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# THE RECONSTRUCTION OF LEGAL ANALOGY-ARGUMENTATION: MONOLOGICAL AND DIALOGICAL APPROACHES

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*Abstract:*
In this contribution two approaches of legal analogy-argumentation will be discussed: the traditional, monological approach and the dialogical approach. This contribution aims at answering the question in how far these approaches may serve as adequate instruments for rational reconstructions of this analogy-argumentation. We will also indicate along which lines the insights resulting from these approaches may be developed further in order to arrive at a more comprehensive and systematic method for a rational reconstruction of argumentation of this sort. We will make use of the insights gained from the pragma-dialectical argumentation theory.

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## *1. Introduction*

In 1951 Hubertus ter Poel has two houses built by contractor Quint on land which Ter Poel rents from his brother Heinrich. When construction is under way it appears that Hubertus ter Poel is unable to pay and that Heinrich ter Poel, being the owner of the land, by right of recourse has become the owner of the houses built thereon. In a lawsuit which eventually comes before the Supreme Court, Quint demands payment for his activities by Heinrich. After all, Heinrich would have been 'unjustifiably enriched' at the expense of Quint. Since there was no legal standard for this legal claim, The Supreme Court had to fill a gap in the judicial system. In the important judgement, in Dutch jurisprudence known as 'Quint v. Te Poel', the Supreme Court considers, among other things:

> 'that (...) according to artt. 658 and 1603, the landlord cannot be expected, by paying a certain amount of money, to annul the enrichment enjoyed by him because of the works constructed by the holder or tenant of the land on which the works have been constructed;
>
> that it is implausible that a claim which the law withholds the holder and the tenant, would befall the contractor who has constructed these works under agreement with the tenant, and who suffered damage because his co-contractor is unable to make payments;'

Here the Supreme Court uses an analogy-argumentation: the judicial gap is filled by analogical application of two existing of legal standards which were meant for different (yet similar) cases, for a case for which no legal rules had been laid down. The judicial gap is filled by means of a construction of a new legal standard: he who constructs works, contracted to do so by the tenant, and who suffers damage because his co-contractor appears to be unable to make payments, does not have a case from unjustified enrichment.

Both in legal theory and in legal practice traditionally quite a lot of attention is paid to the use of analogy-argumentation and other 'specifically legal argumentation forms' such as *a contrario-* and *a fortiori*-argumentation. There are two explanations for this.

In the first place it is the very use of analogy-argumentation which raises a number of questions. Analogy-argumentation is used-as is apparent from the judgement 'Quint v. Te Poel'-to solve legal questions whenever there is a gap in the legal system. The judge construes a legal norm and, as such, acts as a 'substitute-legislator'. Whenever a judge does this, the question whether or not he should use analogy-argumentation is often brought up for discussion, and in case there are no objections, whether he has used the correct analogy-argumentation.

Secondly, the *reconstruction* of analogy-argumentation raises a number of problems. The acceptability of analogy-argumentation can only be assessed if the argumentation has been construed in an adequate fashion. The argumentation must be identified as such, unexpressed elements must be made explicit and the structure of this, often complex, argumentation needs to be analysed. This *rational reconstruction* of analogy argumentation-a reconstruction aimed at the assessment of the quality of the argumentation-is a difficult task and one that has been studied by legal theoreticians from different theoretical angles.

In this contribution I will discuss two of these approaches: the traditional, monological approach of analogy-argumentation and the dialogical approach. The aim of this article is to indicate in how far these approaches provide an adequate instrument for the rational reconstruction of analogy-argumentation. First I will give an outline of the traditional monological approach. Then I will discuss the dialogical approach which has been developed as a reaction to the traditional approach. Lastly I will indicate how the insights which have resulted from these approaches may be may be developed into a more comprehensive and systematic method for a rational reconstruction of argumentation. My starting-point will be the pragma-dialectical argumentation theory.

*2. The monological analysis of analogy-argumentation*

Within the framework of legal theory, analogy-argumentation is traditionally reconstructed from a mainly logical perspective, the analysis aiming at the question whether the conclusion is justified on formal grounds. Authors such as Tammelo (1969) and Klug (1982) consider analogy-argumentation as a specifically legal argumentation form, which, on the surface of it do not meet the requirements of logical validity, but which can be reconstructed as a logically valid argumentation. This approach of analogy-argumentation can be characterized as *monological* and *product-oriented*. It is monological because the reconstruction is an abstraction of the discussion context within which the argumentation is used. It is product-oriented or individualized because the reconstruction is aimed at the final product of the process in which the argumentation is employed. In this context I will discuss Tammelo's analysis as a significant exponent of this traditional approach.

