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Analogija i vaganje: teza o djelomičnoj svodljivosti i njezini problemi

Na temelju analize strukture i slijeda postupka analogije, autor upućuje kritiku tezi o djelomičnoj svodljivo-sti, tj. tezi prema kojoj se analogija, izuzev onoga njezinog koraka koji predstavlja strogu analogiju, može svesti na vaganje. U radu se stoga prvo iznose neki problemi navedene teze, poput nenužnosti svodljivosti ili činjenice da se pod krinkom vaganja provodi prava analogija. Središnja je teza rada tvrdnja da analogiju nije moguće uspješno svesti na oblik vaganja.

Gljučne riječi: analogija, prednjak (antecedent), vaganje, čimbenici usporedbe, pravne praznine, teza o djelomičnoj svodljivosti, načela, pravila, sličnost, podvođenje

1 TRI KAO POČETNA TOČKA ANALOGIJE I VAGANJA

Idea da primjena prava uključuje tri osnovna postupka, podvođenje, vaganje i analogiju, nedavno je postala središnja tema teorije prava, pružajući nove uvide u analizi njihovih veza: (i) podvođenja i analogije, (ii) podvođenja i vaganja te (iii) analogije i vaganja.¹ Međutim, uzimajući u obzir činjenicu da se podvođenje provodi u svakom slučaju primjene prava, a analogija i vaganje koriste samo u određenim normativnim uvjetima, proizlazi da je treća veza jedina koja povezuje osnovne postupke koji su, prema ovom shvaćanju, normativno nenužni.² To obilježje analogije i vaganja predstavlja određene probleme: (i) koji su njihovi posebni normativni uvjeti? (ii) postoji li ikakvo preklapanje između tih uvjeta? i (iii) u kojoj mjeri se analogija i vaganje mogu udružiti ili jedno drugo ometati? Upravo ovdje dolazi do izražaja teza o djelomičnoj svodljivosti.³ Uobičajena kao objašnjenje analogije u smislu vaganja, ta teza odnosi se upravo

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- 1 O tri osnovna postupka vidi Alexy (2010: 9 i dalje), Brožek (2008: 188 i dalje) i Bustamante (2012: 59 i dalje).
- 2 Prva premisa čini se neospornom: nijedan pravni slučaj ne može se riješiti a da nije ispunjen prednjak (antecedent) (norme ili odlučne norme (*decision-norm*)). Drugu premisu objasniti će kasnije.
- 3 Brožek 2008: 188 i dalje.

na probleme koji proizlaze iz veze između tih dvaju osnovnih postupaka primjene prava.

2 ANALOGIJA PO KORACIMA: NEKA OSNOVNA RAZMATRANJA GLEDE SLIJEDA

Unatoč tome što analogija predstavlja sam postupak usporedbe, ona je, u strogom smislu, i rezultat: utvrđenje, za neku svrhu, odnosa sličnosti.⁴ Da bi se dosegla krajnja točka, potrebno je poduzeti neke korake: (i) identificirati uspoređivane izraze, (ii) sačiniti popis čimbenika usporedbe, (iii) procijeniti sličnost ili ne-sličnost na temelju svakog od čimbenika, (iv) izvršiti odabir odlučujućeg čimbenika i (v) zaključiti da analogija postoji, ako ona postoji na temelju odbranog čimbenika.⁵ Dakle, čitav je postupak razmjerno složen.

Složenost postupka očituje se već u pogledu čimbenika usporedbe. Kao što je poznato, oni su, naravno, beskonačni.⁶ Neovisno o tome što je predmet usporedbe, uzimajući u obzir neograničena svojstva izraza i beskonačne izvanjske kriterije analize, sve se može koristiti kao čimbenik usporedbe. Budući da kontekst usporedbe može suziti skup čimbenika, taj učinak smanjivanja olakšava savladivost čitavog postupka.

- Kad uspoređujemo automobile (*a*) i bicikle (*b*), skup čimbenika je beskonačan: $\check{c}_1$ – cijena, $\check{c}_2$ – brzina, $\check{c}_3$ – metalna građa, $\check{c}_4$ – udobnost, $\check{c}_5$ – ljepota, $\check{c}_6$ – zadovoljstvo koje pružaju Johnu, itd.
- Ako se *a* i *b* uspoređuju s obzirom na kontekst kupnje, skup je sužen: neki čimbenici mogu postati nevažni; primjerice, $\check{c}_3$ (metalna građa) ili $\check{c}_6$ (zadovoljstvo koje pružaju Johnu).

Složenost postupka dolazi do izražaja i kod procjene sličnosti ili ne-sličnosti koja proizlazi na temelju svakog od čimbenika. S obzirom na svaki od čimbenika treba donijeti sud kako bi se ustvrdila ili odbacila sličnost. Na neki način, taj korak predstavlja srž analogije: upravo se u tom koraku uspoređivani izrazi stvarno sučeljavaju na temelju specifične analize sličnosti. Ne smije se previdjeti važnost toga koraka. Zbog nedosljednih sudova stvorenih u ovome stadiju često se javljaju lažne analogije.⁷

4 Naravno, vrsta analogije o kojoj ovdje govorim ona je koja se odnosi na klasifikaciju a ne analogija kojom se podupire predviđanje (Macagno & Walton 2009: 171).

5 O koracima kod analogije vidi Araszkiewicz (2011: 103).

6 Brewer 1996: 932. Peczenik 1996: 312.

7 O lažnoj analogiji, među ostalim argumentima protiv analogije, vidi Shelley (2002: 489).

- usporedba između a i b na temelju $\check{c}_1$ (cijena) može voditi k zaključku o sličnosti ($=$) ili ne-sličnosti ($\neq$);⁸
- usporedba na temelju $\check{c}_2$ (brzina) također može voditi k zaključku $o =$ ili $\neq$; i tako dalje za svaki čimbenik.

Čak i kad je sužena kontekstom, moguće je da će usporedbu i dalje biti potrebno napraviti na temelju mnoštva čimbenika. Iz toga proizlazi da su moguće i različite procjene sličnosti i ne-sličnosti. Dakle, za uspoređene se izraze javlja tablica s različitim rezultatima: izrazi su na temelju nekih čimbenika slični, a na temelju drugih ne-slični. Kako bi i bilo za očekivati, na temelju zajedničkog popisa čimbenika, što su izrazi bliži, to je manje rezultata ne-sličnosti.⁹

- za a i b : $\check{c}_1 \neq$, $\check{c}_2 \neq$, $\check{c}_3 =$, $\check{c}_4 \neq$, $\check{c}_5 \neq$, $\check{c}_6 =$;
- za b_1 i b_2 , hipotetički: $\check{c}_1 =$, $\check{c}_2 =$, $\check{c}_3 =$, $\check{c}_4 =$, $\check{c}_5 \neq$, $\check{c}_6 =$.

Srž složenosti analogije leži, međutim, u odabiru odlučujućeg čimbenika.¹⁰ Ako su određeni izrazi slični na temelju jednog čimbenika, a ne-slični na temelju drugoga, zaključak o postojanju analogije posve je ovisan o odabranom čimbeniku. Taj je odabir, ipak, izvanjski u odnosu na usporedbu: jednak položaj svakog od čimbenika u pogledu izraza podrazumijeva da postupak sam po sebi ne sadrži nikakve kriterije za određivanje bilo kakve nadmoći među čimbenicima.¹¹ Tako je ukupan postupak analogije određen metačimbenikom: onim na temelju kojega je, kad se sve uzme u obzir, moguće odlučiti koji čimbenik treba odabrati.

- za a i b : $\check{c}_1 \neq$, $\check{c}_2 \neq$, $\check{c}_3 =$, $\check{c}_4 \neq$, $\check{c}_5 \neq$, $\check{c}_6 =$;
- za a i b : $(\check{c}_1 \neq) \vee (\check{c}_2 \neq) \vee (\check{c}_3 =) \vee (\check{c}_4 \neq) \vee (\check{c}_5 \neq) \vee (\check{c}_6 =)$;
- za a i b , hipotetički, s metačimbenikom ($m\check{c}_a$) na temelju kojeg se odabire $\check{c}_3$: $a = b$.

3 ISTI KORACI KOD ANALOGIJE U PRAVNIM SLUČAJEVIMA

Prethodnu je shemu moguće u cijelosti primijeniti kada se postupak analogije koristi kako bi se našlo rješenje za slučaj nepredviđen ijednom normom pravnoga poretka. Kada za pravno pitanje nije predviđen nijedan odgovor, postupak analogije je potreban kako bi se utvrdilo je li slučaj u pitanju sličan nekom drugom slučaju koji ispunjava uvjete predviđene nekom postojećom normom.

