IS REASONING BY ANALOGY CENTRAL TO LEGAL REASONING?

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The use of past decisions to assist the resolution of present problems is an unexceptional feature of the reasoning techniques employed in both legal and non-legal contexts. And in law, the use of prior decisions to assist in the resolution of present disputes, has in general reached a considerable degree of refinement. The object of the present paper is not only to reach a conclusion as to whether or not reasoning by analogy is a central component of legal reasoning, but also to examine what analogical reasoning really involves.

Legal reasoning in this context would mean reasoning undertaken by judges and lawyers in the process of adjudication. With that as our premise, although analogical reasoning is very important to the practice of decision-making in Anglo-American courts, this method of reasoning cannot be clearly separated from other forms of reasoning like using principles or policies in decision-making.

I. Reasoning by Analogy

The doctrine of using analogy is definitely the cornerstone of adjudication in Anglo-American legal systems, and whether this method of reasoning is a valid one or not, and whether it should be used or not, the fact remains that it is atleast the most familiar form of legal reasoning. Decisions in difficult and unregulated[1] cases are almost always made by judges and lawyers referring to past relevant decisions which are either analogous or disanalogous to the case to be decided.

According to the common law doctrine, a previous decision is to be treated as an authority, if it is analogous to a present dispute before a court or if it was decided by a court which, has the status to make decisions which will be deemed to be authoritative, and if the decision has not been abrogated by a statute or a court which has the power to overrule prior decisions. So a court relies on analogy whenever it draws

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1. Unregulated cases according to Joseph Raz are those cases where there is a gap in the law applying to the case.

on similarities or dissimilarities between the present case and previous cases, which are not binding principles applying to the present case. Argument by analogy is not a method of discovering which rules are legally binding because of the doctrine of precedent. That discovery requires nothing more than an interpretation of the precedent to establish its *ratio*. Analogical argument is a form of justification of *new* rules laid down by the courts in the exercise of their law-making discretion[2]. As such it succeeds when it helps to establish that the rule adopted by the court is the best it can adopt. Therefore, what is important in deciding whether a certain case is analogous to a certain precedent and thus hold the precedent as applicable, is that it is similar in ways that are relevant for the rule or principle in question to be upheld. If it is still similar but not in any relevant way, then it cannot be said to be analogous. But of course, how is one to judge which similarities are relevant and which are not? It is difficult, but the test of relevance for similarities is the underlying justification of the rule which forms the basis of the analogy.

Example : Let us suppose that case X has characteristics a, b, c, d, e & f, and the court lays down that a, b & c = Rule Y.

Case Z (which is at hand) has characteristics a, b, d, e, f & g.

The court may, relying on the relevant similarities a and b, extend Rule Y by dropping a condition to yield a, b = Rule Y, or create another rule with the same result a, b, d = Rule Y which will co-exist with the old rule. Such a change in the law is justified by the same *purpose or value* which justifies the original rule on which the analogy is based (namely a, b, c = Rule Y).

II. ANALOGICAL ARGUMENTS AND REASONING BY LEGAL PRINCIPLES

The central theme of this paper is that although incredibly important, reasoning by analogy is not what legal reasoning solely consists of. Analogy or disanalogy of the facts of the case at hand with precedents ultimately serves to justify the operation of the rule and the policy or principle at play behind the rule. Decisions in cases not covered by mandatory rules must be shown to be supported by some general legal principle or some relevant analogy or other 'persuasive' legal source.[3]

Often, even in arriving at a decision whether the particular facts of a case are analogous or not, requires weighing of different principles to

2. Raz, THE AUTHORITY OF LAW (1979) at 202.
3. Neil MacCormick, LEGAL REASONING AND LEGAL THEORY (1978) at 178.

decide which value deserves to be promoted by the rule. Analogies must be evaluated, and in the process they inevitably become embedded in a wider web of legal reasoning which must include non-analogical, normative elements.[4] Thus, it is difficult to draw a clear line of distinction between argument from legal principle and argument from analogy. Analogies only make sense if there are reasons of principle underlying them.

By its very nature the justification of a rule is more abstract and more general than the rule it justifies. Therefore, just as it justifies one rule, it could justify another. If one rule is justified as a way of achieving a certain purpose, or of protecting a certain value, so might other rules be if they promote the same purpose or protect the same value in different ways or under different circumstances. The following example[5] illustrates the point clearly:

In *Adams* v. *New Jersey Steamboat Co.*[6], valuables were stolen from a passenger's rented steamboat cabin. The issue in that case was whether the steamboat owner was strictly liable to the passenger for the loss (if having been decided that neither the steamboat nor the passenger was negligent). There were two different precedents directly on point: one held that an innkeeper was strictly liable for the theft of boarders' valuables, while another held that a railroad company was not strictly liable to passengers for the theft of their valuables from open-berth sleeping-car trains. So the legal issue put to Judge O'Brien was: Was the steamboat sufficiently like an inn, on the one hand, or sufficiently like a train on the other to receive the same legal treatment?

The Court held that the steamboat owner was strictly liable to its passengers for any loss. The Judge's reasoning in likening a steamboat to an inn emerged from the principle upon which innkeepers were charged by the common law as insurers of the money or personal effects of their guests, which originated in public policy. It was deemed to be a sound and necessary rule that this class of persons be subjected to a high degree of responsibility in cases where an extraordinary confidence was necessarily reposed in them, and where great temptation to fraud, and danger of plunder existed by reason of the peculiar relations of the parties.

