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Chaïm Perelman and Lucie Olbrechts-Tyteca's Account of Analogy Applied to Law: the Proportional Model of Analogical Legal Reasoning[1]

In this paper, the author has undertaken an attempt to adjust Chaïm 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, Chaïm 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.[2] 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"].

[2] See G. Lamond, *Precedent and Analogy in Legal Reasoning*, in: E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, 2016, available online at: http://www.science.uva.nl/~seop/entries/legal-reas-prec/; B. Brożek, *Rationality and Discourse: Towards a Normative Model of Applying Law*, Warszawa 2007, pp. 147–152; C.R. Calleros, *Legal Method and Writing*, 5th ed., New York 2006, pp. 128–131; N. MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, Oxford 2005, pp. 206–211; N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford 1978, pp. 161–163, 185–186;

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 relevantly 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

C.W. Maris, *Milking the Meter – On Analogy, Universalizability and World Views*, in: P. Nerhot (ed.), *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics*, Dordrecht 1991, pp. 72, 74–78, 102; F. Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*, Cambridge 2009, pp. 51–54; C.R. Sunstein, *Legal Reasoning and Political Conflict*, New York 1996, pp. 62–63, 65–70; Z. Bańkowski, *Analogical Reasoning and Legal Institutions*, in: P. Nerhot (ed.) *Legal Knowledge and Analogy…*, pp. 202–203; L. Alexander, E. Sherwin, *Demystifying Legal Reasoning*, Cambridge 2008, pp. 68–74, 88–103; P. Nerhot, *Legal Knowledge and Meaning (The Example of Legal Analogy)*, in: P. Nerhot (ed.) *Legal Knowledge and Analogy…*, pp. 188–191 (he describes here the account of analogy advanced by Bobbio); D. Hunter, *Teaching and Using Analogy in Law*, "Journal of the Association of Legal Writing Directors", Vol. 2, 2008, available online at: http://ssrn.com/absract=1089669, pp. 153–154; E.H. Levi, *An Introduction to Legal Reasoning*, Chicago 1949, p. 7; J. Nowacki, *Analogia legis*, Warszawa 1966, pp. 21–34, 189; J. Nowacki, Z. Tobor, *Wstęp do prawoznawstwa* [Eng. *An Introduction to Jurisprudence*], 3rd ed., Warszawa 2007, pp. 183–184; E. Smoktunowicz, *Analogia w prawie administracyjnym* [Eng. *Analogy in Administrative Law*], Warszawa 1970, p. 21; Z. Pulka, *Podstawy prawa: Podstawowe pojęcia prawa i prawoznawstwa* [Eng. *An Introduction to Law. Basic Notions of Law and Jurisprudence*], Poznań 2008, pp. 142–145; O. Nawrot, F. Przybylski-Lewandowski, *Wnioskowania prawnicze* [Eng. *Legal Inferences*], in: J. Zajadło (ed.), *Leksykon współczesnej teorii i filozofii prawa: 100 podstawowych pojęć*, [Eng. *The Lexicon of Contemporary Theory and Philosophy of Law: 100 Basic Terms*], Warszawa 2007, pp. 346–347; T. Chauvin, T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa* [Eng. *An Introduction to Jurisprudence*], 7th ed., Warszawa 2012, p. 248; A. Peczenik, *On Law and Reason*, 2nd ed., Dordrecht 2009, pp. 321–322; M. Koszowski, *Rozumowanie per analogiam w prawie precedensowym: dwa ujęcia analogii* [Eng. *Analogical Reasoning in Precedential Law: Two Accounts of Analogy*], "Annales Universitatis Mariae Curie-Skłodowska Sectio G IUS" 2014/2, pp. 82–83. Cf. also S. Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, "Harvard Law Review" 1995–1996/109, pp. 962–963, 965, 971–978, 983–1006, 1017–1021, 1022–1026, 1027.

[3] See G. Lamond, *Precedent…*, pp. 22–23; M.P. Golding, *Legal Reasoning*, Peterborough 2001, pp. 45–49, 102–111; J. Raz, *The Authority of Law: Essays on Law and Morality*, Oxford 1979, pp. 201–206; S.J. Burton, *An Introduction to Law and Legal Reasoning*, 3rd ed., Austin 2007, pp. 25–41, 97–115; S. Brewer, *Exemplary…*, pp. 962–1028; Z. Bańkowski, *Analogical…*, pp. 203–215; J. Hage, *Studies in Legal Logic*, Dordrecht 2005, pp. 113–119; M. Koszowski, *Rozumowanie*…, pp. 71–76.