8 O koracima kod analogije vidi Araszkiewicz (2011: 103).

9 I *vice-versa*. O količinskoj sličnosti vidi Davis & Russell (1987: 265).

10 Ili čimbenici: sva upućivanja na odlučujući čimbenik uključuju, naravno, skup odlučujućih čimbenika.

11 Alexy 2010: 17. Aarnio 1987: 104.

Pravni slučajevi tako postaju izrazi koje treba usporediti. Ako je zaključak da analogija postoji, tada *prima facie* neprimjenljiva norma postaje odlučna norma (*decision-norm*) za slučaj u pitanju i pravno je pitanje odgovoreno.¹²

- Slučaj: »Ulazak u park motociklom«.
- Nepostojanje norme o ulasku u park motociklom.
- Pravilo₁: »Ulazak u park automobilom nije dopušten«.
- »Ulazak automobilom« (*a*) i »Ulazak motociklom« (*m*) su izrazi koje treba usporediti.
- Ako su *a* i *m* analogni, ni »ulazak motociklom« nije dopušten.¹³

Kada su uspoređivani izrazi slučajevi, kao kod pravnog rasuđivanja na temelju analogije, kontekst usporedbe pruža pravno pitanje: ono što je ovdje bitno jest dobiti odgovor glede deontičkog statusa nepredviđene radnje. Upravo tim pitanjem sužava se beskonačan popis čimbenika. Čimbenici koji se ni na koji način ne odnose na to normativno pitanje bit će nevažni za potrebe usporedbe.¹⁴

- Slučajevi: »Ulazak u park automobilom« (*a*) i »Ulazak u park motociklom« (*m*).
- Pravno pitanje: je li dopušten ulazak u park motociklom?
- Nevažni čimbenici: č₁ – broj kotača, č₂ – udobnost za vozača, itd.
- Važni čimbenici: č₃ – zagađivač, č₄ – opasnost za pješake, itd.

Čak i ako se popis čimbenika suzi, još uvijek je moguće postojanje mnoštva čimbenika, koji mogu voditi k tablici s različitim rezultatima. Bez obzira na pouzadnost pojedine procjene, bilo koja dva slučaja mogu biti slična na temelju jednog, a ne-slična na temelju drugog čimbenika.

- za *a* i *m*: č₃ (zagađivač), č₄ (opasnost za pješake), č₅ (vozačeva sloboda djelovanja), č₆ (šteta za vegetaciju u parku), itd;
- za *a* i *m*: č₃ ≠, č₄ ≠, č₅ =, č₆ ≠.

Rezultirajuće sličnosti i ne-sličnosti iz tablice usporedbe predstavljaju temeljni problem u postupku analogije: odabir odlučujućeg čimbenika. Kao što smo vidjeli, ako se na temelju odlučujućeg čimbenika procjeni da postoji sličnost, tada slijedi zaključak o postojanju analogije. Ako ne, pravno pitanje ostaje bez pravnog rješenja na temelju postupka analogije.

12 Nino 2011: 293. Weinreb 2005: 97 i dalje. Guastini 1993: 370.

13 Taj primjer, naravno, pretpostavlja pravnu prazninu glede ulaska u park motociklom, a koja ne postoji ako u obzir uzmemo opće načelo o slobodi djelovanja. Međutim, primjer je valjan ako dodamo normu koja blokira dopuštenje koje proizalzi iz tog načela: primjerice, »ulazak u park ovisi o posebnom pravilu glede vrste vozila u pitanju«. Uz tu normu, i uz postojanje pravila glede automobila i nepostojanje pravila glede motocikala, u odnosu na potonju vrstu vozila postoji pravna praznina.

14 Araszkievicz 2011: 102. Roth 2000: 115.

- Za a i m : ($\check{c}_3 \neq$) $\vee$ ($\check{c}_4 \neq$) $\vee$ ($\check{c}_5 =$) $\vee$ ($\check{c}_6 \neq$).
- Za a i m : ako $\check{c}_5$ onda »Ulazak u park motociklom nije dopušten«.
- Za a i m : ako $\check{c}_4$ onda nema analognog odgovora.

Presudna točka u pravnom rasuđivanju na temelju analogije također redovito počiva na odredbi metačimbenika temeljem kojega će se odabrati prevladavajući čimbenik. Međutim, pravni poredak mora podržavati taj metačimbenik: ako u postupku analogije zaključak podupire nešto što djeluje kao »nova norma«, ne može biti podržana nijedna druga mogućnost. Problem je, naravno, kako.

4 TEZA O DJELOMIČNOJ SVODLJIVOSTI

U kontekstu osnovnih postupaka u primjeni prava, prema tezi o djelomičnoj svodljivosti analogija se djelomično može objasniti pojmom vaganja.¹⁵ Prema toj tezi podržava se samo djelomična autonomnost postupka analogije: izuzev onoga njezinog koraka koji predstavlja strogu analogiju, preostali se koraci mogu svesti na vaganje. Dakle, za sporno pravno pitanje rješenje se može izvesti vaganjem sukobljenih načela, kao i kod svakog vaganja.¹⁶

Ipak, teza o djelomičnoj svodljivosti ovisi o razlici između dviju razina sličnosti: sličnosti₁ i sličnosti₂. Sličnost₁ odgovara onome na što se u ovome radu upućivalo kao na kontekst usporedbe i predstavlja bliskost između slučajeva koji proizlaze iz određenog pravnog pitanja. To pitanje određuje kao slične₁ sve slučajeve čije rješenje je odgovor na isti pravni problem, postavljajući granice za početni stadij sličnosti.¹⁷ Odabrani slučajevi potom su predmet daljnje procjene.

- Pravno pitanje: je li dopušten ulazak u park motociklom?
- Pravilo₁: »Ulazak u park automobilom (a) nije dopušten«.
- Pravilo₂: »Ulazak u park biciklom (b) je dopušten«.
- Ne postoji norma o ulasku u park motociklom (m).
- Pravilo₃: »Najveća brzina kretanja bicikala (b) u parku ograničena je na 10 km/h«.
- Slučajevi a i b su slični₁ slučaju m .
- Slučaj ograničenja brzine b nije sličan slučaju m na ovoj razini sličnosti₁.

Sličnost₂ presudna je razina sličnosti jer stvara normu za slučaj kojom se uspostavlja pravno rješenje. Na ovoj se razini moraju usporediti slučajevi oda-

¹⁵ Brožek 2008: 193.

¹⁶ Brožek 2008: 194.

¹⁷ Što je, kako je već rečeno, neproblematična razina sličnosti (Brožek 2008: 191).

brani na razini sličnosti₁ i donijeti odluka o »relevantnoj sličnosti«. Budući da su slični₁ slučajevi povezani s različitim rješenjima, odgovor na pravno pitanje proizlazi iz onoga slučaja koji je procijenjen kao sličan₂. Zbog toga sličnost₂ predstavlja konačan i dublji odabir sličnosti.¹⁸

- Ne postoji norma o ulasku u park motociklom (*m*).
- Slučaj automobila (*a*): »Ulazak u park automobilom nije dopušten«.
- Slučaj bicikla (*b*): »Ulazak u park biciklom je dopušten«.
- Ako $m = c$ onda $m \sim D$ park;
- Ako $m = b$ onda $m D$ park.

Srž teze o djelomičnoj svodljivosti leži, međutim, u načinu kako se određuje i rješava sličnost₂. Budući da su slučajevi odabrani na temelju sličnosti₁ povezani s različitim rješenjima, ključno je otkriti načela koja podupiru svako od tih rješenja. Kako ta načela po definiciji upućuju u različitim smjerovima, stvara se uobičajeni scenarij sukoba načela.¹⁹

- Pravilo₁ za slučaj automobila (*a*) (»Ulazak u park automobilom nije dopušten«) poduprto je načelom N₁;
- N₁: »Okoliš treba biti pravno zaštićen«.
- Pravilo₂ za slučaj bicikla (*b*) (»Ulazak u park biciklom je dopušten«) poduprto je načelom N₂.
- N₂: »Svatko ima slobodu djelovanja«.²⁰
- Kod pitanja je li dopušten ulazak u park motociklom načela N₁ i N₂ dolaze u sukob.

U slučaju sukobljenih načela do rješenja se dolazi vaganjem, tj. uporabom »formule težine«: načela se važu i jedno će prevladati nad drugim. U skladu s time, načelo koje prevlada pruža rješenje za slučaj u pitanju te se na temelju činjenica slučaja i posljedica koje proizlaze iz pobjedničkog načela stvara »kolizijsko pravilo«.²¹ Takvim se pristupom problem sličnosti₂ preobražava u problem vaganja načela, a što, prema tezi o djelomičnoj svodljivosti, ima značajnu prednost: umjesto postavljanja pitanja glede toga koji su izrazi slični₂, treba samo izvršiti jednostavno vaganje.²²

18 Brožek 2008: 191.

19 Brožek 2008: 194.

20 Ovo načelo početno je bilo predstavljeno u obliku: »ljudi su ovlašteni aktivno se odmarati« (Brožek 2008: 194). Međutim, radi veće pravne preciznosti, u tekstu koristim oblik načela koji, u istom kontekstu, koristi Alexy (2010: 16). Ova izmjena ni na koji način ne utječe na izvedenu shemu.

21 O »kolizijskom pravilu« (zakonu suprotstavljenih načela) vidi, primjerice, Alexy 2002: 54 i Pino 2010: 190 i dalje.

22 Brožek 2008: 195.

- N_1 (okoliš treba biti pravno zaštićen) $\rightarrow m \sim D$ park.
- N_2 (svatko ima slobodu djelovanja) $\rightarrow m D$ park.
- Ako na temelju »formule težine« $N_1 > N_2 \rightarrow m \sim D$ park.

