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COMMENTS ON THE RECONSTRUCTION OF LEGAL ANALOGY- ARGUMENTATION

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Kloosterhuis is concerned in this paper to compare two approaches to analogical argumentation in the law, in light of what each might contribute to rationally reconstructing and evaluating such arguments. Of the two, the dialogical approach, exemplified by Peczenik's work, is favoured primarily because, to simplify, it acknowledges and attempts to incorporate into its evaluation protocol, the special demands on argumentation created by the legal context. Relying on the pragma-dialectical analysis, which views argument forms as dialectical procedures within a specified discourse or context, Kloosterhuis formulates tentative standards for evaluating legal analogical argumentation answering two evaluative issues: when is it appropriate to use analogical argumentation, and when is it used correctly. The first is a salient issue for the law since legal creativity—the filling of gaps—is not always acceptable; for example, it is legally unacceptable to extend by analogy the criminal law to cover actions other than those expressly proscribed.

For North American theorists of law and argumentation, the paper may be inaccessible since it builds upon the extremely active and robust Continental philosophical literature on legal reasoning, a literature almost unknown here. (Once at a conference in Finland, soon after the publication of his highly influential book on legal reasoning, Alexy ruefully remarked to me that "We read you, but for some reason, you do not read us".) To be sure, there is good work done on analogical legal reasoning here, but it tends to be far less formalized and structured than on the Continent. It is rare to read proposed norms of legal reasoning, criteria of adequacy or standards of evaluation of analogical arguments. Perhaps I can most profitably use my commentary to say a word or two about why this may be so.

Analogical argumentation is a very common, I would even venture to say, a dominant mode of legal reasoning in the Common Law tradition. It is far less common in civil law, or legal systems that put more reliance on codification, which is the case for most of the Continent (not including Great Britain, the source of the Common Law tradition). One does not have to be a trained lawyer to know about the Doctrine of Precedent or the barrister's technique of "distinguishing precedents". Roughly, precedential reasoning involves the positing of the core legal rule (or *ratio decidendi*) of one or more previous cases and then comparing and contrasting the facts of the present case in order to move the decision-maker toward, or away from deciding in accordance with a similar rule. Here the reasoning is most certainly dialogical (or more correctly, adversarial) inasmuch as one side is busy creating analogies, while the other side is busy undermining them, and creating others.

Perhaps more importantly though, these legal 'rules' are fluid and open to interpretation. As Ronald Dworkin has argued, much of Anglo-American legal reasoning is reasoning with and about non-rule-like legal standards (principles and policies, he calls them), which do not have clear edges or boundaries. Because of this, most of the analogical argumentation that goes on in a courtroom involves an on-going contest over how these legal standards are themselves to be interpreted. There is considerable play in the system, and notions such as

'reasonable care', 'foreseeable harm', 'undue hardship' and similar weasel words (as they are cynically called by non-lawyers) merely add to the leeway and opportunity for creativity.

Which also suggests, although this is more controversial, that the notion of a 'gap' in the law is not literally true, although it is a convenient fiction used with considerable rhetorical effect. To have a gap, you need clear boundaries; and in the Common Law, there are precious few of those. At the same time, if it is hard, with all the fuzzy boundaries, to discern gaps in the law, it is also difficult to substantiate the objection in a particular case that the judge is engaging in the practice of "judicial legislation", or making up the law as she pleases. As a matter of fact, lawyers don't concern themselves much about judicial legislation — it is a theoretical problem of little practical consequence. But they do get concerned about decisions that are wrong. But 'wrong' is operationalized in our tradition of law not in terms of codes or rules or standards of reasoning, but rather in terms of the availability of arguably better and stronger legal arguments on the other side of the case.

Of course, there is legislation and regulation in our law, and courts do have to apply legislative language rigorously to preserve the clear social value of legal predictability. We do respect the precision that is possible with clear, unambiguous rules. When the legal issue is one of culpability, criminal or otherwise, like other legal regimes, Anglo-American courts, for reasons which would best be termed 'constitutional', will 'read down' legislative language so that it is not stretched, by analogy or other technique, to create a liability where there was not one before.

Where individual culpability is not clearly at issue, though, in our legal system, legislative language is open to interpretation, and analogical expansion. Suppose a statute says that you need two signatures from two witnesses over 16 years old to produce a valid contract, and you only have one from a 15 year old. Not legally binding: there is no room for interpretation, or analogical argumentation. Or so one would have thought. Suppose you have two signatures from two people who claimed to be over 16, and showed you paper evidence to that effect. But they were not over 16 at all. Suppose these two youngsters acted in collusion with the person on the other side of the contract, the contract you relied on, before he pulled the rug out from under you by declaring the contract void. You are out a lot of money. Can the law help you?

If you had the money to sue, and a good lawyer, you could make a plausible legal argument that even though the legal requirement of signatures was not met, the contract should still be declared valid. Your lawyer would argue unjust enrichment, reasonable expectation, promissorial estoppel and other such doctrines, all of which are shorthand for tens and hundreds of other cases in which, if you like, the underlying purpose of getting signatures and trusting people, and not taking advantage of people come to the fore — as grist for the analogical argumentation mill.

Could it be that the Continental literature on legal reasoning in general, and legal analogical argumentation in particular, can strive toward the goal of 'rational reconstruction' because of the character of their law? I suspect that is true in part; although the converse, that our legal reasoning is not susceptible to the rigours of rational reconstruction, surely does not follow. There have been many attempts to recast legal analogical reasoning into a deductive mould; with limited success. Very little has been done in North America to restrict the non-deductive character of legal analogical argumentation, but still, as on the Continent, to treat it with it systematic rigour. Perhaps it is not possible to do so.

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