Bartosz Brożek*

Analogno sklepanje in tehtanje
Odgovor Davidu Duarteju

Cilj članka je odgovoriti na kritiko, ki jo je David Duarte usmeril zoper tezo o delni zvedljivosti, tj. trditev, ki jo Brožek zagovarja v eni izmed svojih knjig in pravi, da je analogno sklepanje deloma zvedljivo na tehtanje pravnih načel. Prvi del članka oriše okvir, ki je avtorju služil pri oblikovanju teze o zvedljivosti, tj. Alexyjevo teorijo pravnega sklepanja. Drugi del je namenjen ovrženju Duartejevih ugovorov. Ti naj namreč ne bi upoštevali prej omenjenega okvira. V zadnjem delu avtor še zatrdi, da so nekateri vidiki njegove teorije analognega sklepanja neodvisni od omenjenega teoretskega okvira in zato uporabni za katerokoli pojmovanje analogije v pravu.

Ključne besede: analogija, tehtanje, teza o delni zvedljivosti

1 TEZA O DELNI ZVEDLJIVOSTI IN ALEXYJEV TEORETSKI OKVIR

V enem svojih del (Brožek 2008) sem predlagal, da je mogoče – v okviru Alexyjevega pojmovanja pravnega sklepanja – analogijo delno zvesti na tehtanje pravnih načel. Postopek, v grobem, zgleda tako:

(1) Znajdemo se pred problematičnim primerom, tj. takšnim, za katerega ni nobenega neposredno uporabljivega pravnega pravila

(2) Prepoznamo primere, ki so *prima facie* podobni (tj. podobni$_1$) predmetnemu primeru in za katere obstajajo nekatere rešitve, tj. za katere imamo neposredno uporabljiva pravna pravila.

(3) Prepoznamo načela v ozadju, ki utemeljujejo pravna pravila, urejajoča *prima facie* podobne primere.

(4) S tehtanjem načel pridemo do odločitve, katero načelo naj ureja predmetni primer. (S tem tudi doženemo, kateri od *prima facie* podobnih primerov je predmetnemu primeru pomembno podoben – ali podoben$_2$).

(5) Ravnanje, ki ga predpisuje močnejše načelo, predstavlja rešitev za predmetni primer.

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Na ta način, tako sem trdil, je mogoče rešiti največji problem katere koli razlage analognega sklepanja v pravu, tj. problem pomembne podobnosti. Navadno je precej preprosto določiti vrsto že rešenih pravnih primerov, ki so – tako ali drugače – podobni predmetnemu primeru. Težko pa je odločiti, kateri od teh primerov je predmetnemu pomembno podoben, tj. kateri naj služi kot podlaga za odločitev po analogiji. Menim, da sem s preoblikovanjem tega problema v tehtanje načel nepoznan postopek (npr. izbiranje »prevladujočega dejavnika«, ki ga predmetni primer deli z enim od *prima facie* podobnih primerov) zamenjal s poznanim (tj. s tehtanjem načel; ta je, seveda, poznan tistim, ki so seznanjeni z Alexyjevim pogledom na pravno sklepanje in se z njim strinjajo). To pomeni, da je mogoče analogno sklepanje razdeliti v dve fazi. Prva je sestavljena iz prepoznave primerov, ki so *prima facie* podobni neurejenemu primeru. Ta faza je v celoti hevristična in jo je mogoče preskočiti (kot takrat, ko problematični primer rešimo brez premišljevanja o podobnih primerih in se namesto tega neposredno ozremo k uporabljivim načelom). V drugi fazi se oblikuje utemeljitev, sestavljena pa je (ta faza) iz tehtanja pravnih načel, ki urejajo *prima facie* podobne primere. Še pomembneje od tega je, kot sem zatrjeval v istem zapisu, da analogno sklepanje »deluje« – vsaj v splošnem – zato, ker navadno obstaja več kot en primer, ki je *prima facie* podoben predmetnemu primeru. Seveda obstajajo tudi primeri, v katerih analogija deluje zgolj z enim *prima facie* podobnim primerom, čeprav to – vsaj tako sem trdil – ni tipično. Da bi prav ovrednotili mehanizem analognega sklepanja, moramo upoštevati njegovo dialektično razsežnost. Prav ta namreč analogiji daje racionalnost, saj tehtanju omogoči, da stopi na oder.

