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Legal analogy as an alternative to the deductive mode of legal reasoning[1]

Introduction

Deduction from legal rules is undoubtedly one of the most familiar methods of legal reasoning. It is – especially in civil law countries – commonplace that statutory rules are to be applied deductively, by use of legal syllogism. Legal deduction is supposed to lead to objectively correct outcomes, as long as its premises are valid/true. At first sight, the deductive line of inference in law seems to be extremely easy in application. One may be under the impression that everyone, not only judges and lawyers, can – without any special training and preparation – reason in this manner.

In this paper, I will try first to reveal some weak points of this attitude to legal deduction and, secondly, to put forward an alternative to the deductive mode of legal reasoning, namely legal analogy.

The mechanism of deduction

In logic, deduction – in contrast to analogy and non-complete induction (i.e. one which is not based upon a full set of data) – is a method that guarantees the truthfulness of the conclusion, provided the premises are also true. The very scheme of inference leads to the infallibility of the outcomes that are hereby reached. This scheme can be presented as follows: all A is B (the major premise), C is A (the minor premise) and C is B (the conclusion); i.e. like in Aristotle's example: All men are mortal, Socrates is a man, therefore Socrates is mortal too.

In the legal domain, deduction takes a slightly different form. The major premise is constituted by a legal norm (or rule). The case at hand (also called pending, instant, *sub*

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judice or under argument) forms the minor premise. The conclusion, in turn, becomes the legal consequences for this case. Accordingly, if a norm that forms major premises is valid (binding, in effect), and the case at hand is true (its facts are proven or posited as such), the legal outcome the deductive leads to is correct as well. In this sense, the deductive mode of legal reasoning can be deemed to be of an infallible or unchallengeable nature, and the whole construction, as such, is called a legal syllogism, as opposed to an 'ordinary' ('logical') syllogism.[2]

However, the above thesis as to the infallible nature of legal deduction is, while undoubtedly enchanting, nothing more than a utopian idea – a quintessential example of legalistic illusion. Indeed, deduction can be infallible, but only in virtual and closed systems, like those of numbers, signs or symbols, or other entities that are defined in advance and possess fixed and unequivocal meaning (e.g. in the world of mathematics, formal logic, IT sciences). It is, however, utterly impotent when it leaves the theoretical realm and has to deal with reality, with all its diversity, flux and immeasurability. Hence deduction is in a miserable position when it comes to linking the normative sphere (the realm of oughtness) to the ontological sphere (the realm of being). The transition from one of these spheres to the other is by no means automatic, being in essence a very complex and intricate process.

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2 With regard to deduction in legal applications cf. A. Peczenik, *On Law and Reason*, Dordrecht 2009, pp. 14–15; S.J. Burton, *An Introduction to Law and Legal Reasoning*, 3rd edition, Austin 2007, pp. 43–58; D.N. MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, Oxford 2005, pp. 32–48, pp. 49–77; idem, *Legal Reasoning and Legal Theory*, Oxford 1978, pp. 19–72; R.J. Aldisert, *Logic for Lawyers: A Guide to Clear Legal Thinking*, 3rd edition, Notre Dame 1997, pp. 53-88; M.P. Golding, *Legal Reasoning*, Peterborough 2001, pp. 39–42; B. Brożek, *Rationality and Discourse: Towards a Normative Model of Applying Law*, Warszawa 2007, pp. 39–59; J. Wróblewski, *The Judicial Application of Law*, Dordrecht 1992, pp. 30–35, 229–232; S. Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, "Harvard Law Review" 1995–1996, no. 109, pp. 930–931 and footnote 13; R. Cross, *Precedent in English Law*, Oxford 1968, pp. 176–181; R. Cross, J.W. Harris, *Precedent in English Law*, 4th edition, Oxford 1991, pp. 187–192; S. Hanson, *Legal Method & Reasoning*, 2nd ed., London 2003, pp. 215–217; K. Opałek, J. Wróblewski, *Zagadnienia teorii prawa*, Warszawa 1969, pp. 308–315. On the notion of a legal norm (rule) cf. A. Ross, *Directives and Norms*, London 1968, pp. 78–138; F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Oxford 1991, pp. 1–37; G.C. Christie, *Law, Norms & Authority*, London 1982, pp. 2–27. On deduction (syllogism) in general cf. J.S. Mill, *A System of Logic, Ratiocinative and Inductive: Being a Connected View of the Principles of Evidence and the Methods of Scientific Investigation*, 8th edition, New York 1882, pp. 126–157; Th. Fowler, *The Elements of Deductive Logic*, 10th edition, Oxford 1895, pp. 85–109. For human rule-based reasoning in psychology cf. S.A. Sloman, *Two Systems of Reasoning*, [in] *Heuristics and Biases. The Psychology of Intuitive Judgment*, eds. Th. Gilovich, D.W. Griffin, D. Kahneman, Cambridge 2002, pp. 381–383; L.J. Rips, *The Psychology of Proof: Deductive Reasoning in Human Thinking*, Cambridge 1994.