[4] See R. Cross, *Precedent in English Law*, Oxford 1968, pp. 181–186; E.H. Levi, *An Introduction…*, pp. 1–27; L.L. Weinreb, *Legal Reason: The Use of Analogy in Legal Argument*, New York 2005, pp. 41–138; R.J. Aldisert, *Logic for Lawyers. A Guide to Clear Legal Thinking*, 3rd ed., Notre Dame 1997, pp. 93–97; G.C. Christie, *Law, Norms & Authority*, London 1982, pp. 68–72; M. Koszowski, *Rozumowanie…*, pp. 67–71; L. Alexander, E. Sherwin, *Demystifying…*, pp. 66–76; J. Nowacki, *Analogia…*, pp. 13–21, 34, 184–188, 190–194, 198, 203–205; J. Nowacki, Z. Tobor, *Wstęp*…, pp. 182–184; L. Morawski, *Zasady wykładni prawa* [Eng. *The Principles of Legal Interpretation*], Toruń 2006, pp. 203–205; L. Leszczyński, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa* [Eng. *The Problems of the Theory of the Application of Law. The Views of the Jurists and the Judiciary*], Kraków 2004, pp. 253–255; J. Wróblewski, *The Judicial Application of Law*, Dordrecht 1992, pp. 223–227; J. Wróblewski, *Sądowe stosowanie prawa* [Eng. *The Judicial Application of Law*], 2nd ed., Warszawa 1988, pp. 280–286; K. Opałek, J. Wróblewski, *Zagadnienia teorii prawa* [Eng. *The Problems of Legal Theory*], Warszawa 1969, p. 316; Z. Pulka, *Podstawy…*, p. 142, 144; O. Nawrot, F. Przybylski-Lewandowski, *Wnioskowania…*, p. 346, A. Peczenik, *On Law…*, pp. 320–321.

think…".[5] 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.[6]

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

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5 Ch. Perelman, L. Olbrechts-Tyteca, *The New Rhetoric. A Treatise on Argumentation*, Notre Dame 1969, p. 397.

6 See Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, pp. 373–374, 397. Cf. also Ch. Perelman, *Imperium retoryki: Retoryka i argumentacja* [Eng. *The Realm of Rhetoric: Rhetoric and Argumentation*], Warszawa 2004, pp. 131–132 and Ch. Perelman, *Logika prawnicza: Nowa 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.

7 Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, pp. 242–247.

8 Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, pp. 350–357. The phrase "reasoning by example" is used interchangeably with the expression "reasoning by analogy" by Edward H. Levi (see E.H. Levi, *The Nature of Judicial Reasoning*, "The University of Chicago Law Review", 1965/3, p. 399; see also E.H. Levi, *An Introduction…*, p. 1, 5). Similarly, "analogical reasoning" ("analogical argument") and "exemplary reasoning" ("exemplary argument") seem to be treated as synonyms by Scott Brewer, who suggests additionally significant heuristic value stemming from using them more or less interchangeably (see S. Brewer, *Exemplary…*, pp. 927–928, 934). Also Jerzy Stelmach points out that in legal discourse, arguments *a simili* and *ab exemplo* are very often used interchangeably and understood as synonyms (J. Stelmach, *Kodeks argumentacyjny dla prawników* [Eng. *The Code of Argumentation for Lawyers*], Kraków 2003, p. 76).

9 Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, pp. 357–362.

10 Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, pp. 218–220. The principle of formal justice (equal protection) is counted as one of the possible instances of the use of an analogical argument, for instance, by Brewer. See S. Brewer, *Exemplary…*, pp. 927–928, 936–937.

11 Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, pp. 362–371.

12 Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, p. 219. See also Ch. Perelman, *Imperium…*, pp. 81–82.