Preden preučim ugovore, ki jih David Duarte niza zoper ta pogled na analogno sklepanje in tezo o delni zvedljivosti, je najprej treba nameniti nekaj besed Alexyjevi teoriji, ki je moji analizi služila kot okvir. Sledeč Ronaldu Dworkinu Alexy razlikuje med pravili in načeli:

> Načela so norme, ki zahtevajo, da se v danih pravnih in dejanskih okoliščinah nekaj uresniči v največji možni meri. Načela so zahteve po optimizaciji, zaznamovane z dejstvom, da jih je mogoče uresničiti v različni meri, in s tem, da je primerna mera uresničitve odvisna ne zgolj od tega, kaj je dejansko mogoče, temveč tudi od tega, kaj je pravno mogoče. (Alexy 2002: 47)

Na drugi strani so pravila »norme, ki so vedno bodisi izpolnjene bodisi ne. Če je pravilo veljavno uporabljivo, potem se zahteva točno to, kar pravilo pravi, nič več in nič manj« (Alexy 2002: 48).

Ko sprejmemo tezo, da je pravni sistem sestavljen iz pravil in načel (osebno imam pomisleke o tej delitvi; glej Brožek 2012), ima to pomembne teoretične posledice. Te posledice je najlaže doumeti, če si zamislimo pravni sistem, sestavljen zgolj iz načel, tj. iz »zahtev po optimizaciji«, kot so »Okolje bi moralo biti pravno varovano« ali »Vsakdo ima svobodo gibanja«. V takem primeru bi

bila uporaba prava izjemno zapletena, saj bi (najbrž) moral v vsakem primeru sodnik izpeljati postopek tehtanja (tj. v vsakem primeru bi obstajala načela, ki vodijo do nasprotujočih si zaključkov). To je razlog, da zakonodajalec uporabi pravna pravila. Ta je namreč mogoče uporabljati s preprostim modus ponens. Vseeno je pomembno pripomniti, da so pravna pravila že rezultat prehodnega tehtanja nekih načel, čeprav to tehtanje ni izvedeno v povezavi s posameznim primerom, temveč v povezavi s skupino primerov. Tako je pravilo »Vozilom ni dovoljen vstop v park« rezultat tehtanja, ki je bilo izvedeno v okviru zakonodajnega postopka, v katerem se med seboj tehtajo načela kot »Okolje bi moralo biti pravno varovano« in »Vsakdo ima svobodo gibanja« zato, da bi oblikovali pravno pravilo, ki naj ureja splošen primer. Glede na to, da zakonodajni postopek ne more upoštevati vseh možnih okoliščin, v katerih se pojavi vprašanje, ali lahko neko vozilo (recimo reševalno vozilo, ki prevaža resno poškodovano osebo) vstopi v park, je še vedno mogoče, da uporabo pravila v konkretnem primeru prepreči neko drugo načelo (npr. »Pravo mora varovati človeško življenje«). Vendar pa Alexy opozarja, da so takšni primeri redki, saj je za to, da bi načelo prevladalo nad pravilom, treba, da to pretehta ne le nad načelom, ki utemeljuje pravilo, ampak tudi nad t. i. formalnimi načeli, kot so »Pravila, ki jih sprejme oblast v okviru svojih pristojnosti, je treba spoštovati« ali »Brez dobrega razloga se ne sme odstopiti od vzpostavljene prakse« (Alexy 2002: 58). A to praktično ne vpliva na opredelitev razmerja med pravili in načeli: slednja so logično predhodna v razmerju do prvih v smislu, da je vsako pravilo rezultat tehtanja določenih načel (glede na skupino primerov). Prav mogoče si je namreč zamisliti pravni sistem, sestavljen zgolj iz načel, nemogoče pa si je zamisliti pravni sistem, ki bi bil sestavljen zgolj iz pravil (ta trditev izhaja iz Alexyjevega vztrajanja, da je pravni diskurz trdno zasidran v splošnem praktičnem diskruzu; prim. Brožek 2007: 160–189). Še ena posledica Alexyjevega razumevanja pravnega sistema je tudi trditev, da v pravu ni pravih praznin (tu se strinjam z Duartejevim zaključkom; prim. Duarte 2015: 7). Edino vrsto »praznin«, o katerih je mogoče govoriti, pomeni situacija, v kateri pravno pravilo, ki bi urejalo predmetni primer, ne obstaja; vendar pa vedno obstajajo načela, ki so uporabna v kateri koli dani okoliščini.

