or by analogy, unless strong reasons for assuming the opposite exist.
5. Only very strong reasons can justify a use of analogy leading to the conclusion that an error exists in the text of the statute.
6. One should not construe provisions constituting exceptions from a general norm extensively or by analogy, unless strong reasons for the opposite exist.
7. Not all reasons justifying extensive interpretation of a statute are strong enough to also justify reasoning by analogy.
8. One should construe provisions imposing burdens or restrictions on a person, unless very strong reasons for assuming the opposite exist. (. . .) Consequently, one should not construe such provisions extensively or by analogy.
9. A statutory provision should be applied analogously to cases not covered by its literal content, if another provision states that they relevantly resemble those which are thus covered.

10. One may utilise *argumentum a contrario* only in exceptional cases when interpreting rule based on precedents.

These ten norms, according to Peczenik, will help us choose between the use of analogy argumentation and a contrario-argumentation, by balancing justice and legal certainty in judicial decisions. Peczenik's approach offers advantages over the traditional approach since it is now possible to characterize analogy argumentation in the context of a dialectical procedure meeting procedural requirements. He emphasizes, more comprehensively than other authors, the standards for the correct use of analogy argumentation and in this respect his approach of analogy argumentation may be regarded as the most complete.

Nevertheless, Peczenik's method too has considerable drawbacks. By emphasizing the dialogical character of judicial argumentation as well as the judge's role in the discussion, analogy argumentation is indeed related to its underlying norms. In the reconstruction of analogy argumentation, however, he hardly elaborates on this point of view and he falls back on the analysis of a judge's abstract product of argumentation. The analysis and assessment of (complex) analogy argumentation, therefore, suffers from the same disadvantages as the traditional approach. As we saw before, Peczenik's analysis of discussion rules is the most elaborate. The ten norms he proposes offer a survey of considerations we should weigh when evaluating the use of analogy argumentation. Thus he offers, more so than others, a starting-point for a fruitful assessment of analogy argumentation. Peczenik himself grants that his norms are provisional. The system underlying these norms too, leaves something to be desired. Some norms relate to the correct choice of analogy argumentation, others to its correct application. Some norms are related to areas of law, others to legal principles, without any clarification of the connection between the two. Some of Peczenik's norms seem to indicate that he distinguishes between different applications of analogy argumentation, but his analysis of the argumentation disregards this distinction. Finally, his norms are at no point incorporated in a method for the reconstruction of the analogy argumentation. Despite the fact that analogy argumentation is analysed in the context of a discussion, one last critical remark must be made. In Peczenik's dialogical approach too all attention is fixed on justifying pro-argumentation whereas negating counter-argumentation is ignored completely. In his analysis too, forms of complex argumentation are never related to specific critical reactions one may expect when analogy argumentation is used.

4. Towards a Dialectical Characterization of Analogy Argumentation

How can we develop Peczenik's insights into a more comprehensive and systematic method for the use and evaluation of analogy argumentation? I will answer this question by appealing to the pragma-dialectical argumentation theory. This theory reconstructs analogy argumentation as part of a discussion subject to dialectical rules. I will use the argumentation in the famous Dutch judgement 'Quint v. Te Poel' to illustrate how insights from the pragma-dialectical argumentation theory

and insights from legal theory can be combined in a productive way. I focus on how the complex argumentation of this judgement can be regarded as a reflection of the critical reactions evoked by analogy argumentation.

In the pragma-dialectical approach, argumentation schemes such as analogy argumentation are analysed as dialectical procedures in a critical discussion. An argumentation scheme is 'a more or less conventionalized way of representing the argumentative relationship between the arguments and the standpoint being defended in a discourse procedure aimed at attempting to convince somebody who doubts the acceptability of the standpoint' (Van Eemeren en Grootendorst 1992). A critical evaluation of argumentation schemes involves, at some point, the use of an *intersubjective evaluation procedure* to test the argumentation for compatibility with the following two criteria:

(1) Is the analogy argumentation an acceptable argumentation scheme?

(2) Has the analogy argumentation been used in a correct way?

When evaluating argumentation, one first has to establish whether the *correct* argumentation scheme *has been chosen*. A scheme is correct if it belongs to the argumentation schemes which are allowable, in principle, in a given discussion context in defense of a particular standpoint. Only if a scheme is recognised as correct, can we find out whether the analogy argumentation was *used in the correct way*, the second criterion. This procedure involves, among other things, the evaluation of the analogy criterion itself as well as an assessment of the cases which are compared on the assumption of similarity.