*Tammelo's analysis of analogy-argumentation*

In *Outlines of Modern Legal Logic* (1969) Tammelo discusses the logical aspects of the *a simili*-argumentation which he considers to be a specifically legal argument, together with a contrario- and a fortiori-argumentation. Tammelo's definition of analogy-argumentation runs as follows: "*Argumentum a simile* proceeds from the idea that if a certain legal consequence is attached to certain legally relevant facts, one is entitled to attach the same legal consequence to essentially similar legally relevant facts." (Tammelo 1969: 129)

Tammelo is of the opinion that analogy-argumentation should be considered as invalid argumentation with legally binding conclusions. By supplementing the unexpressed argument, the argumentation can be reconstructed as a

valid one. In the following invalid argumentation Tammelo demonstrates such a reconstruction:

1. If complex of facts F occurs, it is called theft
2. A complex of facts F', similar to F, occurs
3. Therefore, F' must be treated as theft

When Tammelo supplements and reconstructs this argumentation, he uses the following example. Suppose complex of facts F means: illegally taking away a good with the intention of appropriating this good. A person illegally takes away electricity from the electricity company. Although electricity cannot be regarded as a 'good', taking it away is in essence similar to taking away a good. The social and economical consequences are, after all, the same. For that reason the same sanctions should be imposed on the taking away of electricity as on taking away a good. To this conclusion Tammelo adds: 'However sound this conclusion may be from the viewpoint of morals or social policy, it is unsound from the logical viewpoint.'

According to Tammelo the invalid argumentation can be turned into a valid one by adapting the first premise. The reconstructed analogy-argumentation runs like this:

1. *If* this action involves taking away a good unlawfully or if this action is considered by an authorized legal authority to be similar to taking away a good, *then* this action should be considered as theft.
2. This action is considered to be an *action similar to theft* by an authorized legal authority.
3. Therefore, this action must be considered as theft.

To this reconstruction Tammelo adds that it is only justified to accept the changed first premise if there are sufficient grounds for applying the same legal consequences to cases which are not laid down as to cases which do fall within the range of the legal standard. He concludes that the analogy-argumentation should be considered as a *modus deficiens*: no logically necessary conclusions follow from the premises as put forward. At the same time Tammelo states, however, that if a premise is changed, as in the previous reconstruction, to turn the argumentation into one that is logically valid, the argumentation is, strictly speaking, no longer an analogy-argumentation. His reconstruction is an abstraction of the idiosyncratic character of the analogy-argumentation. No conclusion is drawn on the basis of a comparison. Instead, the comparison has 'shifted' to the antecedent of the reconstructed, new first premise, thus reconstructing the analogy-argumentation as a modes ponens argumentation.

Tammelo considers the new first premise in the argumentation as 'readily available' ("sure to be understood and accepted in the given legal community"). True as this may be, it is mainly due to the extremely general character of this premise. The main objection to this reconstruction is that a new legal standard is formulated which does not fit in with the actual practice of applying analogy-argumentation. Tammelo's own example will make this clear. The standard constructed on the basis of analogy-argumentation which is the foundation for the final decision reads: "If this action involves taking away a good unlawfully then this action must be considered as theft" and not the much broader premise as formulated by Tammelo. Tammelo does not specify why it would be necessary to take as a starting-point this much broader premise.

A number of rather more general objections to do with monological and goal-orientated reconstructions of analogy-argumentation may be added to this critical comment on Tammelo's analysis.

Characteristic of this approach is the complete abstraction from the communicative and interactional context in

which the analogy-argumentation is used. The question of *the identity* of the person putting forward the analogy-argumentation is ignored and so is the question *in which phase* of the legal proceedings analogy-argumentation is employed. Instead, the argumentation is reconstructed as an abstract argumentative product of just one language user, usually a judge.

The fact that no justice is done to the functional character of analogy-argumentation is yet another consequence of this abstract approach. Nor is there any indication as to what sort of interpretative difficulties the analogy-argumentation may offer a solution. The different rules applying to the use of analogy-argumentation in the various areas of law is another matter which is wholly ignored. [1]

These points lead to a number of consequences for the way in which analogy-argumentation is reconstructed.

When *analysing* argumentation the interaction between the judge and his explicit or implicit antagonists is not taken into account. As a consequence this approach cannot adequately describe and explain the structural complexity of analogy-argumentation. Most logical reconstructions of analogy-argumentation amount therefore to a simple argumentation with two premises and a conclusion. This approach lacks a systematic description of how to arrive at a reconstruction of analogy-argumentation.[2] Analogy-argumentation is analysed as an incomplete argumentation form made logically valid by adding an element. As was made clear in the discussion of Tammelo, this means that this reconstruction of the analogy-argumentation is an abstraction of its idiosyncratic character.[3]

For the *evaluation* of the analogy-argumentation, opting for the monological and goal-oriented approach means that the assessment of the acceptability of the argumentation is made exclusively dependent on logical validity and is not systematically related to the legal discussion rules applied to the argumentation. The abstraction from the discussion situation in the logical approach raises yet another problem. Attention is paid to the legitimizing pro-argumentation only, whereas the negating counter argumentation is ignored. The result is that forms of complex argumentation cannot be related to the critical reactions which are characteristic of analogy-argumentation. More specifically, this approach cannot cater to the relation between analogy-argumentation and a contrario-argumentation.