2 DUARTEJEVI UGOVORI

Naj se zdaj obrnem k preučitvi ugovorov Davida Duarteja zoper tezo o delni zvedljivosti. Prvič, Duarte trdi, da naj bi bilo težko natančno določiti načela, ki stojijo za pravnimi pravili, urejajočimi *prima facie* podobne primere; nadalje pripomni, da je takšnih načel lahko več. Tako lahko, na primer, pravilo, ki prepoveduje vstop vozilom v park, podpirata tako načelo, ki se nanaša na varovanje okolja, kot načelo, ki se nanaša na varnost na javnih mestih. Duartejeva prva

skrb je pristna, vendar gre za ugovor zoper Alexyjevo teorijo pravnega sklepanja na splošno, in ne zoper tezo o delni zvedljivosti. Alexy jasno trdi, da je mogoče prepoznati načela, ki »stojijo za« danim pravnim pravilom. To se zahteva, med drugim, ko odločamo v konfliktu med pravnim pravilom in pravnim načelom. V takem primeru tehtamo med spornim načelom na eni strani in, na drugi strani, tistim načelom, ki stoji (skupaj s formalnimi načeli) za ubeseditvijo pravila. Menim, da bi bil Alexyjev odgovor na ta problem precej enostaven: da bi prepoznali pravna načela, ki podpirajo dano pravno pravilo, se opiramo na zdrav razum, pa na splošna pravna določila pravnega akta, v katerem je pravilo izraženo, kakor tudi na dokumente, proizvedene v toku zakonodajnega postopka, ter na doktrino. Duartejevo drugo skrb – da bi lahko za določenim pravilom stalo več kot eno načelo, zaradi česar bi bilo za izvedbo tehtanja treba izbrati enega – je prepoznal in nanjo neposredno odgovoril že Alexy sam. V enem svojih del (Alexy 2007) je razdelal svoje pojmovanje utežnega obrazca, tako da omogoča sočasno tehtanje več načel.

Drugič, Duarte trdi, da je tehtanje – kot se ga uporablja pri analognem sklepanju – zgolj fasada: kar se resnično dogaja, je:

> določanje metadejavnika: glede dejavnikov, ki jih določijo izbrana načela, tehtanje odloči zgolj to, kateri izmed njih bo prevladal. Pod krinko tehtanja poteka resnično analogno sklepanje (Duarte 2015: 5).

Duarteja sam razumem takole: katera koli dva primera sta si tako podobna kot sta tudi različna na nešteto načinov. Avtomobile in kolesa, na primer, je mogoče primerjati na podlagi neskončnega števila dejavnikov: cene, hitrosti, kovinske teksture, udobja, lepote, kako zadovoljijo Johna itd. (Duarte 2015: 2). Analogno sklepanje stremi k prepoznavi merila, ki bi določilo, katerega od možnih dejavnikov primerjave je treba upoštevati, da bi med primeroma vzpostavili odnos pomembne podobnosti in tako razrešili predmetni primer. Ob tem se zdi, da je za Duarteja izbira tega metadejavnika bistvo analognega sklepanja. Iz tega pa sledi, da je uporaba postopka tehtanja, ki sem ga za določitev pomembne podobnosti med dvema primeroma predlagal jaz, zgolj »krinka« za določitev takšnega metadejavnika. V resnici se izbere bistveni dejavnik, to izbiro pa se opiše, »kot da bi« se tikala nečesa popolnoma drugega. Mislim, da tu Duarte zgreši nekaj pomembnega. Temeljni razlog za vpeljavo teze o delni zvedljivosti je bil v tem, da se odpravi vsakršno razpravo o dejavnikih in metadejavnikih, saj je takšen govor preprosto zavajajoč. To je vidno že na površju Duartejevega argumenta: ko primerja dva primera – ali je s kolesom dovoljeno vstopiti v park in ali je z avtomobilom dovoljeno vstopiti v park – končno primerja avtomobile in kolesa, ne pa primerov! Po moji razlagi je situacija drugačna. Trdim namreč, da je analogno sklepanje povezano z vzpostavitvijo dveh vrst podobnosti. *Prima facie* podobnost med dvema primeroma se nanaša na vprašanje, ali se ta primera nanašata na isto vrsto problema. Problem bi bilo mogoče najpre-

