Legal progress through pragma-dialectics? Prospects beyond analogy and E contrario

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Legal Progress Through Pragma-Dialectics? Prospects Beyond Analogy and E Contrario

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ABSTRACT: Pragma-dialectical approaches to legal argumentation seem to be rather different from traditional approaches appealing to standards of propositional logic. Pragma-dialectical analysis of arguments by analogy and *e contrario* seem to fall foul to the rigors of logical analysis, in which problems or even concepts of analogy and e contrario seem to disappear. The brunt of both types of special legal argumentation appears to be borne by often implicit general principles and an appeal to the system of the law as a whole. Still, pragma-dialectics and logical analysis of legal argument are best seen as fruitfully supplementing each other in ongoing research of ever evolving legal argument.

KEY WORDS: analogy, *e contrario*, legal argument, pragma-dialectics, propositional logic

1. PRAGMA-DIALECTICS PUT TO TWO SPECIFIC TESTS, WITH POSSIBLY GENERAL OUTCOMES

'...Jurists' own theories about the character of the problems and the methods of their science have comparatively little value.' (Alchourrón and Bulygin, 1971, p. 66) There may be some seduction to deduce from this well-known *bon mot* the contention that a non-jurist approach to legal reasoning like pragma-dialectics may lead to more fruitful results (although more than a few prominent pragma-dialecticians are legal scholars as well). However, such an inference would come down to an argument *e contrario*, traditionally a suspicious piece of reasoning, not just in the law.

Recently, pragma-dialectics has been appealed to in order to clarify such suspicious *e contrario* arguments. In a noteworthy study, Jansen (2003a) let loose the formidable apparatus of pragma-dialectics in order to analyse and clarify different kinds of more or less explicit *e contrario* arguments in the law. Kloosterhuis (2002) did the

same with *e contrario's* supposed counterpart in legal reasoning, the argument from analogy.

Apart from many interesting issues concerning specific analyses, more general questions concerning pragma-dialectics prop up here. Some of them are well-known, like the supposed incompatibility of a consensus oriented analysis of reasoning and argument, as offered by pragma-dialectics, with 'authoritative' argument in legal procedure and legal administration, based as both seem to be on official authority against any dissent if need to it rises.

Other problems may be less amply discussed, but may be all the more interesting. For example: how does pragma-dialectics relate to monotonic logical analysis of legal argumentation? Such analysis may solve more than a few problems of *e contrario* and analogy. What may be left for pragma-dialectics, then? This relates to possible problems of pragma-dialectics concerning starting-points of analysis in arguments 'as presented', while even a (propositional) 'baby-logic' approach to analogy and *e contrario* may lead to the conclusion that such arguments are no autonomous arguments at all and are comprehensible in wider contexts only, contexts in fact bearing the brunt of argumentation.

So let's see whether the worthwhile enterprise of pragma-dialectics may survive Occam's razor (analogy again), when it comes to analysis of legal argumentation by analogy and *e contrario*. Which of course is not to imply that pragma-dialectics is an unimportant tool in legal discussion in a wider sense.

2. PRAGMA-DIALECTICS AND LOGIC

Though pragma-dialectics is probably too well-known by now in argumentation theory to warrant much further explanation here, still something may be said on its relationships to elementary propositional logic.

First and foremost, there may be no conflict between pragma-dialectics and logic at all, as they address categorically different issues. Pragma-dialectics is dealing with speech acts, whereas logic is about propositions (propositional variables). Pragma-dialectics intends to state rules governing permissible moves in discussion, propositional logic may be expressed as a set of inference rules, governing relationships between premises and conclusions. Pragma-dialectics, on the other hand, is a specific theory of action, is the real ministry of argumentatively unsilly walks.

Next, though pragma-dialectics aims at normative reconstruction by dialectical transformation, it still takes discourse 'as it is' for granted.

No doubt this is deeply related to its practical applicability for participants in real-life discussion. Logical analysis on the other hand may lead to rational reconstruction of argumentation to extents seemingly totally unrelated to real-life discussion. (This contrast may seem confusing, but will come to light in the ensuing analogy and *e contrario* discussion.)