Because of the abstract nature of this approach, moreover, the reconstruction does neither do justice to the fact that analogy-argumentation can be employed to solve various types of interpretation problems, nor to its various assessment criteria. It is precisely because of this disregard for the various uses of analogy-argumentation, that the logical approach cannot give any clue as to the 'specific judicial nature' of analogy-argumentation.

*3. The dialogical approach of the analogy-argumentation*

In order to overcome the disadvantages of the monological approach, authors such as Alexy, Aarnio and Peczenik have analyzed judicial argumentation from a *dialogical* perspective. This approach regards argumentation as part of a discussion in which the validity of the argumentation is subjected to the question whether the discussion process in which a standpoint is defended meets a number of formal and procedural requirements.[4] Since it is Peczenik who gives the most elaborate analysis of analogy-argumentation, his findings will serve as a starting-point for the discussion of the dialogical approach.[5]

*Peczenik's analysis of analogy-argumentation*

When analysing judicial argumentation, Peczenik distinguishes two forms of justifications: a *legal* justification ('contextually sufficient legal justification') in which he demonstrates that the judgement is justified on the grounds

of legal discussion rules, and a *deep* justification in which these rules and principles are justified.6

Both forms of justification, according to Peczenik, imply the use of 'transformations', which involve an argumentative 'jump', resulting in a non-deductive step. Legal justification involves transformations *in the law*, whereas deep justification implies transformations *towards the law*.

It is the *decision transformation* which is executed in order to decide what legal decision is justified in a particular case, which Peczenik regards as a transformation in the law. When a specific legal judgement is the result, when the premises consist of a least one legal standard and when, moreover, this judgement cannot be deduced from the legal standard or the account of the facts, it is considered to be a decision transformation.7 In Peczenik's analysis analogy-argumentation is a decision transformation creating a new legal standard.8 He distinguishes between statutory analogy and legal analogy.9 I will first describe Peczenik's definition as well as his analysis of these two forms of analogy-argumentation. Then I will discuss the standards he proposes for the assessment of analogy-argumentation.

Peczenik's definition of statutory analogy reads as follows: 'One applies a statutory rule to a case which, viewed from the ordinary linguistic angle, is included in neither the core nor the periphery of the application area of the statute in question, but resembles the cases covered by this statute in essential respects.' (Peczenik 1989:392) This definition is the result of both the interpretation-a radical extension of the range of the legal standard-and the method underlying this result: producing essential similarities between cases. The application of statutory analogy is needed as a result of a gap in the law.10

This is Peczenik's reconstruction of statutory analogy:

1. If the fact F or another fact, relevantly similar to F, occurs, then obtaining of G is obligatory
2. H is relevantly similar to F
3. Therefore, if H occurs, then obtaining of G is obligatory

In this analysis the analogy-argumentation has been reconstructed as a logically valid argumentation. The relevant similarities between F and H are crucial in this argumentation. Apart from statutory analogy, Peczenik distinguishes legal analogy. Legal analogy should meet the following requirements:

1. A general norm, G, is justifiable on the basis of the resemblance between a number of established rules, r1 - rn, thus regarded as special cases of G.
2. A case, C, lies outside of the linguistically natural area of application of these rules, r1 - rn.
3. On the other hand, the general norm, G, covers C; in other words, C shows relevant similarities to case regulated by the less general rules, r1 - rn.
4. One adjudicates case C in accordance with G.

The principle of equality forms the foundation for the application of both statutory analogy and legal analogy. The assessment of the similarity between cases is crucial for the evaluation of the analogy-argumentation. A sound assessment, according to Peczenik, must therefore weigh various types of arguments. To this end Peczenik proposes standards for the assessment of analogy-argumentation, by contrasting the use of analogy-argumentation to the use of *a contrario-argumentation*. He introduces the following structure of an a contrario-argumentation:

Obtaining of the situation G is obligatory only if the fact C takes place (*premise*)

The fact C does not occur, obtaining of G is not obligatory (*conclusion*)

We have seen that the use of analogy-argumentation is justified on the principle of similar cases being treated in similar ways. In the same way the use of a contrario-argumentation is justified on the grounds that the law must be obeyed. Peczenik concludes that the choice between analogy and a contrario is decided by weighing two aspects of legal certainty: predictability and other moral considerations.

In order to give an insight into the sort of considerations that must be weighed, Peczenik proposes ten *reasoning norms*. These norms may serve as a guideline when weighing the arguments in favour of the use of either analogy-argumentation or a contrario-argumentation.