5 PRVI PROBLEM: SLUČAJNI ISHOD VAGANJA

Iz teze o djelomičnoj svodljivosti, unatoč njezinoj neospornoj zanimljivosti, proizlazi nekoliko problema. Prvi i najintuitivniji tiče se izbora načela koja stoje u pozadini pravila koja uređuju slične₁ slučajeve. Iako izgrađena kao pojednostavljen model, teza o djelomičnoj svodljivosti, čini se, zanemaruje činjenicu da je moguće postojanje različitih načela koja podupiru pravila koja uređuju slične₁ slučajeve. To je neposredno važno zbog dvaju razloga. Prvo, jer pokazuje da je izbor načela složeniji nego što se čini i, najviše, jer konačan rezultat ovisi o načelima koja su uključena u vaganje.²³

- Slučaj automobila (*a*): pravilo₁ (»Ulazak u park automobilom nije dopušten«) poduprto je načelom N_1 i ili načelom N_3 .
- N_1 : »Okoliš treba biti pravno zaštićen«.
- N_3 : »Tjelesna cjelovitost je nepovrediva«.
- Slučaj bicikla (*b*): pravilo₂ (»Ulazak u park biciklom je dopušten«) poduprto je načelom N_2 .
- N_2 : »Svatko ima slobodu djelovanja«.
- Pravno pitanje i dalje je isto: je li dopušten ulazak u park motociklom (*m*)?
- Ako su upletenja N_2 u N_1 i u N_3 različita (kako motocikli zagađuju i kako mogu nanijeti štetu tjelesnoj cjelovitosti), ishodi vaganja mogu se razlikovati.
- Hipotetički: $N_1 > N_2 \rightarrow m \sim D$ park, ali $N_3 < N_2 \rightarrow m D$ park.

6 DRUGI PROBLEM: ANALOGIJA POKRIVENA VAGANJEM

U vezi s prethodnom točkom, čini se da teza o djelomičnoj svodljivosti zanemaruje i činjenicu da su načela koja su izabrana za provođenje postupka vaganja materijalno povezana s čimbenicima koji se koriste za uspoređivanje slučajeva: svako od načela u postupku vaganja opisuje neki čimbenik za slučajeve odabrane tijekom stadija sličnosti₁. Dakle, ne samo da izbor načela opisuje

²³ Naravno, ništa ne priječi da s obje strane pitanja bude više od jednog načela, što onda zahtijeva proširenu »formulu težine« (Alexy 2002: 409; Sieckmann 2010: 110). Međutim, bit je u tome da, korištenjem vaganja, analogija postaje ovisna o dvojbenom izboru između načela (ometajući dosljednost ishoda analogije).

odabir čimbenika, nego je, štoviše, postupak vaganja izložen samo kao shema za organiziranje odabira odlučujućeg čimbenika. To stoga vodi k tvrdnji da se vaganje ovdje koristi samo kao alat za utvrđivanje metačimbenika: vaganjem se samo odlučuje koji će od čimbenika odabranih temeljem izabranih načela prevladati. Pod krinkom vaganja provodi se prava analogija.²⁴

- Za a , b i m : $\check{c}_1$ (zagađivač), $\check{c}_2$ (sloboda kretanja), $\check{c}_3$ (opasnost za pješake).
- Načela N_1 , N_2 i N_3 predstavljaju $\check{c}_1$, $\check{c}_2$ i $\check{c}_3$.
- N_1 : »Okoliš treba biti pravno zaštićen«; u $\check{c}_1$: $m = a$; $m \neq b$.
- N_2 : »Svatko ima slobodu djelovanja«; u $\check{c}_2$: $m = a$; $m = b$.
- N_3 : »Tjelesna cjelovitost je nepovrediva«; u $\check{c}_3$: $m \neq a$; $m = b$.
- Izbor načela N_1 i N_2 znači da su »glavni čimbenici« $\check{c}_1$ i $\check{c}_2$.
- Ako $N_1 > N_2$, tada je odlučujući čimbenik $\check{c}_1$: $m = a$; $m \neq b$.
- $N_1 \rightarrow \check{c}_1 \rightarrow m = a$.

7 TREĆI PROBLEM: VAGANJE NEVAŽNIH NAČELA

Uzimajući u obzir da je, na temelju teze o djelomičnoj svodljivosti, zamjena stadija sličnosti₂ ostvarena vaganjem načela koja podupiru pravila neprimjenljiva na slučaj, javlja se još jedan problem: nevažnost tim pravilima prizvanih načela. Zapravo, unatoč sličnosti₁, ne postoji ništa što bi predstavljalo osiguranje da ta načela neće biti nevažna za neregulirani slučaj, u kojem slučaju ona ne bi mogla opravdati nijedno rješenje. Glavni razlog za takav ishod proizlazi iz neprimjenljivosti jednog od tih načela na slučaj za koji se traži odgovor, što je posljedica činjenice da obilježja koja opisuju taj slučaj ne odgovaraju prednjaku (antecedentu) načela. U tom scenariju, načela prizvana na temelju sličnosti₁ ovdje ne igraju nikakvu ulogu. To vodi k sljedećoj tvrdnji: djelomično svođenje analogije na vaganje moguće je jedino ako je neregulirani slučaj, unatoč sličnosti₁, analogan reguliranom slučaju do te mjere da aktivira upravo ona ista načela koja podupiru pravila čija je analogna primjena predmetom razmatranja.

- Slučaj automobila (a): pravilo₁ »ulazak u park automobilom nije dopušten« poduprto je načelom N_1 .
- N_1 : »Okoliš treba biti pravno zaštićen«.
- Slučaj bicikla (b): pravilo₂ »ulazak u park biciklom je dopušten« poduprto je načelom N_2 .
- N_2 : »Svatko ima slobodu djelovanja«.

24 Kad se uzme u obzir da se vaganjem, u njegovom pravom smislu, samo odlučuje koju između svih primjenljivih normi treba primijeniti na slučaj, postaje jasno da se vaganjem, kad se ono koristi za izbor jedne od različitih na slučaj neprimjenljivih normi, samo određuje bliskost i udaljenost između slučaja i svake od neprimjenljivih normi.

- Novi slučaj sličnosti₂: smije li se u park ući memorijalnim tenkom (*mt*)?
- Ne postoji norma o ulasku u park memorijalnim tenkom (*mt*).
- Kod sličnosti₁ se ništa nije promijenilo: pitanje se i dalje odnosi na dopuštenje ulaska.
- Vaganje načela N_1 i N_2 za slučaj *mt* je besmisleno: u najboljem slučaju, načelo N_2 je nevažno.
- Neregulirani slučaj ne ispunjava prednjak (antecedent) načela N_2 .²⁵

8 ČETVRTI PROBLEM: MANJAK NAČELA ZA VAGANJE

Prepreka tezi o djelomičnoj svodljivosti koja leži u podlozi prethodnog problema može se proširiti na sve normativne situacije u kojima pravila koja uređuju slične₁ slučajeve nisu utemeljena ni na jednom načelu ili, možda najčešće, u kojima su ta pravila poduprta istim načelom. U takvim situacijama vaganje nije moguće zbog jednostavnog razloga što ne postoji dovoljno načela za vaganje. Poznato je da je vaganje postupak rješavanja normativnih sukoba nerješivih na temelju normi u sukobu: zbog tog razloga, za vaganje su potrebne dvije ili više normi.²⁶ Stoga, kad su načela poduprta istim načelom, ne može doći do vaganja.

- Pravilo₁: »Promet automobilima ograničen je na tri dana u tjednu«.
- Pravilo₂: »Automobili čiji registracijski broj započinje parnim brojem mogu prometovati ponedjeljkom, srijedom i petkom«.
- Pravilo₃: »Automobili čiji registracijski broj započinje neparnim brojem mogu prometovati utorkom, četvrtkom i subotom«.
- Nije doneseno pravilo za nekolicinu automobila čiji registracijski broj započinje slovom.
- Slučaj parnog broja (*p*): pravilo₂ poduprto je načelom N_1 .
- Slučaj neparnog broja (*n*): pravilo₃ poduprto je načelom N_1 .
- N_1 : »Okoliš treba biti pravno zaštićen«.
- Pravno pitanje: kada mogu prometovati automobili čiji registracijski broj započinje slovom?
- Vaganje je neupotrebljivo: načelo N_1 podupire oba pravila; ne postoji normativni sukob.

²⁵ To je još vidljivije ako se ono koristi u svojoj prvotnoj inačici: »ljudi su ovlašteni aktivno se odmarati« (Brožek 2008: 194). Čini se neospornim da ulazak u park memorijalnim tenkom ni u kojim okolnostima ne predstavlja primjer aktivnog odmaranja.

²⁶ Primjerice, Pino 2010: 185 i dalje, i Duarte 2010: 56 i dalje.

9 POZADINSKI PROBLEM: ANALOGIJA I VAGANJE SE NE PREKLAPAJU

Svi do sada identificirani problemi s tezom o djelomičnoj svodljivosti, na neki način, ne predstavljaju ništa više nego posljedicu jednog šireg problema: analogija i vaganje se ne preklapaju. To postaje jasnije kada uzmemo u obzir činjenicu da svaki od tih osnovnih postupaka zahtijeva suprotne normativne okolnosti: dok analogija ovisi o nepostojanju ijedne primjenljive norme, vaganje se oslanja na primjenljivosti dviju ili više normi. Činjenica da tim postupcima prethode suprotne normativne okolnosti upućuje na njihovo međusobno isključivanje. Slučaj u kojem je potrebno izvršiti analogiju nije slučaj u kojem bi trebalo izvršiti vaganje i *vice-versa*.