prosteje opredeliti kot par protislovnih izjav (ne lastnosti!), npr. {p, ~p}, kjer p pomeni »dovoljen je vstop v park« (seveda je mogoče oblikovati bolj zapleteno in intuitivno smelo opredelitev problema). To, da sta dva primera *prima facie* podobna, pomeni, da sta del istovrstnih problemov. Naj ob tem opozorim na dejstvo, da je ob takšnem govoru sklicevanje na kakršne koli dejavnike (kot te razume Duarte) nepotrebno. Kar je dobro, saj sta si – ko analogijo pojmujemo z dejavniki – katera koli dva primera podobna *prima facie* (s čimer postane sam pojem *prima facie* podobnosti neuporaben); hkrati pa ni res, da katera koli dva primera zadevata istovrstni problem. Poleg tega je po tezi o delni zvedljivosti, druga faza analognega sklepanja sestavljena iz tehtanja pravnih načel, kar tudi ne vključuje dejavnikov. S tem ne trdim, da se metadejavnike določa skozi tehtanje načel, ampak da je treba zavrniti že samo misel na mehanizme analognega sklepanja, ki temeljijo na dejavnikih. Dodatna posledica tega teoretskega manevra je v tem, da se analogija – razumljena skladno s tezo o delni zvedljivosti – trdno vklopi v širše pojmovanje utemeljitve (npr. v Alexyjevo teorijo praktičnega diskurza). Če se držimo pojmovanja analognega sklepanja z dejavniki, smo v precej težjem teoretskem položaju, kar se tiče utemeljevalne moči analognega sklepanja.

Tretjič, Duarte ugotavlja, »da nič ne zagotavlja, da /.../ načela [prepoznana z določitvijo *prima facie* podobnih primerov] niso nepomembna za neurejeni primer in torej ne bi mogla utemeljiti nobene odločitve« (Duarte 2015: 6). Tako bi bilo, če bi bili *prima facie* podobni primeri določeni na podlagi podobnosti nekih dejavnikov; ko pa je *prima facie* podobnost omejena na primere, ki zadevajo istovrstni problem (kot smo to opredelili prej), ta ugovor ne vzdrži več: nobena nevarnost namreč ni več, da pravna načela iz analognega primera ne bi bila v ničemer pomembna za predmetni primer.

Končno, Duarte še trdi, da »so vsi problemi s tezo o delni zvedljivosti /.../ zgolj posledica večjega problema: tj., da se analogno sklepanje in tehtanje ne ujemata« (Duarte 2015: 6). To je domnevno utemeljeno z dejstvom, da analogno sklepanje in tehtanje zahtevata »nasprotujoče si normativne okoliščine: medtem ko je analogno sklepanje odvisno od odsotnosti uporabljive norme, zahteva tehtanje uporabljivost dveh norm ali več« (Duarte 2015: 6). Vendar, kot sem skušal pokazati prej, ni tako; vsaj ne v okviru Alexyjeve teorije prava in pravnega sklepanja, v katerem nikoli ni mogoče priti do situacije, ko ne bi imeli nobene uporabljive pravne norme (tj. bodisi pravila bodisi načela). Edina možnost za sprožitev analognega sklepanja se pojavi, kadar predmetni primer ni urejen z nobenim pravnim pravilom (vedno pa namreč obstaja vsaj eno pomembno in uporabljivo načelo).

3 SKLEP

Naj ponovim glavne poudarke mojega argumenta:

(1) Teza o delni zvedljivosti je smiselna zgolj v okviru Alexyjevega pogleda na pravo (ali temu podobnega pojmovanja), po katerem je pravo sestavljeno tako iz pravil kot iz načel in po katerem v pravnem sistemu ni resničnih pravnih praznin.