> 1. If an action is not explicitly forbidden by a statute or another established source of law, one should consider it as permitted by the interpreted valid law, unless strong reasons for assuming the opposite exist. In other words, one should, as a rule, interpret prohibitions *e contrario*, not by analogy.11
>
> 2. Only relevant similarities between cases constitute a sufficient reason for conclusion by analogy.
>
> 3. One should not construe provisions establishing time limits by analogy. Neither should one construe them extensively, unless particularly strong reasons for assuming the opposite exist.(...) Ratio legis of the time limits is to assure fixity of the law, whereas analogy and extensive interpretation tend to lower fixity.
>
> 4. One should not construe provisions establishing sufficient conditions for not following a general norm extensively or by analogy, unless strong reasons for assuming the opposite exist.
>
> 5. Only very strong reasons can justify a use of analogy, leading to the conclusion that an error exists in the text of the statute.
>
> 6. One should not construe provisions constituting exceptions from a general norm extensively or by analogy, unless strong reasons for the opposite exist.12
>
> 7. Not all reasons justifying extensive interpretation of a statute are strong enough to also justify reasoning by analogy.
>
> 8. One should construe provisions imposing burdens or restrictions on a person, unless very strong reasons for assuming the opposite exist.(...) Consequently, one should not construe such provisions extensively or by analogy.
>
> 9. A statutory provision should be applied analogously to cases not covered by its literal content, if another provision states that they relevantly resemble those which are thus covered.
>
> 10. One may utilise *argumentum e contrario* only in exceptional cases, when interpreting a rule based on precedents.

These ten norms, according to Peczenik, will be of help when choosing between the use of analogy-and a contrario-argumentation, in such a way that they provide a starting-point when balancing justice and legal certainty in judicial decisions.

As compared to Tammelo's reconstruction, Peczenik's approach offers a number of advantages since the latter views analogy-argumentation in the context of a problem solving process. In Peczenik's method, analogy-argumentation is characterized as an argumentation scheme in a discussion meeting dialogical requirements. As is apparent from the description of Peczenik's analysis of analogy-argumentation, he emphasizes, more so than other authors, the standards for the correct use of analogy-argumentation and in this respect his approach of analogy-argumentation may be regarded as the most complete.

Nevertheless, Peczenik's method too has some considerable drawbacks. By emphasizing the dialogical character of judicial argumentation as well as the judge's role in the discussion, analogy-argumentation is indeed related to its underlying norms. In the reconstruction of analogy-argumentation, however, he hardly elaborates on this point of view and falls back on the analysis of a judge's abstract product of argumentation. The analysis and assessment of (complex) analogy-argumentation, therefore, suffers from the same disadvantages as the monological approach.

Because Peczenik describes analogy-argumentation as a decision transformation and because he distinguishes between two forms of analogy-argumentation, he does indeed do justice to the functional character of this argumentation. He ignores, however, the relation between the different sorts of interpretative problems as well as the various functions of analogy-argumentation in this context.

As we saw before, Peczenik's analysis of discussion rules is the most elaborate. The ten norms he proposes offer a survey of the sort of considerations to be weighed when evaluating the use of analogy-argumentation. In doing so he offers, more so than others, a starting-point for a fruitful assessment of analogy-argumentation. Nevertheless, Peczenik himself is right in stressing the provisional character of these norms. The system underlying these norms too, leaves something to be desired. Some norms relate to the correct choice of analogy-argumentation, others to its correct application. Some norms are related to areas of law, others to legal principles, without any clarification as to the connection between the two. Some of Peczenik's norms seem to indicate that he distinguishes between different applications of analogy-argumentation, without his analysis of the argumentation explicitly expressing this distinction. Finally, his norms are at no point incorporated within a method for the reconstruction of the argumentation.

Despite the fact that analogy-argumentation is analysed in the context of a discussion, one last critical remark must be made. In Peczenik's dialogical approach all attention is fixed on justifying pro-argumentation whereas negating counter-argumentation is ignored completely. In his analysis forms of complex argumentation are never related to the specific critical reactions one may expect when analogy-argumentation is used, nor does Peczenik give any indication as to the interrelationship between analogy-argumentation and a contrario-argumentation.

*4. Starting-points for a pragma-dialectical reconstruction of analogy-argumentation*

How can we develop Tammelo and Peczenik's insights into a more comprehensive and systematic method to be used for the reconstruction of analogy-argumentation? I will try and answer this question in the following section. I will start from the way in which the pragma-dialectical argumentation theory reconstructs analogy-argumentation as part of a discussion subject to dialectical rules. I will attempt to show how insights from the pragma-dialectical argumentation theory and insights from legal theory can be combined in a productive way on the basis of the argumentation used in the judgement 'Quint v. Te Poel'. I will focus on the way in which the complex argumentation of this judgement can be regarded as a reflection of the critical reactions to be expected when analogy-argumentation is used.

In pragma-dialectical analyses of argumentation, argumentation schemes such as analogy-argumentation are analysed as dialectical procedures in a critical discussion. An argumentation scheme is "a more or less conventionalized way of representing the argumentative relationship between the arguments and the standpoint being defended in a discourse procedure aimed at attempting to convince somebody who doubts the acceptability of the standpoint" (Van Eemeren en Grootendorst 1992). A critical evaluation of argumentation schemes involves, at some point, the use of an *intersubjective evaluation procedure* to test the argumentation for compatibility with the following two criteria:

(1) Is the analogy-argumentation an acceptable argumentation scheme?
(2) Has the analogy-argumentation been used in a correct way?