This difference is related to propositional logic belonging to contexts of justification only. Logic is no description or even prescription of processes of thought and discussion, but a yardstick of validity in argument. Somebody may suddenly see the light in a difficult problem of science or even of law. Whether there was real light after all is to be determined by logically valid argumentation from acceptable premisses. Pragma-dialectics occupies much more complex and interesting positions here, by serving both as a critical guide for discussion and as an evaluation tool for argumentation.

Next, pragma-dialectics is not just fully compatible with propositional logic, it presupposes such logic, both in its own consistent and coherent formulation and in appealing to propositional logic, for example in requesting consistency in complex standpoints in debate.

Still some possible competition between pragma-dialectics and good old simple propositional logic may be left. Such simple logic may explicitly figure in analysis and evaluation of arguments and conclusions, just as pragma-dialectics intends to. Indeed, recent and impressively extensive pragma-dialectical analyses of analogy and *e contrario* argument in law may serve to show the strengths and weaknesses of such applications of pragma-dialectics in comparison with attempts to simply logically analyse analogy and e contrario.

3. ANALOGY AND E CONTRARIO IN PRAGMA-DIALECTICAL PERSPECTIVES

Kloosterhuis defines analogy as follows (2002, p. 78, see also Kloosterhuis, 2000, for a slightly earlier and much shorter explanation in English):

> Legal argumentation by analogy is a speech act in which a judge applies an argumentation scheme based on a comparison relationship, in an attempt to justify a practical interpretation of a legal rule in a critical discussion, against real or supposed antagonists.

Kloosterhuis next criticises traditional analyses of analogy for three reasons: they offer no adequate characterisation, no adequate method of analysis and no criteria for judging argumentation. Against this, he starts from the idea that analogy is 'a speech act through which a judge reaches a practical (i.e. case-oriented) interpretation of a legal

rule', in defence of an analogy standpoint *vis-à-vis* implicit or explicit antagonists (socialising argument, as it is called in pragma-dialectics). So what are successful performances of analogy speech acts, then? Kloosterhuis distinguishes between first and second order arguments. First order argument is rule application, second order argument is argumentation on rule application. Such second order argument may be linguistic, systematic or teleological-evaluative, so he contends, leading to first order argumentation: analogous application of a given legal rule. It is really important to notice here that Kloosterhuis takes a main role of the analogon by itself for granted, in his pragma-dialectical analysis of analogy (2002, p. 145 and elsewhere).

Kloosterhuis goes on to make many more important distinctions (important at least from a 'phenomenological point of view'). Thus he interestingly distinguishes between *analogia legis, analogia juris* and analogy from hypothetical cases (2002, pp. 134 ff.) and between singular (related to a single rule) v. generic analogy (related to more than one rule) (2002, pp. 159 ff.). Also, distinctions are made between analogous application of given rules (2002, pp. 145 ff.) v. 'constructive rule decision in order to fill legal gaps' (2002, pp. 172 ff.), and between interpretation problems, comparison of norms or cases and qualification problems (2002, pp. 204 ff.)

It comes as no surprise, then, that Kloosterhuis concludes by qualifying analogy as an 'overworked concept'. However interesting and important his manifold of distinctions may be, it altogether leaves the impression that analogy may even be a will-o'-the-wisp with which not even pragma-dialectics may come to grips.

The other main subject here, argument *e contrario*, is defined by Jansen (2003b) as 'the argument that a certain legal rule must not be applied analogically'. Next she distinguishes between two main types: *e contrario* as an argument leading to non-applicability of a legal rule or *e contrario* as 'inversion' of a legal rule. The 'modern' non-applicability version is said to lead to no special problems of logic, while the 'classic' inversion version is held to come down to 'reasoning from contrasts'. Modern *e contrario* reasoning is 'maximally defended by coordinatively compound argumentation, in which the first argument states that the legal rule is not literally applicable to the facts at hand and the second argument that the legal rule must not be applied analogically to those facts.' Classic *e contrario*, on the other hand, rests on the 'reversed legal rule' as the foundation for a conclusion about a legal consequence. On another level of argumentation, such a 'reversed legal rule' can be applied analogically, *a fortiori* and in a reductive way, just like a 'normal' legal rule (Jansen, 2003a, p. 214).