13 Ch. Perelman, *Imperium…*, p. 127. Cf. also Ch. Perelman, *Logika…*, p. 173.

14 Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, p. 357.

provides a model that can be availed of on condition that one can show that new case is sufficiently similar to the old one."[15]

Therefore, as one may observe, Ch. Perelman and L. Olbrechts-Tyteca do not generally deny the presence of arguments based upon a discerned similarity in the province of law. Instead, their idiosyncratic thesis on the absence of analogical reasoning in law comes from their adoption of a specific definition of analogy, precisely the requirement that the cases being compared should belong to two (ontologically) different spheres.

3. The scheme of analogical reasoning

The term "analogy" is purported to be of an ancient tradition and to have its origin in mathematical proportion, e.g. 2 : 4 is as 4 : 8, which may be further transferred into a more universal scheme: A : B is as C : D.[16]

In law, however, the most popular scheme of analogical reasoning seems to be one of the following or similar:

1) Ascertaining/proving the facts of the case at hand, i.e. one in which the legal consequence is to be determined (while knowing this consequence is needed, it is not established yet).
2) Ascertaining the facts of the "law case", i.e. one in which the legal consequence is known and which is chosen for the purpose of comparison.
3) Determination of the existence of relevant (sufficient) resemblance between the facts of the case at hand and the facts of the "law case" – especially due to some common (shared) feature or features which are regarded as material/important.
4) Depending on the outcome of the process involved in point 3, deciding whether the case at hand should be attached the same – or similar – legal consequence as that of the "law case".[17]

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[15] Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, p. 107.

[16] For the original meaning of the term "analogy" and changes which this meaning has undergone in the course of time see S. Brewer, *Exemplary…*, pp. 949–951.

[17] As for such or similar structures see in general: K.J. Holyoak, P. Thagard, *Mental Leaps: Analogy in Creative Thought*, Cambridge 1996, p. 15; 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 ed., New York 1882, pp. 393–394. Cf. also D. Walton, *Informal Logic: A Pragmatic Approach*, 2nd ed., Cambridge 2008, p. 309; W. Patryas, *Elementy logiki dla prawników* [Eng. *The Elements of Logic for Lawyers*], 2nd ed., Poznań 1994, pp. 205–207; K. Ajdukiewicz, *Zarys logiki* [Eng. *The Outline of Logic*], Warszawa 1955, pp. 172–173; Z. Ziembiński, *Logika praktyczna* [Eng. *Practical Logic*], 26th ed., Warszawa 2007, p. 191; W. Wolter, M. Lipczyńska, *Elementy logiki: wykład dla prawników* [Eng. *The Elements of Logic: Lecture for Lawyers*], 3rd ed., Warszawa 1980, p. 238 and the models of Drobisch and Sigwart described by W. Biegański, *Wnioskowanie z analogii* [Eng. *Analogical inference*], Lwów 1909, pp. 32–33. In legal use: J. Nowacki, *Analogia…*, p. 16; J. Nowacki, Z. Tobor, *Wstęp…*, pp. 182–183; J. Nowacki, *Problem normotwórczości wnioskowania przez analogię* [Eng. *The Problem of Norm-Making Character of Analogical Inference*], "Studia Prawnicze" 1974/1, p. 98; L. Morawski, *Zasady…*, p. 203; L. Leszczyński, *Zagadnienia…*, p. 253–254; S.J. Burton, *An Introduction…*, p. 26, 40; J. White, *Analogical reasoning*, in: D Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, Malden 1996, p. 584; A. Peczenik, *On Law…*, p. 321; J. Wróblewski, *The Judicial …*, pp. 223–226; J. Wróblewski, *Sądowe…*, pp. 280–284; Z. Pulka, *Podstawy…*, p. 144; A. Jamróz, *Wprowadzenie do prawoznawstwa* [Eng. *An Introduction to Jurisprudence*], 2nd ed., Warszawa 2011, p. 204; T. Chauvin, T. Stawecki, P. Winczorek, *Wstęp…*, p. 248; M. Lechniak, *Elementy logiki dla prawników* [Eng. *The Elements of Logic for Lawyers*], Lublin 2006, p. 99; K. Opałek, J. Wróblewski, *Zagadnienia…*, p. 316; L. Alexander, E. Sherwin, *Demystifying…*, p. 66. Cf. also E.H. Levi, *An Introduction…*, p. 2; R. Cross, *Precedent…*, p. 182 and M.P. Golding, *Legal…*, p. 45.
The ways of capturing the gist of analogical reasoning in a general manner may be divergent. For instance, it is pointed out that "[a]n analogical argument in legal reasoning is an argument that a case should be treated in a certain way because that is the way a *similar* case has been treated" (see G. Lamond, *Precedent…*, p. 19) or that the defining feature of analogical reasoning is "the use of examples in the process of moving from premises to conclusions in an argument" or that such a feature of the logical structure of argument by analogy is "the focus and reliance on

Thus, this scheme has nothing in common with mathematical proportion, as it is based on the notion of relevant (sufficient) similarity between the two sets of facts.

