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Chaîm Perelman and Lucie Olbrechts-Tyteca’s Account of Analogy Applied to Law: the Proportional Model of Analogical Legal Reasoning

In this paper, the author has undertaken an attempt to adjust Chaîm Perelman and Lucie Olbrechts-Tyteca’s conception of analogy to the province of law. He thus sketches out a pertinent scheme of legal analogy based upon the similarity of proportions and indulges in a consideration of the merits and demerits of such a proposition. To this aim, as the proportions that are compared in such an account of analogy, the relations between the facts of the cases and their legal outcomes were chosen: one such outcome already known and one tentatively posited. Finally, however, the author’s analyses lead to the conclusion that despite its considerable theoretical attractiveness and some mystical charm, legal analogy consisting of the comparison of two proportions is either quite similar to orthodox approaches to analogical reasoning in law or too obscure for one to employ it credibly in the legal setting. In consequence, until its proponents have elucidated the workings of proportional analogy in more detail, the potential use of such a form of analogy in the province of law does not seem promising and cannot be recommended.

Keywords: proportion, proportional, proportionality, analogy, legal, Chaîm Perelman, Lucie Olbrechts-Tyteca, account, law, reasoning, approach, logic, apply, analogically

1. Introduction

There are many conceivable approaches to analogical reasoning in law. The difference between them lies mainly in the way in which the relevant similarity is established between the cases being compared. Thus some of these approaches are based on the idea of a common principle or rule (ratio juris/legis, leading thought, value) by which such cases can be embraced and resolved. Some of them place emphasis on the comparing

1 This paper is connected with the research project the author carried out in the United Kingdom as a guest researcher at Aberystwyth University as part of the Polish governmental programme “Mobilność Plus” [Eng. “Mobility Plus”].

of the facts of the cases in light of the reasons (justification, rationale) that argue for ascribing a given legal consequence to one or both of these cases.\(^3\) And yet others take no pains to explain the phenomenon of relevant similarity in any more detail, letting it remain obscure, or else refer to the inexplicable notion of intuition, emotions or a wish as to the outcome desired in the case at hand that order the analogizer to regard both cases used for comparison as being relatively similar to each other.\(^4\)

The account of analogy based upon the similarity of proportions seems, however, to be quite distinct. As it appears, it was proffered by Chaïm Perelman and Lucie Olbrechts-Tyteca as the exclusive appropriate account of analogical reasoning at large. While these authors themselves have not shown how this conception is to work in the legal setting, its core idea is worthy of enough attention to attempt to transpose their approach to the realm of legal thought. In doing so, I shall also try to evaluate the suitability of this approach for the needs of law and its application.

2. Perelman and Olbrechts-Tyteca’s denial and terminological confusion

To begin with, one must note that Chaïm Perelman and Lucie Olbrechts-Tyteca claim overtly that “in law, reasoning by analogy has a much smaller place than one might

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This astonishing and uncommon thesis primarily stems from the very fact that they – as it appears without any compelling reason – give the notion of analogy quite another meaning than is usually ascribed to it. Indeed, Ch. Perelman and L. Olbrechts-Tyteca have assumed that the matters being compared within analogical reasoning have to belong to two distinct spheres, the condition which, in their view, cannot easily be fulfilled in the legal domain and hence analogy is generally not present therein.\(^5\)

Secondly, they have distinguished other kinds of arguments and reasoning which are traditionally equated or regarded as being very akin to analogical inference. Thus they have separated the following from analogy: arguments by comparison,\(^7\) argumentation by example,\(^8\) illustration,\(^9\) the rule of (formal) justice\(^10\) and argumentation from model and anti-model.\(^11\) The presence of these other forms of reasoning/arguing in law is, in turn, unquestioned by them.

For instance, in their opinion, “[t]he rule of justice furnishes the foundation which makes it possible to pass from earlier cases to future cases” and “makes it possible to present the use of precedent in the form of a quasi-logical argument”.\(^12\) To put it differently, according to Ch. Perelman, the already made judicial decisions, especially those of the Supreme Court, can – if combined with the principle of justice that entails the requirement of equal treatment – serve as a model for deciding pending cases.\(^13\) The occurrence of arguments from the example, together with the plausible influence of recent examples that modifies the meaning of the earlier ones, has also been acknowledged by these authors in relation to the legal domain.\(^14\) Moreover, as they add in the context of the principle of inertia, which places a premium on the continuance of an existing state when there is no good reason to act otherwise, “[i]n countries were traditionalism is strong, precedent becomes an integral part of the judicial system and


\(^{6}\) See Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, pp. 373–374, 397. Cf. also Ch. Perelman, *Imperium retoriki: Retoryka i argumentacja [Eng. The Realm of Rhetoric: Rhetoric and Argumentation]*, Warszawa 2004, pp. 131–132 and Ch. Perelman, *Logika prawnicza: Nova retoryka [Eng. Legal Logic. The New Rhetoric]*, Warszawa 1984, pp. 174–175. They state thus that “[i]n the field of law, reasoning by true analogy appears to be restricted to comparison as to particular points of systems of positive law separated by time, place, or content. On the other hand, whenever resemblances between entire systems are sought, the systems are regarded as examples of a universal system of law. Similarly, whenever someone argues in favor of the application of a given rule to new case, he is thereby affirming that the matter is confined to a single domain. Accordingly, if pursuant to the wish of certain jurists to see in analogy something more than the term by which one’s opponent’s example is disqualified, there is to be a rehabilitation of analogy as a device for wider interpretation, this result can be achieved only if analogy is given different meaning from the one we have proposed.” See Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, p. 374.