Again, as with Kloosterhuis, this approach to *e contrario* is extremely interesting, if only for its seemingly unequalled attention to 'phenomenological' detail. True to the realities of legal argumentation

through pragma-dialectics? Or may it be that more than a few ramifications of analogy and *e contrario* have face-value only and may disappear in the light of less charitable and more rigorously logical analysis? Or even that analogy and *e contrario* as sensible concepts and conceptions in themselves may be done away with?

4. ANALOGY AND E CONTRARIO (PROBLEMS) KILLED OFF BY (BABY) LOGIC, OR: BACK TO LEGAL CONTENT

Noteworthy about these analyses of analogy and *e contrario* indeed is their starting point in the unquestioned presumption that there is something like legal analogy, just as it is taken for granted that there is something like *e contrario*. Here it will be contended that in so far as concepts and realities of analogy and e contrario may be saved at all, they belong to the realm of heuristics and rhetoric, and have little if anything to do with reasoning and argument in contexts of justification.

Two examples of analogy may serve to clarify this. First, the famous late 19th century *Adams v. New Jersey Steamboat Co*. case paradigmatically serves to show what matters in legal reasoning by analogy (see Golding, 1984, pp. 46 ff., for a description of the case and an analysis of analogy rather different from though not necessarily at odds with the analysis offered here). Waking up in the morning, a man travelling on a river steam boat found money missing from his cabin. He sued the steamboat company for damages. Though there was no precedent, the court still ordered the company to pay, because innkeepers had such liability by precedent and because 'steamboat circumstances' were found to be sufficiently like 'inn circumstances', regarding the legal issue at hand.

What matters here is the underlying principle, and nothing else. If there is a general duty or obligation of care on parties offering night accommodation, then both inn-keepers and steamboat companies are under such a duty or obligation. But of course there is no logical relationship at all between the original analogon (the inn precedent) and the general principle of care. Things are the other way round: if the general principle holds, than there are inn liability implications, and steamboat company implications as well. But the inn liability rule may also be derived from the (patently implausible) rule that innkeepers are liable for anything happening to their guests, and from many more patently implausible 'principles' of course, like that everybody accommodating guests is fully liable for everything happening to such guests, etc. If on the other hand no general principle of care as stated above

is taken to hold, then a duty of care for innkeepers must be a special case, or an antiquated precedent.

To put things in terms of simple propositional logic ('p' is the underlying principle, 'q' is the original analogon):

$$\begin{array}{l} p \rightarrow q \\ q \\ \hline p \end{array}$$

is abduction at best (there may indeed be many more grounds for q, see on this Kaptein, 1999). All and any backing for p to be derived from this is the compatibility of p with q, in the sense of q being one of many implications of p. But again q may be an implication of so many more principles, thus having little if any importance in backing the relevant principle by itself. Or: the original analogon plays no more than a marginal role in the justification of the 'analogously derived new rule' at best. The new rule, e.g. a steamboat liability rule, wholly relies on the underlying principle and its further backing. The principle indeed needs to be more adequately defended, by appeal to its 'fit' with the body of existing law, but also by appeal to its 'fit' with background moral convictions, with notions of reasonableness and equity and so on, if the following argumentation is to plausibly lead to r, the 'new' analogous rule:

$$\begin{array}{l} p \rightarrow r \\ p \\ \hline r \end{array}$$

Thus the whole weight of so-called argument from analogy is on underlying principle(s) and not on the original analogon at all. Then the original analogon is no more than a suitable starting-point from a purely heuristic point of view, or a rhetoric prop probably convincing audiences with a penchant to sticking to black letter law (explicitly containing the original analogon) and thus prone to shunning 'vague principles' not to be found explicitly in print (see later on *pia fraus* as well).

Here it will go without much further saying that at least from a logical point of view there are no relevant differences between *analogia legis, analogia juris*, analogy from precedent etc. What matters in all superficially different kinds of analogy is again the underlying principle (see Kaptein, 1995, with further references).