(2) Teza o delni zvedljivosti zamenjuje nepoznan in nekoliko skrivnosten postopek določanja pomembne podobnosti med pravnimi primeri z bolj poznanim postopkom tehtanja načel.

(3) V tem okviru je analogija dvofazni postopek, sestavljen iz hevristične faze (tj. prepoznava *prima facie* podobnih primerov in načel, ki te urejajo) ter faze oblikovanja utemeljitve (tj. tehtanje pravnih načel).

(4) Moj predlog stremi k odpravi pogleda, ki analogno sklepanje razčlenjuje z zatekanjem k dejavnikom; namesto tega predlagam, da se *prima facie* podobnost med primeri ugotovi s sklicevanjem na problem, ki zadeva predmetni primer, pomembno podobnost pa naj se določi s postopkom tehtanja. Namen predloga ni v drugačni ubeseditvi tega, kar trdijo zagovorniki na dejavnikih utemeljenih pogledov na analogno sklepanje; mišljen je kot bistveno drugačno pojmovanje analognega sklepanja.

(5) Bistvena ugotovitev mojega predloga je, da je analogno sklepanje – v splošnem primeru – dialektično. Na neki način skušam obrniti tradicionalni pogled na analogno sklepanje. Po tradicionalnem pogledu naj bi vedno, kadar imamo opravka z neurejenim primerom, neutrudno iskali neki drug primer, ki je prvemu pomembno podoben. Sam pa trdim, da je navadno ob katerem koli neurejenem primeru lahko prepoznati vrsto primerov, ki so del podobnih problemov, pri čemer je težji del odločitev, kateri od teh primerov je predmetnemu primeru pomembno podoben. Obstoj več *prima facie* podobnih primerov omogoča razlikovanje in primerjavo različnih rešitev za predmetni primer, kar pa olajša tudi določitev pomembne podobnosti in s tem razrešitev predmetnega primera.

Še zadnja pripomba: vedno znova sem ponavljal, da je teza o delni zvedljivosti smiselna zgolj ob opiranju na Alexyjevo teorijo pravnega sklepanja. Kljub temu pa menim, da so nekateri vidiki analognega sklepanja, ki sem jih skušal osvetliti – predvsem tisti, na katere se sklicujem v točkah (4) in (5) – pomembni za vsak teoretski poskus razlage analognega sklepanja v pravu.

Iz angleškega izvirnika prevedel
Matija Žgur.

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Analogy and Balancing: A Reply to David Duarte

The goal of the paper is to reply to David Duarte's critique of the partial reducibility thesis – a claim I defended in one of my books that analogy is partly reducible to the balancing of legal principles. In the first part of the paper I sketch the framework against which the thesis was formulated, i.e. Robert Alexy's theory of legal reasoning. In the second part I attempt to rebut Duarte's objections, pointing out that they do not take into account the Alexian background of my considerations. Finally, I suggest that some aspects of my theory of analogical reasoning are independent of its theoretical background and may be of value for any conceptualization of analogy in the law.

Key words: analogy, balancing, partial reducibility thesis

1 PARTIAL REDUCIBILITY THESIS AND THE ALEXIAN FRAMEWORK

In Brożek 2008 I suggested that – within the context of Robert Alexy's conception of legal reasoning – analogy may be partially reduced to the balancing of legal principles. The procedure looks roughly as follows:

(1) One encounters a problematic case, i.e. a case for which there is no directly applicable legal rule.

(2) One identifies cases *prima facie* similar (or similar$_1$) to the given one, for which there exist definite solutions, i.e. for which there are directly applicable legal rules.

(3) One identifies principles standing behind (backing) the legal rules that govern the *prima facie* similar cases.

(4) Through the balancing of principles, one decides which of the principles should govern the case at hand. (This also establishes which of the *prima facie* similar cases is relevantly similar – or similar$_2$ – to the case at hand.)

(5) The course of action dictated by the prevailing principle(s) is the decision in the case at hand.