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4. Jefferson White, *Analogical Reasoning*, in Dennis Patterson, ed., 'A Companion to Philosophy of Law and Legal Theory' (1996).
5. This example is borrowed from Scott Brewer, *Exemplary Reasoning. Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 Harvard Law Review, 923 at 1004. The analysis however is original.
6. 151 N.Y. (1896).

What this example tries to reveal is that often behind reasoning by analogy, the court has to weigh arguments of principle in order to decide which analogy to prefer. In the above mentioned case, there was an equally applicable precedent of a railroad company not being strictly liable to its passengers, but the Court came to the conclusion that the steamboat was analogous to the inn rather than a rail road company on the basis of the purpose it thought necessary to uphold. So whether a steamboat counts as an inn under the rule of strict liability, and therefore, whether a steamboat company should be likened to an inn-owner depends on whether we think the rule is meant to charge innkeepers as insurers under public policy or some other railway related purpose. Therefore, as we can see, arguments by· analogy are important, yet it is no less clear that the analogy used in the above case did not make the decision given obligatory. The existence of the analogy did not compel Judge O'Brien to reach the conclusion he reached; rather it was crucial in showing that the conclusion otherwise desirable was permissible in law. The analogy provided legal support for, but not legal compulsion of, the decision given.[7]

Keeping the above arguments in mind, there is no sensible way of comparing or distinguishing situations to the end of rule-governance apart from purposive judgments. An analogical comparison is not inherently in the facts; it is a way of grouping facts that helps us advance certain interests. It is rather that we cannot marry rule to circumstance effectively unless we are willing to bring both the definition of appropriate circumstance and the definition or relevant rule-applying endeavour by the particular rule to be applied[8] *e.g.* : the steamboat counting as an inn.

One of the most important objections to this form of reasoning is that analogical arguments are inconclusive because there are many incompatible analogies which can be drawn and the courts choose which ones to draw on independent grounds. This is a valid point, but its significance is misunderstood if it is supposed that it shows that analogical reasoning is a mere window dressing. The point is valid to the extent that the law already contains pragmatic conflicts. Suppose rules A1 and A2 promote conflicting social goals, the court will have to choose whether to introduce a new rule B1 promoting the same rule as A1 or B2 which promotes the same goal as A2. That choice will not be based on analogy. But the fact that whichever rule the court adopts is analogical to some

7. *Supra* n. 6 at 181.
8. Unger Roberto, WHAT SHOULD LEGAL ANALYSIS BECOME? (London, 1996) at 60.

existing rule is still relevant in showing that the court is not introducing a new pragmatic conflict but is supporting one side in an existing dispute.[9]

Analogical reasoning is thus not only useful for applying law, but also for making new law. Argument by analogy, used in law-making, involves interpreting the purpose and rationale of existing legal rules; these are equally essential for a correct interpretation and application of the law. Analogy is used in law-making to show harmony of purpose between existing laws and a new one.[10] It is also used in interpretation through the assumption that the law-maker wished to preserve harmony of objectives and his/her Acts should be interpreted as designed to pursue goals compatible with those of related rules.

III Sunstein's Analysis of Analogical Reasoning[11]

Legal theorist Cass Sunstein regards analogy as a form of bottom-up reasoning by which decisions can be made by focusing on the particulars of the case. He then proceeds to emphasize the use of his famous 'incompletely theorizing agreements' in analogical reasoning, but this is not a very coherent argument. On the one hand he claims that principles are developed with constant references to particular cases, and on the other hand he refers to them as incompletely theorized agreements because the judgments are unaccompanied by a full apparatus to explain their basis. He maintains that lawyers typically lack the tools for large-scale theorizing and thus, analogical reasoning is ideal because it calls for a low or intermediate level of principles rather than general abstract principles.

In my view his basic premise of analogical reasoning is inverted, because he sees legal principles evolving out of analogies, and not analogies arising because of the principles. Analogy without any base of theory or purpose would be blind. Such arguments cannot be those of logic alone. What is more mystifying is his categorization of low-level and high-level principles and thus, favouring incompletely theorized agreements. I do not think that such a distinction is possible, for to decide whether a particular rule (which is not binding) may be applied to the case at hand it is necessary to go into the matter of what the purpose of the rule is, and whether it is worth upholding. If this is what he refers to as high-level principles, then we cannot escape them for they remain the very foundation of legal reasoning and must be applied in the use of analogy too.

9. *Supra* n. 1 at 208.
10. *Ibid.*
11. Cass Sunstein, *On Analogical Reasoning*, 106 Harvard Law Review at 741.

IV. Conclusion

Analogies only make sense if there are arguments of principle underlying them. Therefore, we cannot hold that reasoning by analogy is by far central to legal reasoning, for it involves valuing of legal principles and justification of rules, which are independent methods of legal reasoning. For ultimately, analogical arguments are useful primarily in instances when there is no applicable rule or statute to the case at hand, or binding precedents, that the court has to look for analogies — although it is not uncommon for argument from analogy in the application and interpretation of statutes too. However, a good amount of legal reasoning still takes place through rule application and weighing of principles. We can, therefore, hold that there are myriad ways of legal reasoning, and analogical reasoning — a very important method, is after all one of those myriad ways.

To conclude in the words of Unger, "A developed practice of analogical judgment is one resembling a more self-conscious and bounded version of many of our ordinary methods of moral and political judgment : bounded by the starting point in legal materials, and made self conscious by the determination to articulate the aims of an endeavour that is both collective and coercive".[12]

12. *Supra* n. 7 at 59.