One more example may serve to further clarify the redundancy of the analogon by itself. In The Netherlands and in more than a few other legal orders, legal and public discussion rages about the extent of duties of care of banks toward clients dangerously spending money

on shares, options etc. Thus Du Perron recently (2003) and prominently defended the position that banks and like firms not just need to inform clients about possible risks, but also are to refuse to perform any really risky financial operations possible disadvantageous to clients, if such banks and like firms are to evade liability for all ensuing clients' losses.

In defence of this seemingly paternalist position he appealed to an analogy with a well-established medical-legal rule, implying medical doctors' refusal, even upon explicit and well-informed patients' request, to perform any medical operation (by surgery or otherwise) without clear need but still carrying with it serious and irreversible consequences. Such a duty of care may be self-evident in the case of a medical doctor refusing to amputate limbs for no really good reason. However, this duty of care is not exclusively related to the doctor-patient relationship. It is based upon a more general principle, prescribing not to act upon any fellow human beings' wishes or commands if their realisation may have damaging consequences for subjects involved.

Interesting here is the question: why such paternalism? Reasons behind it may explain its scope in legal contexts. More than a few will probably say: loss of limbs is infinitely more serious than loss of money and that is why the underlying principle does not apply to share investment and like situations.

Concerning the 'loss of money-loss of limb' analogy it is important to note that there is not even any direct legal force in the original analogon, as civil law dealing with relationships between private clients and banks has nothing to do with medical law, at least not in any formal sense. Still the sense of the analogy, however strongly debatable, is immediately apparent. This serves to show again that the analogon cannot furnish any ground for the argument by analogy apart from being a 'source' in a purely heuristic sense.

This example also brings to light one more time that analogy is much more important in legal reasoning than explicit analogy, mentioned as such, may suggest. The life of the law and of legal reasoning is comparing, looking for sometimes hidden similarities and differences.

Such differences are at the core of *e contrario* argument. To begin with, it seems apposite to take *e contrario* argument to relate to what Jansen called 'inversed legal rules', as such semblance of rule application and its attendant logical invalidity is what the whole problem of *e contrario* starts with. Or: how may it be that reasoning based on denial of the antecedent, a fallacy not just in propositional logic, may be acceptable after all? (Abduction is to be found here again, as $[a \rightarrow b] \leftrightarrow [\neg b \rightarrow \neg a]$, or: a contrario's denying the antecedent is logically equivalent to abduction's affirming the consequent, see on this Kaptein, 1999.)

Again, the solution comes into sight as soon as the focus is shifted from rules applied *e contrario* to wider contexts. Arguing that a rule does not apply to a certain case, semblance of the contrary notwithstanding, does not imply much by itself. However, such argumentation may be supplemented by reasons why there are no other relevant legal grounds for the legal consequence implied by the rule. Then something like the following ensues, adequately covering both 'classic' and 'modern' e contrario according to Jansen:

$$\frac{\begin{array}{l}([p \vee q \vee r \ldots \vee a] \rightarrow b) \\ b \rightarrow [p \vee q \vee r \ldots \vee a] \\ \neg p \,\&\, \neg q \,\&\, \neg r \,\&\, \ldots \,\&\, \neg a\end{array}}{\neg b}$$

('p' etc. stand for legal conditions, 'b' for the legal consequence). Which is of course sound logic. In casu and in general some or other legal consequence, like liability to payment, may have different legal grounds, like breach of contact or damage. Exclusion of one of such grounds (for material and/or procedural reasons) does not exclude liability by itself. Only as soon as all possible grounds are excluded may the legal consequence be denied. Or: e contrario in whatever form is essentially related to argument purporting to non-applicability of legal rules or grounds.

The original rule 'applied *e contrario*' recedes to backgrounds then. Its non-applicability by itself may elicit no more than the question: so what? Are there no other relevant grounds? Whether there are any alternative grounds (sufficient conditions) has to be found out by appeal to the whole body of relevant law. Again, as in the analogy argument, more or less complex reasoning appealing to underlying principle may be appealed to in order to determine this body of relevant law. In this important sense *e contrario* is not so much analogy's counterpart as well as relying as much on an (implicit) appeal to the system and the underlying principles as analogy does (see also Kaptein, 1993).