In this way, I argued, one is able to solve the most pressing problem for any account of analogical reasoning in the law: that of relevant similarity. Usually,

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it is quite easy to determine a number of already solved legal cases which are similar – in one way or another – to the case at hand. The hard problem is to decide which of those cases is relevantly similar, i.e. which is to serve as the basis for the analogical decision. By transforming this problem into the balancing of principles, I believe to have replaced an unfamiliar procedure (e.g., choosing the 'prevailing factor' which the case at hand shares with one of the *prima facie* similar cases) with a familiar one (i.e. balancing of legal principles; of course, it is familiar for those who know Alexy's view of legal reasoning and agree with it). This means that analogy can be divided into two phases. The first phase consists in identifying cases which are *prima facie* similar to the unregulated case. It is purely heuristic – it may be dispensed with (as when one resolves the problematic case without contemplating any similar cases, but instead directly looks for the applicable principles). The second phase, in turn, is justification-generating and consists in balancing of the legal principles which govern the *prima facie* similar cases. More importantly, in the paper I claimed that what makes analogy "work" – at least in the general case – is that, given a problematic case, there usually is more than one case *prima facie* similar to the contemplated case. Of course, there are instances in which analogy operates with only one *prima facie* similar case. However, this is – or so I argued – not typical. In order to fully appreciate the mechanism of analogical reasoning, one needs to recognize its dialectical dimension. It is that dimension that makes analogy rational, as it is what enables balancing to enter the stage.

Before I examine David Duarte's objections against this view of analogy, and the partial reducibility thesis, it is necessary to devote a few words to the Alexian framework which served as the background for my analyses. Following in the footsteps of Ronald Dworkin, Alexy distinguishes rules and principles:

> Principles are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities. Principles are optimization requirements, characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible. (Alexy 2002: 47)

Rules, on the other hand, "are norms which are always either fulfilled or not. If a rule validly applies, then the requirement is to do exactly what it says, neither more nor less" (Alexy 2002: 48).

When one accepts the thesis that any legal system is made of rules and principles (I have my doubts regarding the distinction in question; see Brożek 2012), important theoretical consequences follow. It is best to grasp them by imagining a legal system which consists solely of principles, i.e. "optimization requirements" such as "The environment should be protected by the law" or "Everyone has freedom of movement". In such a case, the application of law would become very complex, as for (presumably) every case the judge would have to carry

out a balancing procedure (i.e., for any case there would be principles leading to contradictory conclusions). This is the reason why the legislator introduces legal rules, which are applied *via* simple *modus ponens*. But it is necessary to notice that legal rules are already a result of weighing some principles, although not in relation to a particular case, but to a class of cases. Thus, the legal rule "Vehicles are not allowed into the park" is an outcome of the balancing procedure undertaken during the legislative process in which such principles as "The environment should be protected by the law" and "Everyone has freedom of movement" are weighed against each other to produce a legal rule governing a generic case. Moreover, since the legislative process cannot take into account all the possible circumstances in which the question arises of whether a vehicle (say, an ambulance carrying a seriously injured person) can enter the park, it is still possible that the application of the rule may be blocked by another principle (say, "Human life should be protected by the law"). However, Alexy emphasizes that such an occurrence is rare, since for a principle to prevail over a legal rule requires that the principle outweighs not only the principle backing the rule, but also the so-called formal principles, such as "Rules passed by an authority acting within its jurisdiction are to be followed" or "One should not depart from established practice without a good reason" (Alexy 2002: 58). This changes little, however, when it comes to characterizing the relationship between rules and principles: the latter are logically *prior* to the former in the sense that each rule is an outcome of balancing some principles (for a class of cases). It is possible to imagine a legal system consisting solely of principles, while it is impossible to imagine a legal system consisting only of rules (this thesis follows from Alexy's insistence that legal discourse is firmly embedded in the general practical discourse, cf. Brożek 2007: 160–189). One further consequence of Alexy's view of the legal system is that there are no genuine gaps in the law (and here I concur with Duarte's conclusion; cf. Duarte 2015: 7). The only kind of "gap" one can speak of is a situation when there is no legal *rule* governing the given case; however, there always are *principles* which are applicable to any given circumstances.