As I said above, apart from Peczenik's analysis of analogy argumentation, little systematic research has been devoted to standards needed to know whether a judge may use analogy argumentation to solve a particular interpretative problem and to factors that determine whether this kind of argumentation is acceptable. The example of analogy argumentation is therefore a perfect example of Prakken's claim that, except of priority rules like *Lex Specialis*, there are not many clear rules (or metaprinciples) in legal debates about interpretation of rules. First, the *ordering* of interpretation criteria is not clearly defined and second, the interpretation rules are tentative and leave room for interpretation. So there is ample room for debate. This is the reason why Prakken and Sartor (1996) plea for an integration of normative research on dialectical criteria and descriptive research on actual reasoning practice.

One of the recent attempts to integrate normative en descriptive research concerning statutory interpretation is made bij the research group 'The Comparative Statutory Interpretation Group'. In their study *Interpreting Statutes* (1991), edited by MacCormick and Summers, they explore the interpretational norms and practices comparatively and jurisprudentially across a wide range of legal systems. One of the main findings of this descriptive research is the categorization of 11 major types of interpretative arguments and connected to this, their 'universalist' thesis

that all legal systems studied share these as a common core of good reasons for interpretative decisions. The 11 types of interpretative arguments are:

A. Linguistic Arguments

1. Arguments from a standard ordinary meaning of ordinary words used in the specific section of the statutory text being interpreted.
2. Arguments from a standard technical meaning of ordinary words or of technical words, legal or non-legal.

B. Systematic Arguments

3. Contextual-harmonization arguments. These arguments arise from the part of the statutory section in which the words in issue appear, from usage in other parts of that section, in related sections of the same statute, and in sections of closely related statutes.
4. Arguments invoking precedents already interpreting the statute at hand.
5. Arguments based on statutory analogies. For example, when a case is not provided for in the statute, the case is to be treated in the same fashion that closely analogous cases are treated in the statute.
6. Arguments of a logical conceptual type in which implications are drawn from recognized general legal concepts.
7. Arguments appealing to general legal principles potentially or actually operative within the field in which the interpretational issue arises.
8. Arguments from any special history of the reception and evolution of the statute.

C. Teleological-Evaluative Arguments

9. Arguments from statutory purpose to the effect that a given possible meaning of the statute best serves that purpose; this argument is teleological in nature.
10. Arguments consisting of substantive reasons the weight or force of which is not essentially dependent on any authoritativeness that the reasons may also have. This type of argument consists of direct invocation of substantive reasons, that is, moral, political, economic or other social considerations.

D. Transcategorical (Intentional) Arguments

11. Arguments to the effect that the legislature intended that the words have a given meaning (transcategorical).

The authors believe that their ‘common core’ thesis is important, not only because it implies (along with the rational explicability of variations) a common rationality rooted in shared values, but also because it implies the feasibility of an ideal *normative* model for the interpretation of statutes. In the last chapter MacCormick and Summers propose the following model:

(a) In interpreting a statutory provision, consider the types of argument in the following order:
   (i) linguistic arguments;
   (ii) systemic arguments;
   (iii) teleological/evaluative arguments;

(b) Accept as *prima facie* justified a clear interpretation at level (i) unless there is some reason to proceed to level (ii); where level (ii) has for sufficient reason been invoked, accept as *prima facie* justified a clear interpretation at level (ii) unless there is some reason to move the level (iii); in the event of proceeding to level (iii), accept as justified only the interpretation best supported by the whole range of applicable arguments.

(c) Take account of arguments from intention and other transcategorical arguments (if any) as grounds which may be relevant for departing from the above prima facie ordering.

According to MacCormick and Summers this model is simple and leaves open many key questions about priorities and relative weights in interpretative argument. But it provides the authors a starting point to at least sketch a general line on the soundness of interpretative reasoning in law.[5]

Indeed, the model is for those who are interested in an *ordering* of interpretative norms an important step forward. Let us see how things work out for analogy argumentation. First, analogy-argumentatio is a *systemic* argument. This means that analogy argumentation is only relevant when a linguistic reading of the norm is unacceptable (in case of the interpretation of a norm) or is impossible (in case of a gap). How can we refine the model focusing on the specific norms relevant for the correct choice and application of analogy argumentation? Let us systemize some jurisprudential standards (mentioned a.o. by Peczenik) in order to arrive at specific criteria for the use of analogy argumentation.

The first class of standards concerns the question how the *area of law* bears on analogically or *a contrario* application of legal standards. Legal theory, as a rule, claims that the area of law to which the legal standard belongs, determines the possibilities of using that standard analogically or a contrario. The most telling example of this rule is the ban on analogy in criminal law: 'stretching penalization' on the basis of analogy argumentation is contrary to the very nature of criminal law. Tax law is yet another area of law that limits the possibilities to apply legal rules analogically. It is generally assumed that analogical application is admissible only if advantageous to the taxpayer. Finally, as we will see later, civil law too limits the possibilities of applying analogy argumentation to legal rules.