Common to analogy and *e contrario* is their wide significance, far beyond their relatively limited 'explicit' application. Think of the medical doctor-bank analogy and its many more or less fruitful varieties in formal and informal legal reasoning, turning around relevant versus irrelevant similarities, to be decided upon by appeal to underlying principle again. Or of the well-nigh standard denial of relevance of possible legal grounds in order to ward off claims. This wide significance is of course deeply related to there being no such things as argumentation by analogy or *e contrario* per se. Argumentation explicitly called by such names is not really different from standard legal argumentation in terms of similarities and differences.

Actually, the semblance of real argument hiding underlying factors bearing the brunt of argumentation may be a more or less conscious attempt to *pia fraus*. This disappearance trick may well have an age-old background in legalistic styles of reasoning, in which upholding the semblance of reliance on nothing but the law was deemed all-important. Certainly in analogy cases, legalistic courts longing to stick to the rules or to authoritative precedent, might simply not have wanted to be honest about their expanding upon the law by simply and explicitly stating the relevant background rule or principle. Then analogous reasoning 'on the basis of a given legal rule' is the natural way out of course. Or pia fraus indeed. Thus concepts and uses of analogy may well wane in less legalistic times and a cursory look at contemporary adjudication may learn that explicit appeal to analogy is more or less extinct indeed.

With e contrario things may be a bit different. E contrario appeals to all relevant law as well. 'E contrario application of a legal rule' is a different kind of pia fraus, then, rendering the impression that no – by definition non-legalistic – argumentation on possible legal grounds to be found in the system is apposite at all.

5. CONCLUDING REMARKS ON JUSTIFICATION/SO MANY PROPER ROLES LEFT FOR PRAGMA-DIALECTICS

Thus baby logic's sledge hammer cracked surfaces subtly worked upon by pragma-dialectics, (mercy-)killing 'overworked' concepts of analogy and e contrario. What's left for pragma-dialectics? All the rest. A logical approach to analogy and e contrario, or to well-nigh universal similarity and difference argumentation in the law, clearly shows that the good work is just to begin. The brunt of such argumentation is borne by material principles, not just determining relevant similarities (analogy), but also determining what are relevant legal grounds in the end (e contrario).

Of course the next and really important question is how to find out about and justify such background principles 'unifying' the law? For example: is strict liability the main principle of contemporary tort law in The Netherlands, or is there still pride of place for fault as a primary condition for liability? Or is it no longer plausible to take one of these principles as the general starting point? Such complex questions cannot simply be decided by appeal to simple logical analysis. Pragma-dialectics may here return to the scene, in order to reasonably regiment a well-nigh impenetrable mix of linguistic, historical, systematic, teleological-evaluative etc. considerations. In fact, Dworkin's (1986) and others' appeal to Rawlsian notions of reflective equilibrium

(implying that justification relies on the best total fit of all relevant general and particular factors, see Rawls, 1999 may make good use of both logical standards of consistency and coherence and of regimentation by the rules of pragma-dialectics.

This brief analysis of analogy and *e contrario* may thus have shown something of rather more general importance. There need be no competition or conflict between pragma-dialectical and 'traditional' logical approaches to legal reasoning. Just as no logic, however advanced, will ever sufficiently serve to regiment reasonable argument and conclusion, so no plausible pragma-dialectics can do without the analytical powers of logic, in order to eliminate pseudo-problems and determine possibly underlying proper subjects of pragma-dialectics in the first place.

Thus regarded, the scholarly contributions by Jansen and Kloosterhuis derive their importance not just from meticulous exposition and illustration of so many interesting intricacies of legal reasoning (to be studied with great profit by anyone interested in legal reasoning), but probably in the first place from being essential intermediate stages in ongoing critical discussion of legal reasoning. Their main subjects as such may have fallen foul to Occam's razor by now. Where there is no problem, there need be no pragma-dialectics. But more than enough is left (and not to be left to the jurists mentioned by Alchourrón and Bulygin), and coming up continuously in the life and times of the law.

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