Legal deduction misconception

Apart from the requirement that the rule that serves as a major premise has to be infallible in the sense that whenever the antecedent occurs the legal consequence prescribed by this rule cannot be non-entailed, the precondition of the success of legal deduction is that the symbols, objects, persons which are mentioned in the major premise have to be exactly the same as the symbols, objects and persons present in the minor premises. In the example with Socrates, we have, therefore, to be certain that Socrates is one of the men which the major premise refers to. If there is even a grain of doubt in this respect, the whole infallibility of the deduction is rendered invalid. In mathematics and formal logic, objects are determined and precise. We know that 2, 3, 4, 5... are numbers, we know that 2 plus 2 is 4, and that it could not be otherwise. Similarly in board games, like chess, we have no doubt which piece is which or how it can move.

In legal deduction, however, we encounter a serious problem at the very outset. Firstly, both the major and minor premises are not given beforehand. And they need to be constructed in a way which is far from objective or even intersubjective. In order to obtain the major premise, a legal norm or rule, one has to derive it from a judicial precedent or canonical text (i.e. a text of statutes, regulations, constitutions, ordinances etc). The process of such derivation is, however, not standardized and free of subjective choices; different norms (rules), of an uneven degree of generality and complexity, can be constructed upon the same provision of a given legal act.

Even more serious difficulties occur when we turn to the minor premise of legal deduction. This premise is not given in any form; it have to be constructed almost completely from scratch.

What we are dealing with are actually the raw facts of the case at hand. To obtain the minor premise, we must process thus these facts and put them into a linguistic description so as to form a specific expression which may be subsequently used as a minor premise for the sake of legal deduction. Yet since we may describe any factual situation in an infinite number of ways, we do not describe those facts neutrally, but rather in the terms of the major premise (a norm/rule constituting this premise), or, looking from a slightly different angle, we ascertain here whether the situation generally stated in the major premise (the norm/rule it is consisted of) also occurs in the case at hand.

It is noteworthy that the effect of such ascertainment/description leads directly to the application or non-application of a rule (norm) that forms the major premise to the case at hand, entailing as a corollary that we ascribe to this case the legal consequence which this rule (norm) prescribes. Hence, one may say that, after having made the aforementioned description/ascertainment, there is no reasoning at all in legal deduction. The subsumption of the rule forming the major premise to the described factual situation that constitutes the minor premise is a mere illustration which has no bearing on the

outcome of legal deduction. Everything which was crucial and decisive for this outcome had already been done, i.e. while the minor premises had been being constructed, the phenomenon present in the case at hand had been being classified as one encompassed by the rule specified in the major premises.[3]

Before, however, making such a classification, the major premise of a legal deduction is, as Burton metaphorically put it, 'dangling in the air.'[4] There is a gap between the facts of the case and the rule (norm) that, as Weinreb says, has to be bridged.[5] In turn, after a classification has been made, no further mental operation is needed. So Cross may confidently elucidate that "the crucial decision is made before the reasoning can be cast into syllogistic form. Not only is the syllogism constructed after the facts have been found, but it is also constructed after any legal problems concerning the scope of the rule have been solved."[6]