2 DUARTE'S OBJECTIONS

Let me now turn to examine David Duarte's objections to the partial reducibility thesis. First, he claims that it may be difficult to pinpoint the principle standing behind the legal rule governing a *prima facie* similar case; further, he observes that there may be more than one such principle. For example, the rule forbidding cars to enter the park may be backed by both the principle pertaining to the protection of the environment, and the principle pertaining to the safety in public places. Duarte's first worry is genuine, but it is an objection

against Alexy's theory of legal reasoning in general, and not the partial reducibility thesis. Alexy clearly claims that it is possible to identify principles "standing behind" the given legal rule. It is required, *inter alia*, when one decides a conflict between a legal rule and a legal principle. In such a case, one weighs, on the one hand, the conflicting principle, and on the other, the principles standing behind the formulation of the rule (together with the formal principles). I believe that Alexy's reply to this problem would be quite straightforward: in order to identify legal principles supporting the given legal rule one makes recourse to common sense, but also to the general legal provisions of the legal act in which the rule is expressed, as well as the documents produced during the legislative process and doctrinal theories. Duarte's second worry – that there may be more than one principle standing behind the given rule, which would make it necessary to pick one of them for the process of balancing – has been identified and answered directly by Alexy. In Alexy 2007 he elaborates his conception of the Weight Formula in such a way that enables the simultaneous balancing of several principles.

Second, Duarte claims that balancing – as used in analogy – is only a façade: what really goes on, is the

> determining of 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. (Duarte 2015: 5)

I read Duarte as saying the following: each two cases are similar and dissimilar in an endless number of ways. For example, cars and bicycles may be compared according to an infinite number of factors: price, speed, metal texture, comfort, beauty, how it pleases John, etc. (Duarte 2015: 2). Analogical reasoning aims at identifying a criterion which would determine which of the possible comparison factors should be taken into account to establish relevant similarity between two cases, and thus resolve the case at hand. Further, Duarte seems to claim that the selection of this meta-factor is the essence of analogical reasoning. It follows that the use of the process of balancing I suggested for establishing relevant similarity between cases is just the determination of the meta-factor "in disguise". What really happens, is the selection of the relevant factor; and the selection is described "as if" it concerned something completely different. I believe that Duarte misses an important point here. The very reason for introducing the partial reducibility thesis was to dispense with all the talk about factors and meta-factors, as such idiom is simply misleading. It is visible already at the surface level of Duarte's argument: when he compares two cases – of whether a bicycle can enter the park and whether a car can enter the park – he ultimately compares cars and bicycles, not cases! Meanwhile, on my account the situation is different. I claim that analogical reasoning is connected to establishing two kinds of similarity. *Prima facie* similarity between two cases

pertains to whether those cases are concerned with the same *kind of problem*. In its simplest form, a problem may be defined as a pair of contradictory *statements* (not *properties!*), e.g. {*p*, ~*p*}, where *p* stands for "may enter the park" (of course, it is possible to provide a more complex and intuitively sound definition of a problem). To say that two cases are *prima facie* similar means that they pertain to the same kind of problem. Let us observe that this mode of speaking makes it unnecessary to refer to any factors (as understood by Duarte). This is quite fortunate, since when analogy is conceptualized in terms of factors, any two cases are *prima facie* similar (making the very concept of *prima facie* similarity meaningless); but it is not true that any two cases address the same kind of problem. Furthermore, according to the partial reducibility thesis the second stage of analogical reasoning consists of balancing legal principles, which also does not involve factors. Thus, my claim is not that the determination of the meta-factor is done through the balancing of principles, but rather that the very idea of the factor-based mechanism of analogy should be rejected. One further consequence of this theoretical manoeuvre is that analogy – understood along the lines of the partial reducibility thesis – becomes firmly embedded in a more general conception of justification (i.e., Alexy's theory of practical discourse). When one sticks to the account of analogy in terms of factors, one is in a more difficult theoretical position regarding the justification force of analogy.

Third, Duarte observes that "there is nothing to ensure that those principles [identified by determining the *prima facie* similar cases] are not irrelevant for the unregulated case, in which case they would be unable to justify any solution (Duarte 2015: 6)." This would be so if the *prima facie* similar cases were determined on the basis of the similarity of some factors; however, when the *prima facie* similarity is limited to those cases which address the same kind of problem (as defined above), this objection seems no longer valid: there is no real danger that the legal principles involved in the analogical case would have no relevance for the case at hand.