When evaluating argumentation, one first has to establish whether the *correct* argumentation scheme *has been chosen*. This means that it needs to be verified whether the scheme that was used belongs to the argumentation schemes which are admitted, in principle, to a given discussion context in defense of a certain standpoint. Only if the answer to this question is positive, can it be established whether the analogy-argumentation was *used in the correct way*, the second criterion. This procedure involves, among other things, the evaluation of the analogy criterion itself as well as an assessment of the cases which are compared on the assumption of similarity. Little systematic research has been devoted to the standards that apply when answering the question whether a judge can use analogy-argumentation when solving a particular interpretative problem as well as to the factors that determine the acceptability of such a procedure. As far as I know there is no detailed survey of standards to be used to evaluate the acceptability and correct use of analogy-argumentation as an argumentation scheme. Occasionally, standards have been suggested to ascertain whether, in a given case, it is appropriate to either use analogy-argumentation or a contrario-argumentation as argumentation scheme. As we have seen in the previous section, Peczenik's survey is, in this respect, the most elaborate.

The first class of optional standards have to do with the question of what *area of law* the legal standard originates when applying it either analogically or a contrario. Legal theory, as a rule, has it that the area of law to which the legal standard belongs, determines the possibilities of using that standard analogically or a contrario. The most telling example of this rule is the ban on analogy in criminal law: 'stretching penalization' on the basis of analogy-argumentation is contrary to the very nature of criminal law. Tax law is yet another area of law that limits the possibilities to apply legal rules analogically. It is generally assumed that analogical application is admissible only if advantageous to the taxpayer. Finally, as we will see later, civil law too limits the possibilities of applying analogy-argumentation to legal rules.

The second class of optional standards deals with the question to what *type of standards* the legal norm, used either analogically or a contrario, is taken to belong. Legal theory has it that the type can be contributory to deciding whether analogical or a contrario application is admissible or not. Aarnio (1987: 106), for instance, proposes to distinguish between material and procedural standards, in this respect. According to him, the principle of legal certainty should prevail when interpreting procedural standards. Since prudence is called for when applying analogy-argumentation for the interpretation of these standards, it is only to be expected for a contrario-argumentation to be used instead. The distinction between standards that bind, that permit, that confer authority and assessment standards is another feature relevant in this respect. Peczenik (1989: 396), for instance, indicates that binding norms must be interpreted restrictively and can only be applied analogically in exceptional cases.

The third class of optional standards concern the *structure* of the legal standard that is applied either analogically

or a contrario. It is the character of the conditional link between the terms of application and legal consequence that determines the structure of the legal standard. If a legal standard expresses necessary or necessary and sufficient conditions for the introduction of the legal consequence, analogy-argumentation is not admissible whereas a contrario is. If the legal standard expresses sufficient conditions, analogy-argumentation may be admissible.

The fourth class of optional norms relate to *constituents* of the legal standard that is applied either analogically or a contrario. There is not just a distinction between terms of application and legal consequence, the following normative standards too are distinguished: normsubject, normobject, deontological modality and indications as to time and place. Answering the question whether analogy-argumentation or a contrario-argumentation is, or is not admissible, is also determined by the element from the legal norm to which the analogy-argumentation or the a contrario refers. It is Peczenik who points out that stipulations as to time in legal standards should not be applied analogically. If these norms are accepted as a starting-point and are integrated into the pragma-dialectic standards for the evaluation of analogy-argumentation, it is possible to draw up the following assessment standards.

*Standards for the evaluation of analogy-argumentation*

1. Is the analogy-argumentation a suitable argumentation scheme?

    a: Is it a matter of a gap in the judicial system?
    - is it a matter of a normative gap?
    - is it a matter of an axiological gap?

    b: Can the gap be filled by means of an analogy-argumentation?
    - what judicial field does the analogical legal standard belong to?
    - what type of norms does the analogical legal standard belong to?
    - what type of conditional link is expressed by the analogical legal standard?
    - to what normative element does the analogical legal standard apply?

2. Has the analogy-argumentation been applied correctly?

    a: Is the existing legal norm which served as a starting-point a valid one as such?

    b: Is this particular case, as far as the relevant points are concerned, indeed similar to the description of juristic facts in the existing legal standard?

    c: Is this particular case, as far as the relevant points are concerned, not essentially different from the description of juristic facts in the existing legal standard?

    d: Wouldn't it be advisable to compare this particular case with the description of juristic facts of different legal standards?