The internal normative element

The above charge is, however, only a part of the bigger picture. Legal deduction is in fact far more complicated than logicians may suppose. The building of the major premise, as well as that of the minor premise (the classification involved in the latter), does not happen in vain. The reasoner constructs both premises with a special aim that is well known for this reasoner in advance. This special aim, the known purpose, is not to ascertain what could be linguistically or logically extracted from the canonical text. Nor is it to state how the persons, objects or items present in the case at hand can be best described from the point of language – be it ordinary or sophisticated (especially technical) or official. That purpose/aim is to determine what is to be prescribed, ordered, allowed or prohibited by the law in the case at hand: what are to be the duties and obligations of the litigants, which of them is to win and which is to lose the case. This awareness accompanies the reasoner throughout the process from which both premises emerge.[7]

I venture to say that this – let us call it 'normative' – element is intrinsic to legal deduction and cannot be separated and put aside, despite all the efforts made to that end. Dur-

3 Cf. S.J. Burton, *op. cit.*, p. 43; yet cf. S. Brewer, *op. cit.*, pp. 980–983, 994–998, 1000–1003.

4 S.J. Burton, *op. cit.*, p. 57.

5 L.L. Weinreb, *Legal Reason: The Use of Analogy in Legal Argument*, Cambridge 2005, p. 90.

6 R. Cross, *op. cit.*, p. 178 (R. Cross, J.W. Harris, *op. cit.*, p. 189); R. Cross, *op. cit.*, pp. 178–179 (R. Cross, J.W. Harris, *op. cit.*, pp. 189–190).

7 The goal-oriented nature of legal deduction (classification involved therein) seems to be also discerned by M.P. Golding. He asserts that the question of classification which judges deal with is not of the form: "Is *X* a *Y*?" but rather of the form: "Is *X* a *Y* for certain legal purposes?" or – which he prefers even more – of the form: "Should *X* be treated as a *Y* for certain legal purposes?". Cf. M.P. Golding, *op. cit.*, p. 106.

ing the whole process of the building of major and minor premises, one is fully aware what it is all about and what the consequences of one's choices involved therein will be. In effect, consciously or subconsciously, this indissoluble awareness influences – at least to some extent – the emergence of each of the premises.

Furthermore, legal culture, especially in civil law countries, becomes an unexpected ally here, offering a wide array of means by which one may interpret the canonical text while deriving a rule (norm) before it will form a major premise. The choice of the deductive reasoner is rich: ranging from different literal, teleological and systemic principles of interpretation without any definite order of priority between them; not to mention such legal concepts as that of the 'rational legislator' or different interpretative presumptions (e.g. of ordinary language or conformity with EU law). To have a major premise in a desirable shape, it thus suffices to pick – from among the available options – the one which best conforms to one's 'normative' preference.

In turn, while creating the minor premise (making classification), in addition to the features of language such as vagueness, ambiguity,[8] indeterminacy[9] and context dependence that provide considerable leeway for personal evaluation, one may also take advantage of the latitude that stems from the rules of evidence, including the assessment of

8 On ambiguity and vagueness of terms present in language cf. for instance, F. Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*, Cambridge 2009, pp. 18–23; F. Schauer, *Playing...*, *op. cit.,* pp. 31-37, S.J. Burton, *op. cit.*, p. 52; S. Brewer, *op. cit.*, pp. 993–994; B. Brożek, *op. cit.*, pp. 25–28.

9 The indeterminacy of terms present in language is their intrinsic feature, to remedy which dictionary definitions are of no aid. These definitions are by their very nature imperfect. Not only do they often amount to proffering chains of words which at some point overlap, but such chains can also severely distort the real meaning. To check this, one may look up the meaning of some ordinary word with which meaning one is well acquainted; next turn to the definitions of the words that are used to define this word, and then proceed to the entries that elucidate the words used in the latter definitions. It is quite probable that what will have thus been received will be the same words that are present in the definition of the first word or something which – transposing into this definition – is in variance with the 'intuitive' meaning of that first word. The dictionary definitions, terms and phrases included therein, give only an approximate meaning of the words being defined, and when you go deeper and deeper, the original meaning is so deformed that the defective nature of the lexical definitions is clearly visible. Defining one word by resorting to another which is – at this or some further step – defined by the first word in a row is also unreliable. We know the meaning of particular words mainly from the use of these words in a number of contexts, not from their dictionary definitions. This problem of the indeterminacy innate in language also applies to legal definitions, i.e. definitions which are included in statutes in order to explain the words and phrases used therein. Cf. S.J. Burton, *op. cit.*, pp 54-55. As to the observation that it is impossible to find two words in a language that have an 'exactly' identical meaning (are real synonyms) and the problems one encounters while building lexical definitions cf. Tomasz Gizbert-Studnicki, *Wieloznaczność leksykalna w interpretacji prawniczej*, Kraków 1978, pp. 31–32 and 34–37 respectively.