[5] The authors are right when they say that the model is suggestive for ways in which the analysis of interpretational conflicts and their resolution might be pursued in later studies and that it gives essential insights into the justificatory force of the different arguments – insights which would be essential to any more substantial attempts at building a more detailed model of the interaction of interpretative arguments.

The second class of standards deals with the *type of standards to* which the legal norm is taken to belong. The type of standard affects the admissibility of analogical or *a contrario* application. Aarnio (1987: 106), for instance, distinguishes between material and procedural standards. According to him, the principle of legal certainty should prevail in the interpretation of procedural standards and therefore the use of analogical application is limited. Another important distinction is between standards that bind, standards that permit, standards that confer authority and assessment standards. Peczenik (1989: 396), for instance, indicates that binding standards must be interpreted restrictively and can only be applied analogically in exceptional cases.

The third class of standards concerns the *structure* of the legal standard that is applied either analogically or a contrario. The character of the conditional link between the terms of application and legal consequence determines the structure of the legal standard. If a legal standard expresses necessary or necessary and sufficient conditions for the legal consequence, analogy argumentation is not admissible whereas a contrario is. If the legal standard expresses sufficient conditions, analogy argumentation may be admissible.

The fourth class of standards relates to *constituents* of the legal standard. In addition to terms of application and legal consequence, the following normative elements are distinguished: norm-subject, norm-object, deontological modality and indications as to time and place. These elements likewise affect the admissibility of analogy argumentation or *a contrario*-argumentation. Peczenik points out that stipulations as to time in legal standards should not be applied analogically.

If these norms are accepted as a starting-point and are integrated into the pragma-dialectic standards for the evaluation of analogy argumentation, it is possible to draw up the following assessment standards.

Checklist for the evaluation of analogy argumentation

1. Is the analogy argumentation a suitable argumentation scheme?
   a. Is it a matter of a gap in the judicial system?
      – Is it a normative gap?
      – is it a an axiological gap?
   b. Can the gap be filled by means of an analogy argumentation?
      – what judicial field does the analogical legal standard belong to?
      – what type of norm does the analogical legal standard belong to?
      – what type of conditional link is expressed by the analogical legal standard?
      – to what normative element does the analogical legal standard apply?
   c. Is a better systemic argument available?
2. Has the analogy argumentation been applied correctly?
   a. Is the existing legal norm which served as a starting point valid?
   b. Is this particular case, as far as the relevant points are concerned, indeed similar to the description of juristic facts in the existing legal standard?

c. Is this particular case, as far as the relevant points are concerned, not essentially different from the description of juristic facts in the existing legal standard?
d. Wouldn't it be advisable to compare this particular case with the description of juristic facts of different legal standards?

Taking these standards as a starting-point, it is possible to arrive at a more systematic as well as complete assessment of analogy argumentation in judicial decisions. More systematic since there is a clear interdependency between the assessment standards at hand. If a judge is confronted, for instance, with a gap which cannot be filled by analogy argumentation, he need not consider possible similarities between existing and construed legal standards. The reconstruction is more complete because it does not only focus on the formal validity of the argumentation and the acceptability of the premises but also on the *procedural* standards that indicate whether or not an analogy argumentation was called for in the first place and whether it was applied correctly. Rather than reducing the analogy argumentation to a simple argumentation structure, this enables us to analyse it as argumentation in a *dialectical* context with a complex structure. The elements of this structure may be regarded as reflections of the real or anticipated critical reactions based on the different judging-standards.

So, not only priority rules like *Lex Specialis* play an role in evaluating analogy argumentation, there are a number of other relevant norms. Let us to illustrate this claim, have a look at the Dutch case 'Quint v. Te Poel' (Dutch Supreme Court 30-1-1959, NJ 1959, No. 548). In 1951 Hubertus te Poel has two houses built by contractor Quint on land which Te Poel rents from his brother Heinrich. When construction is under way, Hubertus is unable to pay and Heinrich, the owner of the land, by right of accesion becomes the owner of the houses built thereon. In a lawsuit which eventually comes before the Dutch Supreme Court, Quint demands payment for his activities by Heinrich. After all, Heinrich would have been 'unjustifiably enriched' at the expense of Quint. Since there was no explicit statutory rule for this legal claim, the Supreme Court had to fill a gap in the law. In this important judgement the Dutch Supreme Court puts forward a number of considerations to accompany the analogy argumentation. These considerations can be seen as reflections of critical questions to be asked in a dialectical procedure. Let us look at the first argument:

> Considering that the argument also addresses the Court's interpretation of art. 1269 of the Civil Code ('All obligations proceed from either agreement, or from the law')
> Considering:
> (1) that the Court is right in stating that the regulation of art. 1269 of the Civil Code does not allow the assumption that an obligation between two persons arises in all cases in which a judge is of the opinion that the rules of reasonableness and fairness dictate that one person carries out a certain performance for the other;