- Slučaj: »Ulazak u park motociklom (*m*)«.
- Normativne okolnosti analogije: ne postoji norma o *m*.
- Normativne okolnosti vaganja: u pogledu *m*, načelo *N*₁ i načelo *N*₂ su u sukobu.

Moguće objašnjenje preklapanja postupaka analogije i vaganja, unatoč njihovom međusobnom isključivanju, leži, čini se, u reduktivnom shvaćanju uloge načela kao stvarno usmjeravajućih normi. Prihvatanje činjenice da su načela norme poput svih ostalih normi, što je neizbježna posljedica njihove deontičke naravi, mora podrazumijevati to da načela reguliraju slučajeve na isti način kao i pravila. Osobita obilježja načela, počevši od njihove primjenljivosti u različitim stupnjevima, ne utječu na činjenicu da ona i pružaju pravna rješenja: ako slučaj ispunjava prednjak (antecedent) načela, onda za taj slučaj postoji pravna posljedica. Očito je da, ako jedno načelo dođe s drugim u sukob, rješenje ovisi o njihovom vaganju. Međutim, jednom kad je ishod vaganja poznat, poznata je i konačna posljedica i nema više mjesta za uključivanje analogije.

- Pravno pitanje: je li dopušten ulazak u park motociklom?
- *N*₁: »Okoliš treba biti pravno zaštićen«.
- *N*₂: »Svatko ima slobodu djelovanja«.
- Ulazak motociklom slučaj je na koji su primjenljiva načela *N*₁ i *N*₂.
- Ne postoji norma o »ulasku u park automobilom«.
- Ne postoji norma o »ulasku u park biciklom«.
- Do pravnog rješenja dolazi se vaganjem načela *N*₁ i *N*₂.

Dakle, ispada da reduktivno shvaćanje uloge načela kao stvarno usmjeravajućih normi utječe na ispravno razumijevanje pravne praznine. Ako pravna praznina i dalje predstavlja izočnost regulacije, kod razumijevanja dosega pravne praznine mora se uzeti u obzir da i načela i pravila na jednak način predviđaju pravne posljedice, iako su načela, sa svojim širokim prednjacima (antecedenti-

ma) koji pokrivaju veliki dio stvarnosti, znatno suzila prostor za neregulirane slučajeve. Stoga, za primjenu prava ne postoji pravna praznina ako je sporni slučaj manifestacija prednjaka (antecedenta) načela: ako slučaj aktivira pravilo, pravilo je primjenljivo, ali ako aktivira »samo« načelo, slučaj je također predviđen pravom i, uz prethodno vaganje ili bez njega, treba primijeniti načelo.²⁷

- Pravno pitanje: je li dopušten ulazak u park motociklom?
- N₁: »Okoliš treba biti pravno zaštićen«.
- N₂: »Svatko ima slobodu djelovanja«.
- Ulazak motociklom slučaj je na koji su primjenljiva načela N₁ i N₂.
- Pravilo₁: »Ulazak u park automobilom nije dopušten«.
- Pravilo₂: »Ulazak u park biciklom je dopušten«.
- Do pravnog rješenja ne dolazi se na temelju analogije.
- Do pravnog rješenja i dalje se dolazi na temelju vaganja načela N₁ i N₂.
- Pravno pitanje: je li dopušten ulazak u park automobilom?
- Pravno rješenje pruža pravilo₁.

Čini se da se ono što se razumijeva pod »pravnom prazninom« znatno promijenilo uzimajući u obzir razliku između načela i pravila i, posljedično, ono što proizlazi iz naravi načela kao »optimizacijskih zahtjeva«.²⁸ Ako se prihvati da se i načelima i pravilima propisuju pravne posljedice i da se, dakle, i primjenom načela i primjenom pravila na isti način mogu rješavati slučajevi, doseg »pravne praznine« sada, čini se, pokriva samo dvije normativne situacije: (i) malo vjerojatnu situaciju u kojoj nijedna norma, ni pravilo ni načelo, nije primjenljiva na slučaj i (ii) situaciju u kojoj pravilo, blokirajući primjenljivost načela, predviđa posljedicu koja nije posebno određena za kategoriju koja, između ostalih, spada i u njegovo područje primjene.²⁹ Ako te normativne situacije određuju

27 Ali sigurno bez primjene analogije, s obzirom na to da nisu nazočne njezine normativne okolnosti. Time se opravdava tvrdnja da neki oblici navodne analogije ne mogu biti smatrani analogijom (vidi, primjerice, Verheij & Hage 1994: 65; također, u okviru reduktivnog pristupa, Kaptein 2005: 502). Naravno, s obzirom na pojam pravne praznine, ovdje se uzimaju u obzir samo normativne praznine (o razlici između normativnih i aksioloških praznina vidi Nino 2003: 281 i Rodríguez 2000: 152).

28 Primjerice, Alexy 2002: 47 i dalje, i Brožek 2012: 223.

29 Ono što se ovdje želi reći jest da normativne praznine postoje samo na razini pravila ako je praznina stvorena na temelju pravila, odnosno na razini načela ako je ijedno načelo primjenljivo (Ruiz Manero 2005: 123). Primjerom koji slijedi u glavnom tekstu, u slučaju pravne praznine₂, dobro se može pokazati na što se ovdje misli. S druge strane, važno je istaknuti da uobičajeno razlikovanje izričitih i prešutnih načela (primjerice, Burazin 2014: 171) ni na koji način ne utječe na ovo pitanje. Ako je načelo nepisano, moguće su samo dvije situacije: ili ono jest ili nije norma skupa (pravnog poretka). U potonjem slučaju, načelo ne postoji i iz njega ne proizlazi ništa. Međutim, ako je ono stvarna norma skupa, što je naravno slučaj kad je riječ o običajnom izvoru, onda se ono ponaša kao i sva ostala načela i ni po čemu nije različito od

što može ući u doseg »pravne praznine«, iz toga slijedi da je osnovni postupak analogije ograničen upravo na njih.³⁰

- Slučaj₁: promet automobilima čiji registracijski broj započinje slovom.
- Prazninom ispunjena situacija₁: ako slučaj₁ nije pokriven nijednim pravilom ili nijednim načelom (pravna praznina₁).
- Prazninom ispunjena situacija₂: ako postojeće norme sadrže neodređene posljedice za slučaj₁, primjerice:
- Pravilo₁: »Promet automobilima ograničen je na tri dana u tjednu«.
- Pravilo₂: »Automobili čiji registracijski broj započinje parnim brojem mogu prometovati ponedjeljkom, srijedom i petkom«.
- Pravilo₃: »Automobili čiji registracijski broj započinje neparnim brojem mogu prometovati utorkom, četvrtkom i subotom«.
- Nije doneseno pravilo za nekolicinu automobila čiji registracijski broj započinje slovom (pravna praznina₂).

10 ZAKLJUČNA PRIMJEDBA

Analogija je usmjerena k cilju: između čimbenika usporedbe, osobito na razini sličnosti₂, odabir se može izvršiti samo s obzirom na neku svrhu. Bez neke takve svrhe neodrediv je metačimbenik na temelju kojega se odlučuje o tome koji će od čimbenika prevladati i, zbog tog razloga, nedostaje opravdanje za odabir između čimbenika pa odabir postaje posve arbitraran. Budući da načela šire i očitije propisuju ciljeve koje je usvojio pravni poredak i budući da se ti ciljevi uvode u postupak analogije kako bi se riješio problem metačimbenika, ciljno usmjerena narav analogije u toj je vrsti normi pronašla svoj glavni izvor sposobnosti djelovanja. Ovdje se, međutim, načela javljaju u dvojakoju ulozi: kao »propisivači ciljeva« i, s obzirom na to da pružaju neposredna rješenja za slučajeve, kao »smanjivači pravnih praznina«. S tom dvojakošću treba biti oprezan: kad god je slučaj reguliran načelom, načelo odmah zaustavlja korištenje analogije i tako uklanja mogućnost da tvori kriterij glede toga što je čemu slično.

*S engleskog jezika preveo
Luka Burazin.*

pisanih načela. Bilo ono pisano ili ne nevažno je za određivanje pravne posljedice, pod uvjetom da je (prihvaćeno kao) norma koja pripada skupu.

30 Sve to pretpostavlja da analogija, kao postupak koji se može koristiti kako bi se stvorilo odlučnu normu (*norm-decision*) koju nije donijela normativna vlast, ovisi o normi koja dopušta njezinu uporabu pod određenim uvjetima i činjenici da je taj uvjet postojanje pravne praznine.