the credibility of witness testimony or the presence of more than one probable course of events.[10]

As already stated, this normative element of legal deduction presents itself as indispensible and inescapable. If one tries to separate and abandon it, for instance, in favour of the purely linguistic meaning of a canonical text, the legal outcomes would become haphazard and often patently absurd, or unjust to an extent that no-one of sound mind could accept them.

To sum up, the passage from the specific to the general, from the 'is' to the 'ought,' is not only not automatic, but it is to a large extent dependent on the particular person who makes it. The ways this person can follow are individual choices, rather than choices determined purely by logic/mathematics. The deductive scheme of inference serves here, in turn, only as a schematic illustration of what has previously been done. It neither shows the real sequence of reasoning, nor justifies the outcome reached.

One more reason for the logical fallacy of legal deduction

Legal deduction also encounters one additional obstacle from the requirements of logic. As Cross and Harris noted, in syllogism the test of the validity of the conclusion consists in the principle that the denial of the conclusion entails the denial of one or other of the premises.[11] If we treat this requirement strictly, such a test would mean that in legal syllogism the denial of the conclusion must entail the denial of the truthfulness of the facts of the case at hand, or the denial of the validity of the legal rule (norm) that constitutes the major premise. If, therefore, there were a rule at the entrance to a bus banning dogs, and if a bus driver nonetheless permitted a guide dog to enter, the whole rule would thus be automatically made invalid (legally void). Such an attitude does not, however, fit the common understanding of how legal rules operate, i.e. lawyers as well as the addressees of law know that despite allowing a guide dog to go on a bus, the rule banning entry to dogs can still be in force in relation to the vast array of dogs that are not guide dogs.

Corollaries: the alternative seen in legal analogy

If legal deduction is either a fallacy from the logical point of view, or a mere illustration of another kind of mental operation that occurred previously, what is, therefore, the real

10 Incidentally, in legal deduction, the derivation of a rule (norm) that forms the major premise and the determining of the facts that constitute the minor premise seem to be done simultaneously. On the lack of difference from the standpoint of pure logic between the interpretation of the wording of a legal rule (ascertaining of this rule meaning) and the classification of a given phenomenon under such a rule cf. D.N. MacCormick, *Legal...*, *op. cit.*, pp. 93–97.

11 R. Cross, *op. cit.*, pp. 177–178; R. Cross, J.W. Harris, *op. cit.*, pp. 188–189.

mode of legal reasoning by which the law is applied in concrete cases? Having to answer such a question, it may be wise to rest on the assertion that this mode depends on the internal human ability to take into account a number of divergent factors that are regarded by the reasoner as relevant in law, viz.: the intention of the legislator, historical events that preceded the given legislation and the mischief which this legislation springs from, the past judicial decisions rendered in similar cases, values and goals that are generally protected and pursued in a given legal system, common sense and the sense of justice, socially accepted attitudes, and the socially desired outcome for the case at hand, etc.[12] If one perceives legal deduction as an all-embracing collective name for considering such diverse factors, not as something grounded in logic, that stance may be considered reasonable.[13] However, one other legal method presents itself as more adequate and promising here, namely: legal analogy. All the more so if we comprehend such analogy as being complex, multidimensional, dependent on a broad socio-political context, and hard-wired into the human mode of non-standardized thinking.