4. The proportional model of analogy

The original approach to the structure of analogy has not, however, been completely abandoned nowadays. This account appears to have vigorous proponents in the persons of Ch. Perelman and L. Olbrechts-Tyteca. They conceive of the scheme of analogy exactly in the proportional manner, i.e. as having the form: A is to B as C is to D.[18] Moreover, according to them, the resemblance involved here is a resemblance of structures (of a relationship, to be exact).[19]

For the sake of terminology, they refer to the relation between A and B as *theme* and the relation between C and D as *phoros*. They also posit that usually the *phoros* is better known than the *theme* and hence the former is used here in order to explain the latter.[20] The most intriguing aspect, however, is the already mentioned requirement these authors link intrinsically with analogy, i.e. that *phoros* and *theme* have to belong to two different spheres. This requirement – regardless of that how weird it may seem to be – is of paramount importance in their approach, namely its absence automatically leads to the conclusion that the mode of reasoning is of a non-analogical character. In other words, according to Ch. Perelman and L. Olbrechts-Tyteca, reasoning that does not meet this requirement – since the relations being compared that both belong to the same sphere are amenable to being subsumed under a common structure – cannot be perceived in terms of analogy any longer, constituting a form of argument by example or illustration in which the *phoros* and the *theme* represent two particular cases of a general rule.[21]

Ch. Perelman and L. Olbrechts-Tyteca also make allowances for an analogy which consists not of four terms but of only three. It then takes the form of: A is to B as C is to B (or A is to B as A is to C). In relation to such a three-term scheme, the

examples in the process of inferring conclusions from premises" (S. Brewer, *Exemplary…*, pp. 927, 934) or yet that "[a]nalogy in logic consists in linking two terms by a resemblance, with the predicate attributed to the first of them being then attributed to the second. This relationship of resemblance between the two terms leads to a conclusion" (see P. Nerhot, *Legal Knowledge and Meaning…*, p. 183).

[18] Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, p. 372.

[19] Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, p. 372. Nonetheless one must be aware that Ch. Perelman and L. Olbrechts-Tyteca do not equate analogy to mathematical proportion, regarding this proportion "to be merely a particular instance of similarity of relationship, and by no means the most significant one." See Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, pp. 372–373. See also Ch. Perelman, *Imperium…*, pp. 131–132 and Ch. Perelman, *Logika…,* p. 174 (where it is stated that in mathematical proportion the occurring relations are identical and symmetrical, while in analogy the relations are only similar to each other).

[20] Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, p. 373.

[21] Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, p. 373; see also C.W. Maris, *Milking…*, p. 73. Władysław Biegański also seems to discern the different character of the items that are compared within analogical reasoning. For him, analogy cannot amount to making simple associations between things, being instead of a logical nature and requiring thorough analysis and comparison; hence also the cases being compared here differ from each other, and the analogizer is alert to this peculiarity (see W. Biegański, *Wnioskowanie…*, pp. 56–57 and also pp. 51–52). It would be, however, misleading to think that Biegański is of the same view as Ch. Perelman and L. Olbrechts-Tyteca. He rather just places emphasis on this property of analogical reasoning that it is not about things which are considered identical (representing the same genus, class), but about things which can be regarded as the same for certain purposes despite having some visible differences. Accordingly, he does not hesitate to invoke in his entry on analogical reasoning an example in which the Earth is compared to Mars in order to ascertain whether the latter is also inhabited. Both of these items belong to the physical world and are of the same ontological category (are planets) and as such clearly do not fulfill Ch. Perelman and L. Olbrechts-Tyteca's requirement of the involvement of two different spheres (see W. Biegański, *Wnioskowanie…*, p. 46).