Taking these standards as a starting-point, it is possible to arrive at a more systematic as well as complete reconstruction of analogy-argumentation in judicial decisions. More systematic since there is a clear interdependency between the assessment-standards at hand. If a judge is, for instance, confronted with a gap which cannot be filled by means of an analogy-argumentation, it is not necessary to raise the question whether there is a possible similarity between existing and construed legal standards. The reconstruction is more complete

because it does not only focus on the matter of the formal validity of the argumentation and the acceptability of the premises as regards contents but also on those standards that indicate whether or not an analogy-argumentation was called for in the first place and whether it was applied correctly. Rather than reducing it to a simple argumentation, this enables us to reconstruct the analogy-argumentation as argumentation with a complex structure. The elements of this structure may be regarded as reflections of the different judging-standards. To illustrate this, let us have a closer look at the case 'Quint v. Te Poel'. Apart from the arguments quoted at the beginning of this contribution, the Supreme Court puts forward a number of considerations to accompany the analogy-argumentation:

> *Quint v. Te Poel (Supreme Court 30-1-1959, NJ 1959, No. 548)*
>
> Considering that the argument also addresses the Court's interpretation of art. 1269 ('All obligations proceed from either agreement, or from the law')
>
> Considering:
>
> (1) that the Court is right in stating that the regulation of art. 1269 does not allow the assumption that an obligation between two persons arises in all cases in which a judge is of the opinion that the rules of reasonableness and fairness dictate that one person carries out a certain performance for the other;
>
> (2) that the Court, however, having found that Quint's assumed claim is not supported by any specific section of the law, and therefore concluding that Quint is not entitled to his claim, has given too limited an interpretation of the words "from the law";
>
> (3) that, after all, from these words it does by no means follow that all obligations should be directly supported by some section of the law, but from these can: only be inferred that in cases not specifically laid down in the law, that the solution has to be accepted which fits within the system of the law and is in keeping with cases that are laid down in the law;
>
> (4) that now it has to be investigated whether, in the present case, an obligation within the meaning of the law can be assumed to have been created between parties;
>
> Considering:
>
> (5) that in this context the question arises whether the owner of a property who, because of the fact that the accession rule applies here, is obliged to compensate him who has constructed the works to the amount of his enrichment;
>
> (6) that the law does provide for cases when works have been constructed by someone with only limited legal authorization (artt. 762, 772 and 826) that these-mutually divergent-regulations, however, which are connected with the special nature of the commercial claims to which they refer, cannot, in this context, be of decisive significance;
>
> (7) that, however, according to artt. 658 and 1603, the landlord cannot be expected, by paying a certain amount of money, to annul the enrichment enjoyed by him because of the works constructed by the holder or tenant of the land on which the works have been constructed;

(8) that it is implausible that a claim which the law withholds the holder and the tenant, would befall the contractor who has constructed these works under agreement with the tenant, and who suffered damage because his co-contractor is unable to make payments;

(9) that what is stipulated in art. 659 does not alter this since a special provision, equal to that of the bona fide owner, does not befall Quint, who, could have known the works would be constructed on land which did not belong to the client by consulting the public registers, doing so, in Quints own words, only after the construction had been completed.'

Reflecting on these considerations in the light of the judging-standards I mentioned earlier, one can determine how decisive a role these considerations play in judging analogy-argumentation.

The first consideration can be viewed in the light of the question whether analogy-argumentation is an appropriate argumentation scheme to fill up a gap. The Supreme Court, in this respect, is of the opinion that an alternative solution-a direct appeal to 'reasonableness and fairness' as a source of the agreement-has been rejected by the Court.

The second and third consideration of the Supreme Court can also be viewed in the light of the question whether analogy-argumentation is an appropriate argumentation scheme. The Court's answer was negative and the Supreme Court agreed. The Supreme Court, in these considerations, judges that from these words from the law-'All obligations proceed from either agreement, or from the law'-does not follow that all obligations should be directly supported by some section of the law, but from these can: only be inferred that in cases not specifically laid down in the law, that the solution has to be accepted which meets two requirements: it should fit within the system of the law and it should be in keeping with cases that are laid down in the law. These considerations reflect the fundamental character of this case. The Supreme Court, in this judgement, admits the possibility of employing analogy-argumentation in cases like these for filling up gaps and, at the same time, formulates two general requirements which have to be met when employing analogy-argumentation.

When the Supreme Court has argued that analogy-argumentation is a suitable argumentation scheme, it confronts the question what analogical application is the most acceptable. Considerations 6 through 9 deal with this question. Considerations 6 through 9 can be regarded as negative answers to question 2b: someone with only limited legal authorization as well as the bona fide owner do have a case from unjustified enrichment, the point being that the case of Quint, the person who is personally authorized, though not bona fide, is in fact *dissimilar*. The negative answers to question 2b could be regarded as examples of *a contrario*-argumentation.