Thus understood, analogy works through the judgement of the similarity between the cases being compared, where judgment is a result of the resemblance between the all or selected facts of these cases, influenced by the factors mentioned in the paragraph above. The first outcomes reached by such an analogy – which are delivered almost automatically by intuition or hunch – can then be tested by reference to these factors, among which special prominence should be given to the rationale of the 'legal cases' that have been used as the points for comparison with the case at hand. These 'legal cases' may be here of a different origin: precedential ones, typical instances that a particular statutory provision applies to, cases – hypothetical or real – the legal consequences of which are known and difficult to challenge for a member of a given legal culture. In this way, legal analogy may lead to the application in concrete cases of already existing judicial prec-

12 Also the attributes of the reasoner themselves cannot be ignored here. They influence the result of the application of law to a similar – if not even a greater – extent. In consequence, the beliefs, preferences of values and desired goals together with all of the data and information stored in the long-term and short-term memory of a judge would have some impact on the legal outcome he/she arrives at in a pending case.

13 The necessity of taking into account different factors of the aforementioned kind is probably also a reason why legal rules are said to be never completely indicative in relation to the situation in which they apply. On such assertions cf. G.C. Christie, *op. cit.*, pp. 7–8. From the psychological point of view, taking into account such a mixture of incommensurable factors is possible within the so-called intuitive (experiential, associative) reasoning that is here opposed to the rational, deliberative, rule-based kind. On this psychological division cf. S. Epstein, *Integration of the Cognitive and the Psychodynamic Unconscious*, "American Psychologist" 1994, vol. 49, pp. 709–724; M. Gladwell, *Blink. The Power of Thinking without Thinking*, London 2006; *Handbook of Intuition Research*, ed. M. Sinclair, Cheltenham 2011; *Heuristics and Biases...*, *op. cit.*; *Intuition in Judgment and Decision Making*, ed. H. Plessner, C. Betsch, T. Betsch, New York 2008.

edents, and of statutory, precedential, constitutional or even customary rules, as well as the law in general.

An analogical mode of applying the law thus comprehended may also be a remedy for curtailing judicial discretion and making legal decisions seem less arbitrary. At least, as it appears, the giving of priority to the above-mentioned factors is more trustworthy and ordered when it is done in relation to the concrete facts of the cases being compared than it would be if it were made *in abstracto*. If a rationale can explain a specific legal consequence ascribed to one case, why should it not be used in order to ascribe the same or a similar legal consequence to another case if such ascribing is identically or similarly justified in light of this rationale?

The application of general rules via analogy in the place of legal deduction has also attracted the attention of a number of scholars, gaining their acceptance and often open admiration. Thus Weinreb states: "[w]ithout the intervention of analogical arguments, legal rules and the rule of law itself would be only theoretical constructs."[14] Arthur Kaufmann is recognized as the proponent of the idea that "by its nature every application of law, every Rechtsfindung, consists not in a conclusion of formal-logical type identifiable as simple subsumption, but in a process of analogical type,"[15] which concept was later on endorsed by Jacques Lenoble.[16] According to Herbert Lionel Adolphus Hart, in turn, if a case does not belong to plain cases (i.e. those "constantly recurring in similar contexts to which general expressions are clearly applicable" / "where there is general agreement in judgments as to the applicability of the classifying terms"), all that one called upon to answer can do is to consider "whether the present case resembles the plain case 'sufficiently' in 'relevant' respects."[17] In a similar vein, Bańkowski and MacCormick assert that: "Where the problem is whether or not to qualify a problematic phenomenon as instantiating some statutory term or another, analogy to less problematic instances covered by prior decisions is relevant."[18] And Burton explains that: "...analogical reasoning may be used to help interpret and apply an enacted rule. The analysis begins with the enacted text. It may help to find base points in the context that can be used to reason analogically in a problem case."[19]

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14 L.L. Weinreb, *op. cit.*, p. 13.

15 Cf. G. Zaccaria, *Analogy as Legal Reasoning – The Hermeneutic Foundation of the Analogical Procedure*, [in] *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics*, ed. P. Nerhot, Dordrecht 1991, pp. 42, 45–49.

16 J. Lenoble, *The Function of Analogy in Law: Return to Kant and Wittgenstein*, [in] *Legal Knowledge...*, *op. cit.*, p. 118.

17 H.L.A. Hart, *The Concept of Law*, 2nd ed., Oxford 1994, pp. 126–127.

18 Z. Bańkowski, D.N. MacCormick, *Statutory Interpretation in the United Kingdom*, [in] *Interpreting Statutes. A Comparative Study*, eds. D.N. MacCormick, R.S. Summers, Aldershot 1991, p. 369.