Bibliografija

- Aulis AARNIO, 1987: *The Rational as Reasonable*. Dordrecht: Kluwer.
- Robert ALEX, 2010: Two or Three? *On the Nature of Legal Principles*. Ur. Martin Borowski. Stuttgart: Franz Steiner Verlag. 9–18.
- , 2002: *Theory of Constitutional Rights*. Oxford: Oxford University Press.
- Michal ARASZKIEWICZ, 2011: *Analogy, Similarity and Factors. Proceedings of the 13th International Conference on Artificial Intelligence and Law*. New York: ACM. 101–105.
- Scott BREWER, 1996: Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Arguments by Analogy. *Harvard Law Review* 109 (1996) 5. 923–1029.
- Bartosz BROŻEK, 2008: Analogy in Legal Discourse. *Archiv für Rechts – und Sozialphilosophie* 94 (2008) 2. 188–201.
- , 2012: Legal Rules and Principles: a Theory Revisited. *i-Lex, Rivista di Scienze Giuridiche, Scienze Cognitive ed Intelligenza Artificiale* (2012) 17. 205–226.
- Luka BURAZIN, 2014: Antinomies Between Implicit Legal Principles: a Solution to the Total-Partial Antinomy. *Courts, Interpretation, The Rule of Law*. Ur. Miodrag Jovanović and Kenneth E. Himma. The Hague: Eleven International Publishing. 167–180.
- Thomas BUSTAMANTE, 2012: Finding Analogies Between Cases. On Robert Alexy's Third Basic Operation in the Application of Law. *On the Philosophy of Precedent*. Ed. Carlos Bernal Pulido. Stuttgart: Franz Steiner Verlag. 59–71.
- Todd DAVIES & Stuart RUSSELL, 1987: A Logical Approach to Reasoning by Analogy. *Proceedings of the Tenth International Joint Conference on Artificial Intelligence*. Ur. John P. McDermott. Burlington: Morgan Kaufmann Publishers. 264–270.
- David DUARTE, 2010: Normative Conditions of Balancing: Drawing Up The Boundaries of Normative Conflicts That Lead to Balances. *Legal Reasoning: the Methods of Balancing*. Ur. Jan Sieckmann. Stuttgart: Franz Steiner Verlag. 51–62.
- Riccardo GUASTINI, 1993: *Le Fonti del Diritto e L'Interpretazione*. Milano: Giuffrè.
- Hendrik KAPTEIN, 2005: Legal Progress Through Pragma-Dialectics? Prospects Beyond Analogy and E Contrario Argument. *Argumentation* 19 (2005) 4. 497–507.
- Fabrizio MACAGNO & Douglas WALTON, 2009: Argument from Analogy in Law, the Classical Tradition, and Recent Theories. *Philosophy & Rhetoric* 42 (2009) 2. 154–182.
- Juan Ruiz MANERO, 2005: Algunas Concepciones del Derecho y sus Lagunas. *Lagunas en el Derecho*. Madrid: Marcial Pons. 103–126.
- Carlos Santiago NINO, 2003: *Introducción al Análisis del Derecho*. 11. izd. Barcelona: Ariel.
- Aleksander PECZENIK, 1996: Jumps and Logic in the Law. *Artificial Intelligence and Law* 4 (1996) 3–4. 297–329.
- Giorgio PINO, 2010. *Diritti e Interpretazione*. Bologna: Il Mulino.
- Jorge Luis RODRÍGUEZ, 2000: Axiological Gaps and Normative Relevance. *Archiv für Rechts – und Sozialphilosophie* 86 (2000). 151–167.
- Bram ROTH, 2000: New Reasoning Patterns in Analogical Legal Case-Based Reasoning: An Informal Investigation. *Legal Knowledge and Information Systems*. Ur. Joost Breuker. Amsterdam: IOS Press. 113–122.
- Cameron SHELLEY, 2002: Analogy Counterarguments and the Acceptability of Analogical Hypotheses. *British Journal of Philosophy of Science* 53 (2002) 4. 477–496.
- Jan SIECKMANN, 2010: Balancing, Optimisation, and Alexy's »Weight Formula«. *Legal Reasoning: the Methods of Balancing*. Ur. Jan Sieckmann. Stuttgart: Franz Steiner Verlag. 101–118.
- Bart VERHEIJ & Jaap HAGE, 1994: Reasoning by Analogy: A Formal Reconstruction. *Legal Knowledge Based Systems. The Relations with Legal Theory*. Ur. Henry Prakken. Lelystad: Koninklijke Vermande. 65–78.
- Lloyd WEINREB, 2005: *Legal Reason. The Use of Analogy in Legal Argument*. New York: Cambridge University Press.

David Duarte*

Analogy and Balancing: The Partial Reducibility Thesis and Its Problems

With an analysis of the structure and the sequence of analogy, the paper is mainly a critique to the partial reducibility thesis: a thesis sustaining that analogy, besides a strictly analogical step, is in the remaining part reducible to balancing. Thus, the paper points out some problems raised by the partial reducibility thesis, such as the contingency of reducibility or the fact that a proper analogy is done under the cover of a balancing. The main point is, however, the claim that analogy and balancing have opposite normative conditions, being this premise the reason to a structural explanation for the unacceptability of the reducibility enterprise.

Key words: analogy, antecedent, balancing, factors of comparison, gaps, partial reducibility thesis, principles, rules, similarity, subsumption

1 THREE AS THE STARTING POINT FOR ANALOGY AND BALANCING

The idea that the application of law includes three basic operations, subsumption, balancing and analogy, has recently become a central matter in legal theory, yielding new insights into the analysis of their connections: (i) subsumption and analogy, (ii) subsumption and balancing, and (iii) analogy and balancing.¹ However, taking into account the fact that subsumption is performed in every case of the application of law, and analogy and balancing are used only under specific normative conditions, it follows that the third connection is the only one linking the basic operations that are, under this point of view, normatively contingent.² This feature of analogy and balancing poses certain problems: (i) what are their respective specific normative conditions, (ii) is there any intersection between those conditions, and (iii) to what extent can analogy

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1 On the three basic operations, Alexy (2010: 9 and ff.), Brożek (2008: 188 and ff.), and Bustamante (2012: 59 and ff.).

2 The first premise seems undeniable: no legal case can be solved without the fulfilment of an antecedent (of a norm or a decision-norm). The second one will be explained later.

and balancing be combined or interfere with each other. It is precisely here that the partial reducibility thesis comes into play.³ Formulated as an explanation of analogy in terms of balancing, this thesis deals exactly with the problems raised by the connection between these two basic operations of the application of law.

2 ANALOGY BY STEPS: SOME BASIC CONSIDERATIONS CONCERNING THE SEQUENCE

Despite being used to represent the operation of comparison itself, analogy is, rigorously, a result: the establishment, for any purpose, of a relation of similarity.⁴ In order to reach the final point, some steps must be taken: (i) identification of the terms compared, (ii) list of comparison factors, (iii) evaluation of similarity or non-similarity under each factor, (iv) choice of the decisive factor, and (v) conclusion of analogy, if this is the case under the factor chosen.⁵ The overall operation is therefore relatively complex.

The operation is complex, immediately, with regard to factors of comparison. As it is known, they are naturally endless.⁶ Independently of what is compared, everything can be used as a factor, considering the illimitable properties of the terms and the infinite external criteria of analysis. Since the context of comparison is able to narrow the set of factors, this decreasing effect gives some manageability to the process.

- When comparing cars (*c*) and bicycles (*b*), the set of factors is endless: f_1 – price, f_2 – speed, f_3 – metal texture, f_4 – comfort, f_5 – beauty, f_6 – how it pleases John, and so on.
- If *c* and *b* are compared for buying purposes, the set is narrowed: some factors may become irrelevant; for instance, f_3 (metal texture) or f_6 (how it pleases John).

Complexity also arises from the evaluation of similarity or non-similarity that each factor confers. Beneath each one of them, a judgment has to be made in order to state or refute similarity. In a certain way, this step is the core of analogy: it is here that the terms compared are effectively confronted under the specific analysis of resemblance. Its importance cannot be overlooked. Often false analogies appear from the inconsistent judgments made at this level.⁷

3 Brożek 2008: 188 and ff.

4 Naturally, the kind of analogy considered here is that regarding a classification and not the analogy supporting a prediction (Macagno & Walton 2009: 171).

5 On analogy steps, Araszkiewicz (2011: 103).

6 Brewer 1996: 932. Peczenik 1996: 312.

7 On false analogy, among other analogy counterarguments, see Shelley (2002: 489).

- Comparison between b and c under f_1 (price) can lead to similarity ($=$) or non-similarity ($\neq$).⁸
- Under f_2 (speed) it can also lead to $\neq$ or $=$; and so on for all the factors.

Even if narrowed by context, a comparison may still have to be done under a plurality of factors. From this it follows that different evaluations of similarity and non-similarity may be carried out. Therefore, for the terms compared, a table with different results appears: terms are similar under some factors and non-similar under others. As would be expected, under a common list of factors, the more proximate the terms, the fewer the results of non-similarity.⁹

- For b and c : $f_1 \neq, f_2 \neq, f_3 =, f_4 \neq, f_5 \neq, f_6 =$.
- For b_1 and b_2 , hypothetically: $f_1 =, f_2 =, f_3 =, f_4 =, f_5 \neq, f_6 =$.

The complexity of the analogy lies, however, in the choice of the decisive factor.¹⁰ If certain terms are similar under a factor and non-similar under another, the conclusion of analogy is wholly dependent on the factor selected. This choice is, nonetheless, external to the comparison: the equal position of each factor with respect to the terms implies that the operation, in itself, holds no criteria for defining any kind of prevalence.¹¹ Thus, the overall analogy operation is decided through a meta-factor: the one that decides which factor, all things considered, is to be chosen.