aforementioned authors seem, however, to assume that the common term, despite being formally the same in both *theme* and *phoros*, is differently used in them, being thus ambiguous. Such a dual meaning of the common term is – as it appears – to follow, according to Ch. Perelman and L. Olbrechts-Tyteca, from the very requirement of the involvement of two different spheres in an analogical pattern of inference.[22] This being the case, the three-term analogy would be fairly similar to its four-term counterpart. That is, despite having the same pronunciation, the common term would here be a homonym and the scheme of such a seemingly truncated version of analogy might be presented as follows: A is to B1 as C is to B2 (or A1 is to B as A2 is to C). Incidentally, also Ch. Perelman and L. Olbrechts-Tyteca themselves appear to admit such an attitude, while they suggest that "any three-term analogy could be analyzed as a four-term analogy".[23,24]

5. Proportional analogy in legal matters

Although Ch. Perelman and L. Olbrechts-Tyteca strongly deny the occurrence of (proportional) analogy in ordinary legal reasoning, I shall try to transpose their account onto this field, bearing in mind the basic mechanism involved in their conception.

First of all, as to the enigmatic requirement that the cases being compared should belong to two different spheres, it must be admitted that the fulfillment of this requirement is hardly attainable in any legal analogy.[25] Yet, I venture to contend that this requirement is difficult to meet in other, non-legal fields as well. Even the division into the spiritual sphere and the sphere of the senses that is Ch. Perelman and L. Olbrecht-Tyteca's paradigm example of the dualism required, seems slightly dubious when looked at more closely.[26] It is – at least *prima facie* – not unchallengeable that in our world there occur some different spheres which have distinct structures and which cannot be subsumed under one universal common system (of rules, ideas, notions etc.). Although in this paper I am not going to take any side in such a dispute, taking for granted Ch. Perelman and L. Olbrecht-Tyteca's stance in this respect appears just too hasty, if not

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[22] See Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, pp. 375–377; Ch. Perelman, *Logika…*, p. 174; Ch. Perelman, *Imperium…,* pp. 131–132.

[23] Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, p. 376.

[24] Also Aristotle's, Kant's, Drobisch's and Spencer's conceptions of analogical reasoning are comprehended in terms of analogy of proportionality. See: G. Zaccaria, *Analogy as Legal Reasoning – The Hermeneutic Foundation of the Analogical Procedure*, in: P. Nerhot (ed.), *Legal Knowledge and Analogy…*, p. 58; J. Lenoble, *The Function of Analogy in Law: Return to Kant and Wittgentstein*, in: P. Nerhot (ed.), *Legal Knowledge and Analogy…*, pp. 121–138; I. Dąmbska, *Dwa studia z teorii naukowego poznania* [Eng. *Two Studies of the Theory of Scientific Cognition*], Toruń 1962, pp. 10, 12; W. Biegański, *Wnioskowanie…*, pp. 28–32, 38–41. On basing analogy on proportion see also: I. Dąmbska, *Dwa…*, pp. 12–14, 38–40; I. Niiniluoto, *Analogy and Similarity in Scientific Reasoning*, in: D.H. Helman (ed.), *Analogical Reasoning: Perspectives of Artificial Intelligence, Cognitive Science, and Philosophy*, Dordrecht 1988, pp. 272–273; M.B. Hesse, *Models and Analogies in Science*, Notre Dame 1970, pp. 62–64 and also pp. 64–67 (juxtaposition of analogy with mathematical proportion); W. Biegański, *Wnioskowanie…*, pp. 58–63; K.J. Holyoak, P. Thagard, *Mental Leaps…*, p. 28; J.S. Mill, *A System of Logic,…* p. 393. As to Aristotle's approach to analogical thinking, it must be, however, remarked that he was not consistent in this respect and based analogy also on a general principle (rule), not the similarity of proportions. See W. Biegański, *Wnioskowanie…*, pp. 5–8; R.A. Posner, *The Problems of Jurisprudence*, Cambridge (Mass.) 1990, p. 87.

[25] As Ch. Perelman and L. Olbrechts-Tyteca state, "[a]nalogy can be excluded also by the conditions governing reasoning. We have seen that, in law, reasoning by analogy has a much smaller place than one might think for the reason that, when it is a question of applying a rule to new cases, we are at once confined within a single field, as a basic requirement of law, for we cannot move out of the field which the rule imposes on us." See Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, p. 397.