19 S.J. Burton, *op. cit.*, p. 77.

Levi also points out that:

> It is only folklore which holds that a statute if clearly written can be completely unambiguous and applied as intended to a specific case. Fortunately or otherwise, ambiguity is inevitable in both statute and constitution as well as with case law. Hence reasoning by example operates with all three.[20]

Murray and DeSanctis advise that:

> Often the legal rules used in the rule-based reasoning syllogism require explanation and illumination to demonstrate for the reader why your prediction of the outcome is legally sound and likely to occur. Analogical reasoning is used within the rule-based reasoning syllogism to further the overall discussion by showing how the rule itself or elements of the rule are supposed to work by discussing and analogizing to or from certain actual circumstances (cases) where the rule was applied to produce a certain outcome.[21]

And Eileen Braman contends that:

> In statutory construction, for instance, when the "plain language" of a disputed provision is ambiguous, judges often look to previous application of the law, seeking to draw connections and/or distinctions between past and pending scenarios. Using analogy in this way helps judges make reasoned decisions about whether or not a particular rule should apply to circumstances giving rise to litigation.[22]

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20 E.H. Levi, *An Introduction to Legal Reasoning*, Chicago 1949, p. 6.

21 M.D. Murray, Ch.H. DeSanctis, *Legal Research and Writing*, New York 2005, p. 10.

22 E. Braman, *Law Politics & Perception. How Policy References Influence Legal Reasoning*, Charlottesville 2009, p. 84; C.R. Sunstein, *Legal Reasoning and Political Conflict*, New York 1996, pp. 79–90; C.R. Sunstein, *Commentary on Analogical Reasoning*, "Harvard Law Review" 1992–1993, no. 106, footnote 147, S. Brewer, *op. cit.*, pp. 990–1003; L.L. Weinreb, *op. cit.*, pp. 88–94, E.H. Levi, *op. cit.*, pp. 6–8, 28–32; D.N. MacCormick, *Rhetoric...*, *op. cit.*, pp. 212–213; J. Nowacki, *Analogia legis*, Warszawa 1966, pp. 49–51, 62–67; H.L.A. Hart, *op. cit.*, p. 127; M.P. Golding, *op. cit.*, pp. 104–107; S.J. Burton, *op. cit.*, pp. 65–74. Moreover, Brewer discerns an analogical form of reasoning even in effecting the so-called: 'reflective equilibrium' between general norms and the particular applications of these norms (cf. S. Brewer, *op. cit.*, pp. 9270928, 938–939). Also Sunstein, who has tried to grasp the commonalities between reflective equilibrium and analogy, despite describing analogy as less ambitious, for it does not require anything like horizontal and vertical consistency, eventually concludes that: "analogical reasoning might therefore be understood as a sharply truncated form of the search for reflective equilibrium..." (cf. C.R. Sunstein, *op. cit.*, pp. 752–754, 777–778, 781–783). Such an approach is all the more noteworthy since "reflective equilibrium" is commonly not considered as something

Furthermore, legal analogy is also supposed to be able do that which legal deduction cannot, that is, to enable us to pass from the world of 'is' to the world of 'ought.' Thus Broekman turns our attention first to the fact that the presumption fundamental for legal thought is that which assumes the basic analogy between 'non-legal reality' and 'legal reality,' and next argues that analogical reasoning is the preferred way by which one may connect these two spheres.[23] The passage of this kind is – whether it is within legal deduction or analogy – all the more necessary since the factors I referred to in the opening paragraph of this section are frequently of a very general character. The reasoner in law, in the main, deals with general intention, general history, general plain meaning, general moral principles, and so on. And these generalities ought to be somehow processed in order to yield a result (legal consequence) for the case at hand.[24]