- For b and c : $f_1 \neq, f_2 \neq, f_3 =, f_4 \neq, f_5 \neq, f_6 =$.
- For b and c : $(f_1 \neq) \vee (f_2 \neq) \vee (f_3 =) \vee (f_4 \neq) \vee (f_5 \neq) \vee (f_6 =)$.
- For b and c , hypothetically, with a meta-factor (mf_a) that chooses f_3 : $b = c$.

3 THE SAME STEPS IN A LEGAL CASES ANALOGY

The previous scheme is entirely applicable when the operation is used to provide a solution for a case unforeseen under any norm of the legal order. Here, where no answer to the legal question is provided, an operation of analogy is required to define whether the case at hand is similar to another which fulfils the conditions foreseen in an enacted norm. Legal cases, then, become the terms to be compared. If the conclusion is an analogy, then the *prima facie* inapplicable norm becomes the decision-norm of the case and the legal question is answered.¹²

8 The symbols $=$ and $\neq$ are used here for simplification purposes, just to represent similarity and non-similarity.

9 And *vice-versa*. On quantitative similarity, Davis & Russell (1987: 265).

10 Or factors: all references to a decisive factor include, naturally, a set of decisive factors.

11 Alexy 2010: 17. Aarnio 1987: 104.

12 Nino 2011: 293. Weinreb 2005: 97 and ff. Guastini 1993: 370.

- Case: Motorcycle entrance into the park.
- No norm on motorcycle entrance into the park.
- Rule₁: “Cars are not allowed to enter the park.”
- “Car entrance” (*c*) and “motorcycle entrance” (*m*) are terms of comparison.
- If *c* and *m* are analogous, “entrance on a motorcycle” is not allowed.¹³

When terms of comparison are cases, as in legal reasoning by analogy, the context of comparison is given by the legal question: what matters here is to obtain an answer to the deontic status of an unforeseen action. The endless list of factors is narrowed precisely by that question. Factors with no bearing on that normative issue will be irrelevant for the comparison.¹⁴

- Cases: “Car entrance into the park” (*c*) and “Motorcycle entrance into the park” (*m*).
- Legal question: Is a motorcycle allowed to enter the park?
- Irrelevant factors: f_1 – number of wheels, f_2 – comfort for the driver, and so on.
- Relevant factors: f_3 – pollutant, f_4 – danger to pedestrians, and so on.

Even if narrowed, there may still be a plurality of factors which may lead to a table with different results. No matter what the reliability of each evaluation is, any two cases may be similar under some factor and non-similar under another.

- For cases *c* and *m*, the factors of comparison are: f_3 (pollutant), f_4 (danger to pedestrians), f_5 (drivers' freedom of action), f_6 (damage to the park vegetation), and so on.
- For *c* and *m*: $f_3 \neq$, $f_4 \neq$, $f_5 =$, $f_6 \neq$.

Now the results of similarity and non-similarity offered by the table of comparison present the main problem in the analogy operation: the selection of the decisive factor (step iv). As we have seen, if the decisive factor implies an evaluation of similarity, then a conclusion of analogy follows. If not, the legal question remains without a legal solution with regard to the analogy operation.

- For *c* and *m*: $(f_3 \neq) \vee (f_4 \neq) \vee (f_5 =) \vee (f_6 \neq)$.
- For *c* and *m*: if f_5 then “Motorcycles are not allowed to enter the park”.
- For *c* and *m*: if f_4 then no analogical answer.

13 This example presupposes, obviously, a gap concerning the entrance of motorcycles into the park, inexistent if a general principle regarding freedom of action is taken into account. However, the example is valid if a norm blocking the permission given by that principle is added: for instance, “entrance into the park depends on a specific rule regarding the kind of vehicle in question”. With this norm, and with a rule for cars and no rule for motorcycles, there is a gap regarding the latter kind of vehicle.

14 Araszkiewicz 2011: 102. Roth 2000: 115.

As is generally the case, the decisive point in legal reasoning by analogy also rests upon the definition of the meta-factor according to which the prevailing factor will be selected. However, this meta-factor must be sustained by the legal order: if in an analogy operation the conclusion supports something that works as a “new norm”, no other option can be upheld. The problem is, of course, how.

4 THE PARTIAL REDUCIBILITY THESIS

In the context of the basic operations in the application of law, the partial reducibility thesis says that analogy can be partially explained through balancing.¹⁵ The thesis sustains only the partial autonomy of the analogy operation: besides a strictly analogical step, the remaining part is reducible to balancing. Thus, for the legal question at hand, the solution is drawn by weighing up the principles in conflict, as in any balancing.¹⁶

The partial reducibility thesis depends, however, on a distinction between two levels of similarity: similarity₁ and similarity₂. Similarity₁ is equivalent to what was referred to here as the context of comparison and stands for the proximity between the cases brought by the legal question at hand. This question defines as similar₁ all cases whose solution is an answer to the same legal problem, setting the boundaries for an initial stage of similarity.¹⁷ The cases selected here are then subject to further evaluation.

- Legal question: Are motorcycles allowed into the park?
- Rule₁: “Cars (*c*) are not allowed into the park.”
- Rule₂: “Bicycles (*b*) are allowed into the park.”
- No norm on motorcycle (*m*) entrance into the park.
- Rule₃: “Speed limit for bicycles (*b*) in the park is 10 km/h.”
- Cases with cars (*c*) and bicycles (*b*) are similar₁ to the cases with motorcycles (*m*).
- Speed limit case *b* is dissimilar to the case *m* at this level of similarity₁.

Similarity₂ is the decisive level of similarity since it creates the norm for the case establishing the legal solution. Here, the cases that were selected at the level of similarity₁ have to be compared and the decision on the “relevant similarity” must be taken. As similar₁ cases are linked to different solutions, the answer to the legal question is given by the case that is evaluated as similar₂. For this reason, similarity₂ stands for the conclusive and deeper choice of similarity.¹⁸

¹⁵ Brožek 2008: 193.

¹⁶ Brožek 2008: 194.

¹⁷ Which is, as stated, an unproblematic level of similarity (Brožek 2008: 191).

¹⁸ Brožek 2008: 191.

- No norm on motorcycle (m) entrance into the park.
- Car case (c): “Cars are not allowed into the park.”
- Bicycles case (b): “Bicycles are allowed into the park.”
- If $m = c$ then $m \sim P$ park.
- If $m = b$ then $m P$ park.

The core of the partial reducibility thesis lies, however, in the way similarity₂ is defined and solved. As the cases selected under similarity₁ are linked to a different solution, the main point is to discover the principles backing each one of those solutions. Since these principles by definition point in different directions, a common scenario of principles in conflict is created.¹⁹

- Car case (c) Rule₁ (“Cars are not allowed into the park.”) is backed by principle P_1 .
- Principle P_1 : “The environment should be protected by law.”
- Bicycles case (b) Rule₂ (“Bicycles are allowed into the park.”) is backed by principle P_2 .
- Principle P_2 : “Everyone has freedom of action.”²⁰
- With the question if motorcycles are allowed into the park, principles P_1 and P_2 conflict.

In the case of conflicting principles, the solution is obtained through balancing, namely the use of the “weight formula”: here, principles are weighed and one of them will prevail over the other. Accordingly, the prevailing principle yields the solution of the case and a “collision rule” is created with the case facts and the consequence withdrawn from the winning principle.²¹ With this approach, the problem of similarity₂ is transformed into the problem of the weighing of principles, which encompasses, as the partial reducibility thesis sustains, a significant advantage: instead of asking which terms are similar₂, only simple balancing must be carried out.²²

- Principle P_1 (“The environment should be protected by law.”) $\rightarrow m \sim P$ park.
- Principle P_2 (“Everyone has freedom of action.”) $\rightarrow m P$ park.
- If with the “weight formula” $P_1 > P_2 \rightarrow m \sim P$ park.

19 Brożek 2008: 194.

20 In its original presentation, the principle mentioned here is “people are entitled to rest actively” (Brożek 2008: 194). However, as is legally more accurate, the principle used in the text is that adopted, in the same context, by Alexy (2010: 16). The change does not affect the scheme in any way.

21 On the “collision rule” (law of competing principles), for instance, Alexy 2002: 54, and Pino 2010: 190 and ff.

22 Brożek 2008: 195.

5 FIRST PROBLEM: RANDOM WEIGHING OUTCOME

Despite it being of undeniable interest, the partial reducibility thesis poses several problems. The first and most intuitive concerns the choice of the principles that stand behind the rules governing similar₁ cases. Albeit constructed as a simplified model, the thesis seems to disregard the fact that different principles may be available to back the rules that sustain similar₁ cases. This is immediately relevant for two reasons. First, because it shows that the principle choice is more complex than it seems and, mainly, because the final result depends on the principles brought to weighing.²³

- Car case (*c*): Rule₁ (“Cars are not allowed into the park”) is backed by principle P₁ and/or principle P₃.
- Principle P₁: “The environment should be protected by law.”
- Principle P₃: “Physical integrity is inviolable.”
- Bicycles case (*b*): Rule₂ (“Bicycles are allowed into the park”) is backed by principle P₂.
- Principle P₂: “Everyone has freedom of action.”
- Legal question is still the same: Are motorcycles (*m*) allowed into the park?
- If interferences of P₂ in P₁ and in P₃ are different (how motorcycles pollute and how they can damage physical integrity), the weighing result can differ.
- Hypothetically: P₁ > P₂ → *m* ~P park, but P₃ < P₂ → *m* P park.