Finally, Duarte claims that "all of the problems with the partial reducibility thesis /…/ are /…/ no more than a consequence of a larger one: analogy and balancing do not match" (Duarte 2015: 6). This point is supposedly justified by the fact that analogy and balancing require "opposite normative circumstances: while analogy depends on the absence of an applicable norm, balancing relies on the applicability of two or more norms" (Duarte 2015: 6). As I tried to show above, this is not true, at least within the framework of the Alexian theory of law and legal reasoning, where a situation in which there is no applicable legal norm (i.e., a rule or a principle) can never take place. The only possibility to trigger analogical reasoning is when the given case is not regulated by a legal *rule* (there always will be at least one relevant and applicable principle).

3 CONCLUSION

Let me reiterate the main points of my argument:

(1) Partial reducibility thesis makes sense only within the framework of the Alexian view of the law (or a similar conception), in which the law consists of both rules and principles, and where there are no genuine gaps in the legal system.

(2) Partial reducibility thesis replaces an unfamiliar and somewhat mysterious process of determining the relevant similarity between cases with the more familiar procedure of balancing principles.

(3) In this setting, analogy is a two-step procedure and consists of the heuristic stage (the identification of *prima facie* similar cases and the principles that govern them) and the justification-generating stage (balancing of legal principles).

(4) My proposal aims at dispensing with analysing analogy by recourse to factors; instead, I suggest to determine *prima facie* similarity of cases by referring to the *problem* involved in the case at hand, and relevant similarity by the process of balancing. This is not intended as another way of saying what the proponents of the factor-based accounts of analogy claim; rather, it is an essentially different conceptualization of analogy.

(5) The important insight of my proposal is that analogy is – in the general case – dialectical. In a sense, I try to reverse the traditional picture of analogical reasoning. On the traditional view of analogy, when one is dealing with an unregulated case, one is desperately looking for another case which is relevantly similar to the case at hand. What I suggest is that – given an unregulated case – it is usually easy to identify a number of cases dealing with similar problems, and the hard part is to decide which of these cases is relevantly similar. The existence of various *prima facie* similar cases makes it possible to *contrast* and *compare* various possible solutions to the case at hand, which facilitates the determination of relevant similarity, and hence the solution to the case.

One final remark: I have repeatedly observed that the partial reducibility thesis is meaningful only against the background of Alexy's theory of legal reasoning. However, I believe that some aspects of analogical reasoning I have tried to highlight – notably those referred to in theses (4) and (5) above – are relevant to any theoretical attempt to account for analogy in the law.

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Synopsis

Bartosz Brożek

Analogy and Balancing: A Reply to David Duarte

SLO. | *Analogno sklepanje in tehtanje. Odgovor Davidu Duarteju*. Cilj članka je odgovoriti na kritiko, ki jo je David Duarte usmeril zoper tezo o delni zvedljivosti, tj. trditev, ki jo Brožek zagovarja v eni izmed svojih knjig in ki pravi, da je analogno sklepanje deloma zvedljivo na tehtanje pravnih načel. Prvi del članka oriše okvir, ki je avtorju služil pri oblikovanju teze o zvedljivosti, tj. Alexyjevo teorijo pravnega sklepanja. Drugi del je namenjen ovrženju Duartejevih ugovorov. Ti naj namreč ne bi upoštevali prej omenjenega okvira. V zadnjem delu avor še zatrdi, da so nekateri vidiki njegove teorije analognega sklepanja neodvisni od omenjenega teoretskega okvira in zato uporabni za katero koli pojmovanje analogije v pravu.

Ključne besede: analogija, tehtanje, teza o delni zvedljivosti

ENG. | The goal of the paper is to reply to David Duarte's critique of the partial reducibility thesis – a claim I defended in one of my books that analogy is partly reducible to the balancing of legal principles. In the first part of the paper I sketch the framework against which the thesis was formulated, i.e. Robert Alexy's theory of legal reasoning. In the second part I attempt to rebut Duarte's objections, pointing out that they do not take into account the Alexian background of my considerations. Finally, I suggest that some aspects of my theory of analogical reasoning are independent of its theoretical background and may be of value for any conceptualization of analogy in the law.

Key words: analogy, balancing, partial reducibility thesis

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