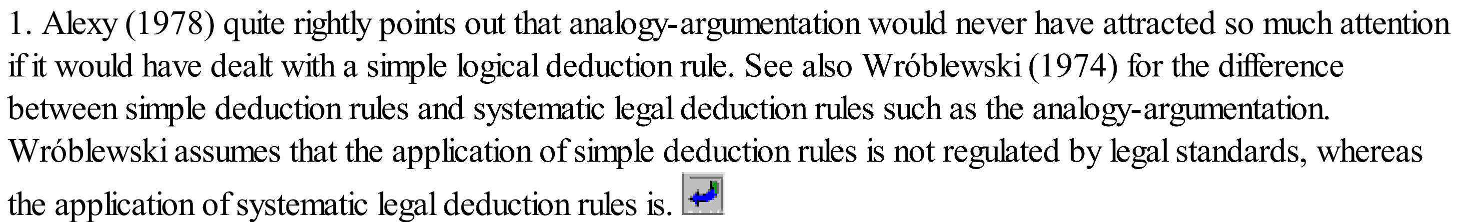
Finally, considerations 7 and 8 contain the core of the analogy-argumentation: the holder and the tenant do not have a case resulting from unjustified enrichment and, therefore, neither has the person acting on behalf of the tenant.

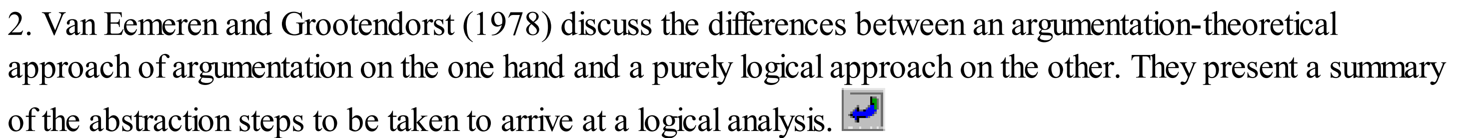
## 5. *Conclusion*

I have shown how analogy-argumentation is reconstructed by legal theoreticians who assume either a monological or a dialogical perspective. I have tried to indicate along which lines the dialogical perspective may be developed to arrive at a more complete reconstruction. The standards for judging as formulated may serve as an initiative. A careful analysis of jurisprudence in which analogy-argumentation plays an important role would

make clear in how far these standards need to be specified.

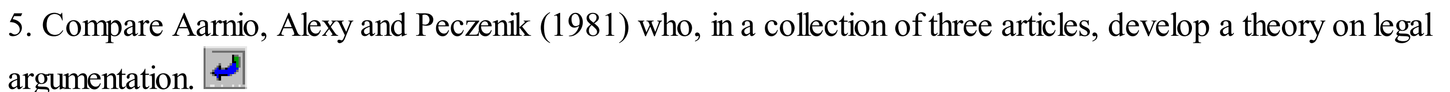
## *Notes*

1. Alexy (1978) quite rightly points out that analogy-argumentation would never have attracted so much attention if it would have dealt with a simple logical deduction rule. See also Wróblewski (1974) for the difference between simple deduction rules and systematic legal deduction rules such as the analogy-argumentation. Wróblewski assumes that the application of simple deduction rules is not regulated by legal standards, whereas the application of systematic legal deduction rules is. 

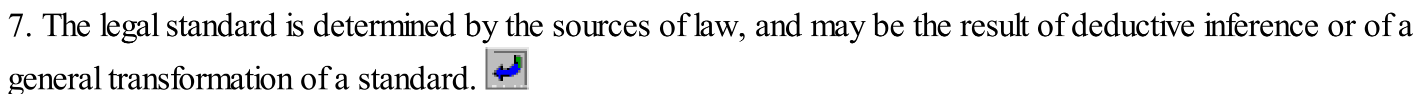
2. Van Eemeren and Grootendorst (1978) discuss the differences between an argumentation-theoretical approach of argumentation on the one hand and a purely logical approach on the other. They present a summary of the abstraction steps to be taken to arrive at a logical analysis. 

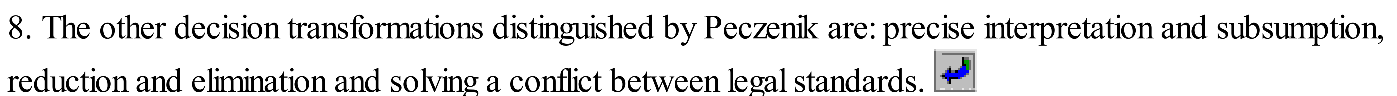
3. Compare, in this context, J.C.Hage in: Feteris et al. (1994:91).

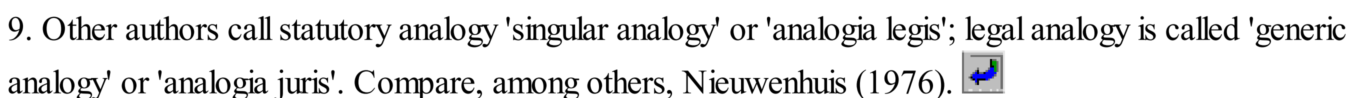
4. For an analysis of the various approaches within the legal argumentation theory compare Feteris (1994). .