6 SECOND PROBLEM: ANALOGY COVERED BY BALANCING

Related to the previous point, the partial reducibility thesis also seems to disregard the fact that the principles chosen to carry out the weighing process are materially connected with the factors used to compare cases: each principle within balancing describes a factor for the cases selected during the similarity₁ phase. Therefore, not only does the choice of a principle describe the selection of a factor, but, furthermore, the balancing process is merely set out as a scheme for organising the choice of the decisive factor. Hence, this leads to the claim that balancing is used here only as a tool for determining the meta-factor: among the factors selected by the principles chosen, balancing just decides which one of them prevails. Under the cover of balancing, proper analogy is performed.²⁴

23 Of course, nothing prevents there being more than one principle on each side of the question, requesting an extended “weight formula” (Alexy 2002: 409; Sieckmann 2010: 110). However, the point is that, through the use of balancing, analogy becomes dependent on a dubious choice among principles (disturbing the consistency of the analogy outcome).

24 When one considers that balancing, in its proper sense, just decides which norm among all those applicable is to be applied to a case, it becomes clear that, when used for selecting one

- For c , b and m : f_1 (pollutant), f_2 (freedom of movement), f_3 (danger to pedestrians).
- Principles P_1 , P_2 and P_3 represent f_1 , f_2 , and f_3 .
- Principle P_1 : “The environment should be protected by law.”; in f_1 : $m = c$; $m \neq b$.
- Principle P_2 : “Everyone has freedom of action.”; in f_2 : $m = c$; $m = b$.
- Principle P_3 : “Physical integrity is inviolable”; in f_3 : $m \neq c$; $m = b$.
- Selection of principles P_1 and P_2 means that the “main factors” are f_1 and f_2 .
- If $P_1 > P_2$, then the decisive factor is f_1 : $m = c$; $m \neq b$.
- $P_1 \rightarrow f_1 \rightarrow m = c$.

7 THIRD PROBLEM: BALANCING IRRELEVANT PRINCIPLES

Taking into account that, under the partial reducibility thesis, the replacement of the similarity₂ phase is achieved by balancing principles that support rules inapplicable to a case, another problem arises: the irrelevance of the principles called on by those rules. In fact, in spite of similarity₁, there is nothing to ensure that those principles are not irrelevant for the unregulated case, in which case they would be unable to justify any solution. The main reason for this result comes from the inapplicability of one of those principles to the case requiring an answer, which follows from the fact that the features describing that case do not match the principle's antecedent. Under this scenario, the principles called on under similarity₁ play no role here. This leads to the following claim: the partial reducibility of analogy to balancing only works if the unregulated case, in spite of similarity₁, is analogous to the regulated case to the point that it triggers exactly the same principles as those backing the rules whose application by analogy is being considered.

- Car case (c): Rule₁ (“Cars are not allowed into the park”) is backed by principle P_1 .

Principle P_1 : “The environment should be protected by law.”

- Bicycles case (b): Rule₂ (“Bicycles are allowed into the park”) is backed by principle P_2 .
- Principle P_2 : “Everyone has freedom of action.”
- New similarity₂ case: May a memorial tank (mt) enter the park?
- No norm on memorial tank (mt) entrance into the park.

of the distinct inapplicable norms for a case, balancing merely defines the proximity and distance between the case and each one of the inapplicable norms.

- Under similarity₁, nothing has changed: the question is still the permission to enter.
- Balancing of principles P₁ and P₂ for *mt* is meaningless: at least, principle P₂ is irrelevant.
- The unregulated case does not fulfil the antecedent of principle P₂.²⁵

8 FOURTH PROBLEM: NOT ENOUGH PRINCIPLES FOR BALANCING

The obstacle to the partial reducibility thesis that underlies the previous problem can be extended to all normative situations in which the rules governing similar₁ cases are not based on any principle or, probably most often, in which those rules are supported by the same principle. In such situations no balancing is possible for the simple reason that there are not enough principles in play. It is known that balancing is an operation used to solve the normative conflicts unsolvable by norms of conflicts: for that reason, balancing requires two or more norms.²⁶ Therefore, when cases are backed by the same principle, no balancing can take place.

- Rule₁: “Car circulation is restricted to three days per week.”
- Rule₂: “Plates with an even first digit: Mondays, Wednesdays and Fridays.”
- Rule₃: “Plates with an odd first digit: Tuesdays, Thursdays and Saturdays.”
- No rule was enacted for the few cars whose plate starts with a letter.
- Even first digit case (*e*): Rule₂ is backed by principle P₁.
- Odd first digit case (*o*): Rule₃ is backed by principle P₁.
- Principle P₁: “The environment should be protected by law.”
- Legal question: When can cars whose plates start with a letter circulate?
- Balancing is unusable: principle P₁ backs both rules; no normative conflict exists.

9 THE BACKGROUND PROBLEM: ANALOGY AND BALANCING DO NOT MATCH

All of the problems with the partial reducibility thesis identified so far are, in a sense, no more than a consequence of a larger one: analogy and balancing do

²⁵ This is even more visible if it is used as the original principle P₂: “people are entitled to rest actively” (Brożek 2008: 194). It seems undeniable that in any circumstance the entrance of the memorial tank can be an instance of resting actively.

²⁶ For instance, Pino 2010: 185 and ff., and Duarte 2010: 56 and ff.

not match. This becomes rather clearer when we take into account the fact that each one of these basic operations demands the opposite normative circumstances: while analogy depends on the absence of an applicable norm, balancing relies on the applicability of two or more norms. Based on their reverse opportunity, this opposition points towards a mutual exclusion. A case requiring an analogy does not call for balancing and *vice-versa*.

- Case (*m*): “Motorcycle entrance into the park.”
- Normative circumstances of analogy: No norm on *m*.
- Normative circumstances of balancing: About *m*, principle P_1 conflicts with principle P_2 .

The probable explanation for the overlap between analogy and balancing, notwithstanding their mutual exclusion, seems to be in a reductive understanding of the role played by principles as effective regulating norms. Acceptance of principles as norms like all others, which is an inevitable consequence of their deontic character, has to imply that they govern cases in the same way that rules do. All the particular features of principles, starting with their ability to be applied in various degrees, do not interfere with the fact that they provide for legal solutions as well: if a case fulfils the antecedent of a principle, then there is a legal consequence for that case. It is obvious that, if this principle conflicts with another, the solution becomes dependent on their balancing. However, once there is a weighing outcome, a final consequence is obtained and there is no place for intromitting an analogy.

- Legal question: Are motorcycles allowed in the park?
- Principle P_1 : “The environment should be protected by law.”
- Principle P_2 : “Everyone has freedom of action.”
- Motorcycle entrance is an instance of principles P_1 and P_2 .
- No norm on “car entrance into the park”.
- No norm on “bicycle entrance into the park”.
- Legal solution is obtained through balancing of principles P_1 and P_2 .

The reductive understanding of the role played by principles as effective regulating norms turns out to affect, then, the proper comprehension of what a gap is. If it still represents an absence of regulation, its extension must consider that both principles and rules are in the same way providing legal consequences, even though principles, bearing expansive antecedents which cover larger amounts of reality, have considerably narrowed the space for unregulated cases. Thus, for the application of law no gap exists if the case at hand is an instance of a principle's antecedent: if it triggers a rule, the rule is applicable, but if it trig-

gers 'only' a principle, the case is legally foreseen as well and, with or without balancing, the principle has to be applied.²⁷

- Legal question: Are motorcycles allowed in the park?
- Principle P₁: “The environment should be protected by law.”
- Principle P₂: “Everyone has freedom of action.”
- Motorcycle entrance is an instance of principles P₁ and P₂.
- Rule₁: “Cars are not allowed into the park.”
- Rule₂: “Bicycles are allowed into the park.”
- Legal solution is not achieved by analogy.
- Legal solution is still obtained through balancing of principles P₁ and P₂.
- Legal question: *Are cars allowed in the park?*
- Legal solution is given by Rule₁.

It seems that what is meant by “gap” has significantly changed pursuant to the distinction between principles and rules and, consequently, to what follows from the “optimisation requirement” character of principles.²⁸ If one accepts that both principles and rules stipulate legal consequences, and thus that both are capable of solving cases in the very same way, the extension of “gap” now has a range that seems to cover only two normative situations: (i) the unlikely situation in which no norm is applicable to a case, neither a rule nor a principle, and (ii) the situation in which a rule, blocking the applicability of principles, has a consequence that has not been specified for a category that, among others, also belongs to its sphere.²⁹ If these normative situations define what can enter into the extension of “gap”, it follows therefrom that the basic operation of analogy is confined to them.³⁰

27 But surely without analogy, as its normative circumstances are not present. This justifies why some forms of alleged analogy cannot be considered as such (for instance, Verheij & Hage 1994: 65; also in the case of a reductionist approach, Kaptein 2005: 502). Naturally, with regard to the concept of the gap, only normative gaps are relevant here (on the distinction between normative and axiological gaps, Nino 2003: 281, and Rodríguez 2000: 152).