[26] For this requirement and its importance for the presence of analogy in particular fields of science see Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, pp. 372–374, 396–397; Ch. Perelman, *Imperium…*, pp. 131–134 and Ch. Perelman, *Logika…*, pp. 174–175.

to say naive. Such a deep ontological assumption evidently needs more scrutiny and meticulous examination, not lending itself to simply being adhered to.

Moreover, Ch. Perelman and L. Olbrecht-Tyteca's explanatory remark that "[e]verything that shows a difference in nature, in order, tends to establish separate spheres which can be respectively occupied by a theme and a phoros"[27] brings only more confusion. Why is it, for instance, that in order to comply with the requirement of the dualism of spheres, it is not enough for each of the compared cases to belong to a different branch of law (e.g. contract and tort law or constitutional and procedural law)? The same can be argued about the difference stemming from the fact that one of the cases being compared has already been decided upon and its legal consequence is known, while the other still awaits judicial consideration and its legal consequence is to be found. Do such cases really not belong to two (ontologically) distinct spheres?

At any rate, irrespective of its (un)meaningfulness, I will put aside this sophisticated requirement and proceed now to the next step of the proportional model of legal analogy, i.e. the scheme of such reasoning. It seems to take the following form:

1) Determining the relation between the facts of the "law case" and its legal consequence.
2) Ascertaining/proving the facts of the case at hand (i.e. the case whose legal consequence is to be found).
3) Determining the relation that exists between the facts of the case at hand and their posited legal consequence (i.e. the consequence that we consider to be potentially appropriate for this case).
4) Having noted the identity of relations mentioned in points 1 and 3, ascribing the posited legal consequence to the case at hand.[28]

Thus following Ch. Perelman and L. Olbrechts-Tyteca's nomenclature, in such legal analogy, A (here: the case at hand) is to B (here: the legal consequence of the case at hand) as C (here: the "law case") is to D (here: the legal consequence of the "law case"). The relation between C and D is the one that is better known and hence can be called *phoros*. The relation between A and B, in turn, is to be, if not explained, then for certain learnt of, and as such can be called *theme*. In addition, if the legal consequence of the "law case" had been the same or very similar as the posited legal consequence of the case at hand, the legal analogy would include not four, but three terms only. That is, it would take the form: A is to B as C is to B.

Incidentally, Jaap Hage also seems to perceive legal analogy as a comparison of two proportions. According to him, cases, both past and pending ones, are compared with respect to their suitability for being decided in a particular way: "If the old case was a suitable case for the decision that was actually taken in it, and the new case is just as suitable or even more suitable for such a decision, there is a reason to take this decision in the new case too."[29] A Polish author, Józef Nowacki, has also intimated a possible comprehension of legal analogical reasoning such as the one depicted above. Alas, he does not elaborate on it, confining himself only to underscoring the value-laden nature of the similarity comprised therein.[30]

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[27] See Ch. Perelman, L. Olbrechts-Tyteca, *The New*…, pp. 374.
[28] Cf. J. Nowacki, *Analogia*…, pp. 188–189.
[29] J. Hage, *Studies*…, p. 114.
[30] J. Nowacki, *Analogia*…, pp. 188–189.

6. A critical evaluation of proportional legal analogy

At first glance, the aforementioned proposition appears to be tremendously attractive. Above all, the legal consequence of the case at hand need not be the same (or similar) here as the legal consequence of the second case that is used for the sake of comparison. On the contrary, it may be quite different. It follows that, for example, in the "law case" the accused may have been convicted and in the case at hand which has been qualified as analogous to it the accused may be acquitted. This is the direct effect of the basic idea of that account of analogy: that the resemblance is required to exist not between the facts of the cases being compared but between two independent relations. In consequence, thus comprehended resemblance does not entail the necessity of having identical or even similar legal outcomes in every such case. The outcomes may differ even significantly, provided the relations involved in the cases being compared are the same. Obviously, this does not mean that these outcomes will never be identical, which in practice may happen too. But what is vital, due to the application of the law via analogy based upon similarity of proportions, law seems able to develop far more rapidly and expansively than it would if one of the orthodox accounts of analogy (mentioned in section 1 and – as to their structure – in section 3) had been adopted. Incidentally, even if we choose the three-term variant of legal proportional analogy, the legal consequences of cases being compared appear to be able to differentiate, at least to some extent. Indeed, according to Ch. Perelman and L. Olbrechts-Tyteca, the common term of such an analogy is to be, by definition, ambiguous. That, in turn, should entail the allowance of having some differences within this term as well.