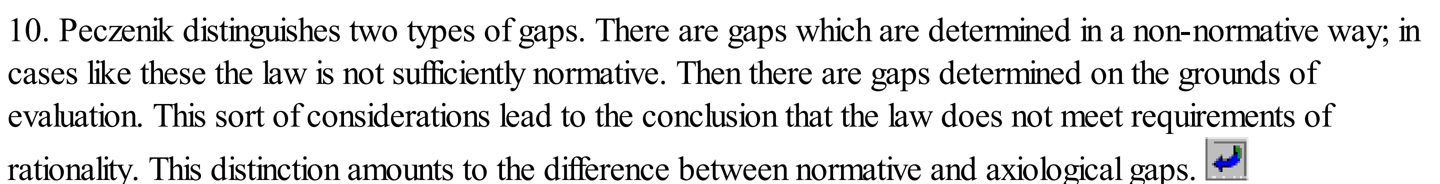
5. Compare Aarnio, Alexy and Peczenik (1981) who, in a collection of three articles, develop a theory on legal argumentation. 

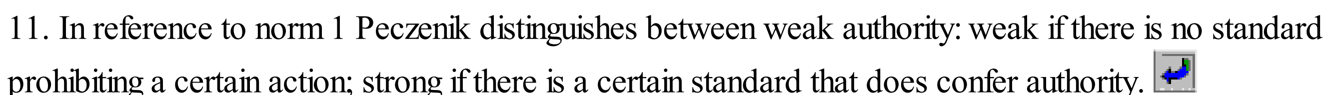
6. Compare Feteris (1994) for an extensive discussion of Peczenik's theory.

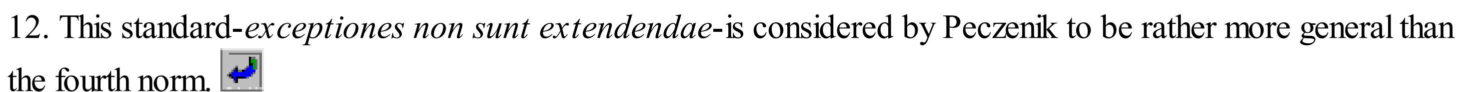
7. The legal standard is determined by the sources of law, and may be the result of deductive inference or of a general transformation of a standard. 

8. The other decision transformations distinguished by Peczenik are: precise interpretation and subsumption, reduction and elimination and solving a conflict between legal standards. 

9. Other authors call statutory analogy 'singular analogy' or 'analogia legis'; legal analogy is called 'generic analogy' or 'analogia juris'. Compare, among others, Nieuwenhuis (1976). 

10. Peczenik distinguishes two types of gaps. There are gaps which are determined in a non-normative way; in cases like these the law is not sufficiently normative. Then there are gaps determined on the grounds of evaluation. This sort of considerations lead to the conclusion that the law does not meet requirements of rationality. This distinction amounts to the difference between normative and axiological gaps. 

11. In reference to norm 1 Peczenik distinguishes between weak authority: weak if there is no standard prohibiting a certain action; strong if there is a certain standard that does confer authority. 

12. This standard-*exceptiones non sunt extendendae*-is considered by Peczenik to be rather more general than the fourth norm. 

### *References*

Aarnio, A. (1988). *The Rational as Reasonable. A Treatise on Legal Justification.* Dordrecht: Reidel.

Aarnio, A., Alexy, R., Peczenik, A. (1981). The foundation of legal reasoning. In *Rechtstheorie*, Band 21, Nr. 2, p. 133-158, nr. 3 p. 257-279, nr. 4, p. 423-448.

Alexy, R. (1983). *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung.* Frankfurt: Suhrkamp.

Eemeren, F.H. van en Grootendorst, R. (1982). *Regels voor redelijke discussies*. Dordrecht: Foris Publications. Proefschrift UvA.

Eemeren, F.H. van en Grootendorst, R. (1992). *Argumentation, Communication and Fallacies*. Hillsdale: Erlbaum.

Eemeren, F.H. van & R. Grootendorst, Het analyseren en beoordelen van betogende teksten. In *Tijdschrift voor Taalbeheersing,* 9-1, 1987, p. 48-66.

Feteris, E.T. (1994). *Redelijkheid in juridische argumentatie. Een overzicht van theorieën over het rechtvaardigen van juridische beslissingen.* Zwolle: W.E.J. Tjeenk Willink.

Hage, J.C. (1994) Reden gebaseerde logica: een speicale logica voor het recht. In: E.T. Feteris e.a. *Met redenen omkleed. Bijdragen aan het symposium juridische argumentatie 1993*, p. 90 -98. Nijmegen: Ars Aequi Libri.

Klug, U. (1982). *Juristische Logik*. (vierde druk). Berlin/Heidelberg/New York: Springer-Verlag.

Nieuwenhuis, J.H., Legitimatie en heuristiek van het rechterlijk oordeel. In: *R.M. Themis*, 1976, p. 494-515

Peczenik, A. (1989). *On Law and Reason*. Dordrecht/Boston/London: Kluwer.

Tammelo, I. (1969). *Outlines of modern legal logic*. Wiesbaden: Franz Steiner Verlag.

Wróblewski, J., Legal Syllogism and Rationality of Judicial Decision, In *Rechtstheorie*, 1974, p. 33 - 46.

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