28 For instance, Alexy 2002: 47 and ff., and Brożek 2012: 223.

29 The point here is that normative gaps exist only at the level of rules if rules created the gap or at the level of principles if any is applicable (Ruiz Manero 2005: 123). The following example, in the case of gap₂, shows what is meant by this. On the other hand, it is important to note that the common distinction between explicit and implicit principles (for instance, Burazin 2014: 171) is of no consequence for this matter. If a principle is unwritten, one of two scenarios has to be real: it is or is not a norm of a set (legal order). If the second alternative is the case, there is no principle at all and nothing follows from it. But, if it is an effective norm of a set, which is naturally the case with a customary source, then it behaves as all principles do and is no different from written principles. Being written or not is irrelevant to defining a legal consequence, provided that it is (accepted as) a norm belonging to a set.

30 All this presupposes that analogy, as an operation adoptable in order to create a decision-norm not enacted by the normative authority, depends on a norm allowing its use under a specific condition and the fact that this condition is the existence of a gap.

- Case₁: Circulation of cars whose plates start with a letter.
- Gap situation₁: If case₁ is not covered by any rule or any principle (gap₁).
- Gap situation₂: If existing norms have unspecified consequences for case₁, for instance:
- Rule₁: “Car circulation is restricted to three days per week.”
- Rule₂: “Plates with an even first digit: Mondays, Wednesdays and Fridays.”
- Rule₃: “Plates with an odd first digit: Tuesdays, Thursdays and Saturdays.”
- No rule was enacted for the few cars whose plates start with a letter (gap₂).

10 FINAL REMARK

Analogy is goal-oriented: no choice among comparison factors, particularly at the level of similarity₂, can be carried out except in view of some purpose. Without some such purpose, the meta-factor deciding which factor prevails is indefinable and, for this reason, the choice among factors lacks justification and becomes a strictly arbitrary option. Since principles provide the ends adopted by a legal order both on a larger scale and more perceptibly, and since these ends are usually introduced in analogy in order to solve the meta-factor problem, the goal-oriented character of analogy has found its main source of operability in these kind of norms. Here, however, principles play a double role: as “end-providers” and, while giving direct solutions for cases, as “gap-decreasers”. This duplicity has to be treated carefully: whenever principles govern a case, they immediately put analogy aside and thus remove the possibility of them constituting the criteria with regard to what is similar to what.

References

- Aulis AARNIO, 1987: *The Rational as Reasonable*. Dordrecht: Kluwer.
- Robert ALEXI, 2002: *Theory of Constitutional Rights*. Oxford: Oxford University Press.
- , 2010: Two or Three? *On the Nature of Legal Principles*. Ed. Martin Borowski. Stuttgart: Franz Steiner Verlag. 9–18.
- Michał ARASZKIEWICZ, 2011: Analogy, Similarity and Factors. *Proceedings of the 13th International Conference on Artificial Intelligence and Law*. New York: ACM. 101–105.
- Scott BREWER, 1996: Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Arguments by Analogy. *Harvard Law Review* 109 (1996) 5. 923–1029.
- Bartosz BROŻEK, 2008: Analogy in Legal Discourse. *Archiv für Rechts- und Sozialphilosophie* 94 (2008) 2. 188–201.
- , 2012: Legal Rules and Principles: a Theory Revisited. *i-Lex, Rivista di Scienze Giuridiche, Scienze Cognitive ed Intelligenza Artificiale* (2012) 17. 205–226.

- Luka BURAZIN, 2014: Antinomies Between Implicit Legal Principles: a Solution to the Total-Partial Antinomy. *Courts, Interpretation, The Rule of Law*. Eds. Miodrag Jovanović and Kenneth E. Himma. The Hague: Eleven International Publishing. 167–180.
- Thomas BUSTAMANTE, 2012: Finding Analogies Between Cases. On Robert Alexy's Third Basic Operation in the Application of Law. *On the Philosophy of Precedent*. Ed. Carlos Bernal Pulido. Stuttgart: Franz Steiner Verlag. 59–71.
- Todd DAVIES & Stuart RUSSELL, 1987: A Logical Approach to Reasoning by Analogy. *Proceedings of the Tenth International Joint Conference on Artificial Intelligence*. Ed. John P. McDermott. Burlington: Morgan Kaufmann Publishers. 264–270.
- David DUARTE, 2010: Normative Conditions of Balancing: Drawing Up The Boundaries of Normative Conflicts That Lead to Balances. *Legal Reasoning: the Methods of Balancing*. Ed. Jan Sieckmann. Stuttgart: Franz Steiner Verlag. 51–62.
- Riccardo GUASTINI, 1993: *Le fonti del diritto e l'interpretazione*. Milano: Giuffrè.
- Hendrik KAPTEIN, 2005: Legal Progress Through Pragma-Dialectics? Prospects Beyond Analogy and A Contrario Argument. *Argumentation* 19 (2005) 4. 497–507.
- Fabrizio MACAGNO & Douglas WALTON, 2009: Argument from Analogy in Law, the Classical Tradition, and Recent Theories. *Philosophy & Rhetoric* 42 (2009) 2. 154–182.
- Juan Ruiz MANERO, 2005: Algunas Concepciones del Derecho y sus Lagunas. *Lagunas en el Derecho*. Madrid: Marcial Pons. 103–126.
- Carlos Santiago NINO, 2003: *Introducción al Análisis del Derecho*. 11ª ed. Barcelona: Ariel.
- Aleksander PECZENIK, 1996: Jumps and Logic in the Law. *Artificial Intelligence and Law* 4 (1996) 3–4. 297–329.
- Giorgio PINO, 2010: *Diritti e Interpretazione*. Bologna: Il Mulino.
- Jorge Luis RODRÍGUEZ, 2000: Axiological Gaps and Normative Relevance. *Archiv für Rechts- und Sozialphilosophie* 86 (2000). 151–167.
- Bram ROTH, 2000: New Reasoning Patterns in Analogical Legal Case-Based Reasoning: An Informal Investigation. *Legal Knowledge and Information Systems*. Ed. Joost Breuker. Amsterdam: IOS Press. 113–122.
- Cameron SHELLEY, 2002: Analogy Counterarguments and the Acceptability of Analogical Hypotheses. *British Journal of Philosophy of Science* 53 (2002) 4. 477–496.
- Jan SIECKMANN, 2010: Balancing, Optimisation, and Alexy's "Weight Formula". *Legal Reasoning: the Methods of Balancing*. Ed. Jan Sieckmann. Stuttgart: Franz Steiner Verlag. 101–118.
- Bart VERHEIJ & Jaap HAGE, 1994: Reasoning by Analogy: A Formal Reconstruction. *Legal Knowledge Based Systems. The Relations with Legal Theory*. Ed. Henry Prakken. Lelystad: Koninklijke Vermande. 65–78.
- Lloyd WEINREB, 2005: *Legal Reason. The Use of Analogy in Legal Argument*. New York: Cambridge University Press.

*Synopsis***David Duarte****Analogy and Balancing: The Partial Reducibility Thesis and Its Problems**

SLO. | *Analogno sklepanje in tehtanje: teza o delni zvedljivosti in njeni problemi.* Avtor z analizo zgradbe in poteka analognega sklepanja poda kritiko teze o delni zvedljivosti, tj. teze, po kateri je analogno sklepanje – z izjemo tistega koraka, ki ustreza strogi analogiji – mogoče razložiti kot obliko tehtanja. Avtor najprej izpostavi nekatere probleme omenjene teze; na primer nenujnost zvedljivosti in dejstvo, da se pod krinko tehtanja opravlja prava analogija. Osrednje sporočilo razprave pa je trditev, da analognega sklepanja ni mogoče uspešno zvesti na obliko tehtanja.

Ključne besede: analogija, antecedent, tehtanje, dejavniki primerjave, praznine, teza o delni zvedljivosti, načela, pravila, podobnost, subsumpcija

ENG. | With an analysis of the structure and the sequence of analogy, the paper is mainly a critique to the partial reducibility thesis: a thesis sustaining that analogy, besides a strictly analogical step, is in the remaining part reducible to balancing. Thus, the paper points out some problems raised by the partial reducibility thesis, such as the contingency of reducibility or the fact that a proper analogy is done under the cover of a balancing. The main point is, however, the claim that analogy and balancing have opposite normative conditions, being this premise the reason to a structural explanation for the unacceptability of the reducibility enterprise.

Key words: analogy, antecedent, balancing, factors of comparison, gaps, partial reducibility thesis, principles, rules, similarity, subsumption

Summary: 1. Three as the Starting Point for Analogy and Balancing. — 2. Analogy by Steps: Some Basic Considerations Concerning the Sequence. — 3. The Same Steps in a Legal Cases Analogy. — 4. The Partial Reducibility Thesis. — 5. First Problem: Random Weighing Outcome. — 6. Second Problem: Analogy Covered by Balancing. — 7. Third Problem: Balancing Irrelevant Principles. — 8. Fourth Problem: Not Enough Principles for Balancing. — 9. The Background Problem: Analogy and Balancing Do Not Match. — 10. Final Remark.

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