On reflection, however, such proportional legal analogy presents itself as too mysterious in order to be utilized trustworthily in legal settings. The process of determining the occurrence of the identity between relations existing between the facts of the cases being compared and their legal consequences is utterly opaque here and needs to be unfolded if we are to trust or even believe it to be workable. The same goes for the ascertainment of the contents of the very relations between cases and their known/posited legal consequences. Theoretically, such determining/ascertainment may be effected through intuition, emotions, the exigencies or will/wish of the analogizer to ascribe the case at hand a certain legal consequence – as well as by the resort to some broad rule (principle) or rationale that stands behind the "law case" (its legal outcome), especially when this rule/rationale includes some causality/theory that may justify the posited legal consequence for the case at hand equally well or better than in the "law case". The presence of any such factors, however, seems to make the proportional account of legal analogy close to the traditional understanding, depriving it of its uniqueness.

It is noteworthy that the very advocates of proportional analogy, Ch. Perelman and L. Olbrechts-Tyteca, appear to have adopted the same stance. For instance, they contend that: "Sometimes the outstripping of the analogy will be the result of showing that theme and phoros are both dependent on a common principle."[31] Moreover, they seem to be of a view that when the *phoros* can be regarded (even) as a partial cause of the *theme* this state is beyond mere analogy.[32]

[31] Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, p. 394 (they also add that: "This common principle may be conceived as an essence, of which both theme and phoros are manifestations").

[32] Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, p. 395.

More enigmatic are the statements that: "The precariousness of the status of analogy is thus largely due to the fact that the very success of an analogy can destroy it" and that: "Broadly speaking, outstripping an analogy has the effect of making it appear as the result of a discovery, as an observation of what is, rather than as the product of an original effort at structuration."[33] At any rate, however, it follows that to Ch. Perelman and L. Olbrechts-Tyteca, analogy is something which cannot be either understood in terms of logical inference or in terms of causal relations, being far more complex and puzzling. The mere assertions that analogies – in the sense these authors attach to this term – "are important in invention and argumentation fundamentally because they facilitate the development and extension of thought" and "[w]ith the phoros as starting point, they make it possible to give the theme a structure and to give it a conceptual setting"[34] are perhaps interesting and defensible, but nonetheless they do not explain the very workings of proportional analogy. Instead, these statements – similar to the determining of the resemblance of proportions – seem to call for further examination.

7. Conclusions

The account of legal analogy that is based upon the similarity of two proportions may be considered as a very attractive concept from the theoretical point of view. As it appears, it enables the analogizer to attach divergent legal consequences to a multitude of cases, and as a corollary it is capable of a considerable contribution to the development of law. This account, however, lacks any explanation as to how the identity or similarity of proportions is to be determined. Neither does it give any answer or clue as to how one should ascertain the very relations between the facts of a given case and their legal consequence, which constitute the very proportions that are compared here. That, in turn, makes it hard to trust such analogy, all the more so in legal matters, whose impact on the life of people is of grave importance and cannot be utterly unpredictable or haphazard. It remains an open question whether the very relations between the facts of the cases used for comparison and their legal consequences can in practice be ascertained at all. Without being able to do that, this account of legal analogy will, however, not go beyond the sphere of merely speculative cerebration.

In consequence, all things being equal, the proportion-based account of analogical reasoning does not find the justification necessary for its reliable employment in the legal domain. Furthermore, it is also highly questionable whether such an account occurs in other fields, including the spiritual domain, as its proponents claim. Until these proponents elaborate in plain terms on the manner in which the similarity of the proportions is to be established (and the contents of the proportions determined), there is hardly any reason to accept their conception – at least if it is to be applied to legal affairs.

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[33] Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, p. 397.

[34] Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, p 385. On top of that, they also wonder: "And have we warrant for denying analogy any power to convince when the mere fact that it can make us prefer one hypothesis to another shows that it has argumentative value? Any complete study of argumentation must therefore give it a place as an element of proof" (see Ch. Perelman, L. Olbrechts-Tyteca, *The New…*, p. 372).

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