This first consideration can be viewed in the light of the question whether analogy argumentation is an appropriate argumentation scheme to fill up a gap. The Supreme Court, in this respect, holds that an alternative solution – a direct appeal to 'reasonableness and fairness' as a source of the agreement – has been correctly rejected by the Court. In other words: this systemic argument is indeed not the right choice to solve the interpretation problem, according to the Supreme Court (question 1c). The Supreme Court continues with the following two arguments:

(2) that the Court, however, having found that Quint's assumed claim is not supported by any specific section of the law, and therefore concluding that Quint is not entitled to his claim, has given too limited an interpretation of the words 'from the law';
(3) that, after all, from these words it does by no means follow that all obligations should be directly supported by some section of the law, but from these can only be inferred that in cases not specifically laid down in the law, that the solution has to be accepted which fits within the system of the law and is in keeping with cases that are laid down in the law;

This second and third consideration of the Supreme Court concern the adequacy of analogy argumentation. The Court's answer was negative but the Supreme Court has a different opinion. The Supreme Court, in these considerations, judges that a statement of law – 'All obligations proceed from either agreement, or from the law' – does *not* imply that all obligations should be directly supported by some section of the law. So, according to the Supreme Court, the Court was not right in choosing this *linguistic* argument: there are reasons to proceed to the category of systemic arguments. According to the Supreme Court we can only infer from this legal rule, that in cases not specifically laid down in the law, the solution has to be accepted which meets two requirements: it should fit within the system of the law and it should be in keeping with cases that are laid down in the law. These considerations reflect the fundamental character of this case. The Supreme Court, in this judgement, admits the *possibility* to employ analogy argumentation in cases like these for filling up gaps and, at the same time, formulates two general requirements which have to be met in analogy argumentation (question 1). The Supreme Court continues as follows:

(4) that now it has to be investigated whether, in the present case, an obligation within the meaning of the law can be assumed to have been created between parties;

Considering:

(5) that in this context the question arises whether the owner of a property who, because of the fact that the accession rule applies here, is obliged to compensate him who has constructed the works to the amount of his enrichment;

(6) that the law does provide for cases when works have been constructed by someone with only limited legal authorization (art. 762, 772 and 826 of the Civil Code); that these – mutually divergent – regulations, however, which are connected with the special nature of the commercial claims to which they refer, cannot, in this context, be of decisive significance;
(7) that, however, according to art. 658 and 1603 of the Civil Code, the landlord cannot be expected, by paying a certain amount of money, to annul the enrichment enjoyed by him because of the works constructed by the holder or tenant of the land on which the works have been constructed;
(8) that it is implausible that a claim which the law withholds the holder and the tenant, would befall the contractor who has constructed these works under agreement with the tenant, and who suffered damage because his co-contractor is unable to make payments;
(9) that what is stipulated in art. 659 of the Civil Code does not alter this since a special provision, equal to that of the bona fide owner, does not befall Quint, who could have known the works would be constructed on land which did not belong to the client by consulting the public registers, doing so, in Quints own words, only after the construction had been completed.'

Reflecting on these considerations in the light of the judging-standards I mentioned earlier, one can determine how decisive a role these considerations play in judging analogy argumentation. After arguing that analogy argumentation is a suitable argumentation scheme, the Supreme Court confronts the question *what* analogical application is the most acceptable. Considerations 6 through 9 deal with this question. Considerations 6 and 9 can be regarded as negative answers to question 2b: someone with only limited legal authorization as well as the bona fide owner do have a case from unjustified enrichment, the point being that the case of Quint, the person who is personally authorized, though not bona fide, is in fact *dissimilar*. The negative answers to question 2b could be regarded as examples of *a contrario*-argumentation. Finally, considerations 7 and 8 contain the core of the analogy argumentation: the holder and the tenant do not have a case resulting from unjustified enrichment and, therefore, neither has the person acting on behalf of the tenant.

5. Conclusion

In this paper I investigated the similarities between the dialectical procedure in the pragma-dialectical theory and the dialectical procedures in AI and Law. Focusing on analogy argumentation, I have shown that there are striking similarities between the pragma-dialectical approach and certain dialectical approaches in AI and Law. Both approaches are aware of the fact that the procedural and dialectical dimension is vital for a good understanding of legal argumentation. Both understand the need for an integration of descriptive and normative research. I have tried to show along which lines the dialectical perspective on analogy argumentation may be

developed. The standards for judging as formulated may serve as a starting point. A careful analysis of case law in which analogy argumentation plays an important role would make clear in how far these standards need to be made more specific.

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