Obviously the outcomes of legal analogy – as outcomes of legal deduction – are not logical, objective or true. Legal analogy does not, however, purport to be able to do that which legal deduction allegedly can do. It is by definition far less ambitious and modest. Instead, it seems to be better suited to making the law and its application more bearable and less haphazard than it would be without using it. At the same time, legal analogy provides the law and its application with the flexibility and reasonableness that they need anyway.[25] In addition, legal analogy appears to correlate with the reality far better than legal deduction does, due to the credo which runs: *similar cases should be treated alike*. The leading thought of legal deduction seems to be, in turn, that: "identical cases ought to be treated identically."[26] As we know, in real life identical cases rarely – if ever – occur.[27]

Incidentally, it is even believed that the names present in language (common terms, attributive and abstract terms, singular and collective terms) owe their existence to comparison, being made in order to capture some resemblance or difference between objects

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that involves an analogical pattern of inference (cf. for instance: L. Alexander, E. Sherwin, *Demystifying Legal Reasoning*, Cambridge 2008, pp. 32–39, 64–88).

23 J.M. Broekman, *Analogy in the Law*, [in] *Legal Knowledge..., op. cit.*, pp. 217–218, 220, 243. Weinreb envisages connecting these two spheres in a fairly interesting way. Namely, the application of law – according to him – appears to consist of the adjustment of the facts of an instant case and a general legal rule in order to close each together with the aim of obtaining the rule that "squarely" or "uniquely" applies to the facts of this case. Even, however, after the construction of such a well-fitted rule, there is still a gap between this rule and the facts of the pending case that no further statement of the rule-like manner or the specification of the facts can close completely. Cf. L.L. Weinreb, *op. cit.*, pp. 82–83, 86–94.

24 S. Burton, *op. cit.*, pp. 55–57.

25 M.P. Golding, *op. cit.*, pp. 48, 107–111.

26 For this aphorism as a counterpart of the maxim: *like cases ought to be treated alike* in the context of the deductive pattern of legal reasoning cf. B.S. Jackson, *Analogy in Legal Science: Some Comparative Observations*, [in] *Legal Knowledge...*, *op. cit.*, pp. 149–150.

27 The other issue is, however, that the very pattern these cases involve is often repeated; as for the problem of universalizability in law cf. for instance: D.N. MacCormick, *Rhetoric...*, *op. cit.*, pp. 146–152.

or groups of objects.[28] Yet another thing are the attempts made in order to demonstrate that both of the types of reasoning mentioned in this paper, deduction and analogy, are dependent on the same kind of comparative reasoning.[29]

Conclusions

To sum up, legal deduction turns out to be a fallacious mode of legal reasoning, insofar as it is supposed to be thoroughly logical and mechanical. Deduction is a method of great significance and service in mathematics, IT and other virtual words. However, it is unsuitable for the legal domain because of the links of the latter with real life and this life's flux and variety. As a method of applying the law, it may only serve as a boilerplate one may use to disguise the real kind of reasoning which is dependent upon many divergent factors. A more accurate way of capturing how lawyers think seems to be legal analogy. It consists in comparing instances for which we know the legal outcomes with instances whose legal consequences we are trying to ascertain. An analogical form of reasoning – due to the judgement of similarity which may be based on different variables – seems to be more suitable for an incommensurable and complex legal environment. Recently, its use as a universal legal method has also received considerable attention on the part of legal theorists and philosophers, especially those looking on from the vantage point of the common law legal system.

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28 Th. Fowler, *op. cit.*, pp. 13, 16–17.

29 As for Spencer's conception of how to base deduction, analogy and induction upon the comparison of two proportions cf. W. Biegański, *Wnioskowanie z analogii*, Lwów 1909, pp. 38–41.

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SUMMARY

Legal analogy as an alternative to the deductive model of legal reasoning

This article demonstrates the inadequacy of legal deduction as a method that guarantees the certainty and predictability of law and its outcomes in concrete instances. *Inter alia*, the Author brings our attention to the far smaller role that the deductive pattern of inference plays in legal thought than one may suppose, since it is rather only a schematic illustration of the decisions that were previously made by recourse to the mental operations of a non-logical nature. In return, he proffers legal analogy as an alternative, by which he understands a mode of thinking which helps the reasoner to take into account a mass of different factors that are traditionally deemed to be relevant for legal thought and decision-making.

Keywords: law, formalism, positivism, analogy, deduction, applying, fallacy, erroneous, scheme, thinking, reason by, inference

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