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Why is Analogy in the Empirical Science and Everyday Life Different from Analogy in Law?[1]

Dlaczego rozumowanie z analogii w naukach empirycznych i życiu codziennym różni się od rozumowania z analogii występującego w prawie?

SUMMARY

The article elucidates differences between analogy in law and the empirical science and everyday matters such as: a) the lack of possibility of verification of its conclusions on empirical grounds resulting in the necessity of its performing either heuristic and probative functions or rejecting both of them, b) being of a prescriptive nature, c) having an obligatory character, d) entailing rather no need for complex underling doctrines or theories, e) causing more serious practical consequences, f) having base points that are easily recognizable, g) serving as a means of extending authority, h) being a subject of training and education, i) receiving extraordinary attention among scholars, often combined with the real adoration – if not worship – on their part.

The author is convinced that – by highlighting these differences – he will have demonstrated the uniqueness of legal analogy. However, simultaneously, he is far from contending that he knows how legal analogy really proceeds and how the judgment of similarity within it is precisely done. Instead, he assumes that if exact knowledge in these respects remains unattainable for human beings, it is all the better for legal philosophy and those who are devoted to it.

Keywords: analogy; law; differences; science; natural; empirical; life; everyday; daily; legal

INTRODUCTION

The analogical pattern of inference has been of special interest to philosophers, theologians, logicians and other scientists since time immemorial. What makes analogy particularly attractive is the ability to widen the current state of

[1] This article is connected with the research project the author has carried out in the United Kingdom as a guest researcher at Aberystwyth University owing to the Polish governmental programme: "Mobilność Plus".

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knowledge, although data are lacking and other, especially formal, methods have failed. This ability, if real, certainly cannot be overemphasized. Leading from the unknown to the known, as it is sometimes said about analogical thinking, is undisputedly of great epistemological value. Indeed, an analogical argument has been employed in order to learn about God, the cosmos, the features of the surrounding nature unnoticeable for the human senses, or even in order to resolve the ordinary problems emerging in everyday life. Moreover, apart from occurring in many kinds of creatures (most notably mammals), the capacity to reason by analogy is sometimes believed to be the most developed and deeply rooted in human minds.

On the other hand, there are a host of sceptics who appreciate analogical reasoning but solely as a heuristic or didactic devise, denying it any capability to establish the truth. According to their position, analogy serves as an effective method for inventing new ideas and concepts, e.g. to conceive how to defeat cancer or how the structure of sound looks. To them, analogy can also be used as a technique for giving educational illustrations or making scientific classifications (generalizations), but by no means are analogical conclusions to be accepted unless proven in a more credible way – whether by conducting an experiment or invoking the rules of classic logic and posited axioms.

In the legal domain, however, analogical reasoning seems to be somewhat different, namely – leaving aside the aptness of the sceptical claim referred above – the empirical kinds of proof that can be applied in everyday life and natural science are not available in the province of law by its very nature. Law as such, its precepts and mandates, is prescriptive (not descriptive) and virtual (not-physical) and at the same time linked in a particular way to the physical world and human beings. (It is first restricted by the conditions of this world and human abilities within it as well as connected to the needs, goals and values people have or wish to ascend and protect.) Moreover, the requirement of equal treatment which is so pervasive in legal thought and orders that similar cases have to be treated alike inevitably puts an extra premium on the analogical reasoning that here comes to the fore, perhaps to the extent one finds nowhere else.

In this article, I will try to capture the features that make legal analogy different from its counterparts in natural science and everyday matters and which are thus responsible for the uniqueness of analogy employed in law.

I. LACK OF THE POSSIBILITY OF THE EMPIRICAL VERIFICATION OF THE ANALOGICAL CONCLUSIONS REACHED IN THE LEGAL DOMAIN

First and foremost, it must be stressed that the conclusions reached by analogy in law cannot be verified on empirical grounds as the analogical conclusions that we encounter in everyday life and natural science. There, even if not at once,

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propositions advanced by the use of analogical reasoning are susceptible to the test which definitely determine their value in terms which allow to reject or adopt them tentatively or finally[2].

In law, we cannot conduct any experiment/observation and any other reliable empirical test that would be able to confirm the truthfulness of the results we obtain by recourse to analogical inference. Therefore we are not in a good position to separate here – at least completely – the heuristic function of analogy from its evidential value. We have rather to either admit or rebut both of them. Undoubtedly, we do not have such a clear-cut choice as the skeptics have in natural science and everyday life which makes it possible to accept analogy as a means of conceiving solutions (advancing hypotheses) and simultaneously reject it as a means of proof. This difference is so important that it is sometimes and for good reason called 'overriding'[3].

Incidentally, it also entails that in law we cannot test the aptness of conclusions reached by analogy on a smaller sample in order to leave the main subject intact until we are certain of it. Such trials seems to be quite viable in everyday life or natural science, where before making final decisions one sometimes may designate some less important item or part of the whole to try out some analogical conclusion upon it (*vide* also: experiments on animals and a small number of humans)[4].

II. PRESCRIPTIVE NATURE OF LEGAL ANALOGY

Secondly, in law, analogical reasoning is not a method by which we are supposed to get to know something new about the surrounding world. Identically as the law itself, the conclusions of legal analogy do not describe anything. Instead, they are about this which is ordered, permitted or prohibited, in a sense, being thus of a normative or – even more precisely – of a prescriptive nature.

Thus Jefferson White remarks: "Conclusion drawn by inference from analogy in law are, for the most part, neither causal nor predictive in this way. In legal argument from analogy the similarities referred to in premisses support a normative, not a causal, inference, that is, an inference about correct legal outcome"[5]. Cass R. Sunstein argues that:

[2] Cf. L.L. Weinreb, *Legal Reason: The Use of Analogy in Legal Argument*, Cambridge University Press: Cambridge 2005, DOI: http://dx.doi.org/10.1017/CBO9780511810053, pp. 76–77.

[3] See: *ibidem*, p. 76.

[4] As Lloyd L. Weinreb indicates, respecting the removing of the cranberry juice stains from Mary's tablecloth through the solution received via analogy: "If, for example, Mary's tablecloth were a family heirloom, she might want to try Edna's suggestion [to pour salt on it on the basis that salt works with wine – M. K.] on a white rag before pouring salt on the tablecloth". See: *ibidem*, p. 72.

[5] J. White, *Analogical Reasoning*, [in:] *A Companion to Philosophy of Law and Legal Theory*, ed. D. Patterson, Wiley-Blackwell: Malden 1996, p. 584.

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We can see an important difference between analogical reasoning in science and analogical reasoning in law and ethics. When scientists engage in analogy, they often use some case A to produce a probabilistic judgment that they think bears on case B. If dropped objects fall in New York, dropped objects will probably fall in London too. […] Law and ethics are different. Here the key work is done not by a probabilistic judgment (based on known similarities), but by development of a normative principle (also based on known similarities)[6].

Weinreb seems to offer a contrasting view, while referring to the similarity between the use of analogy in daily matters and in the courtroom, he elucidates: "The tasks are not always so unlike. We commonly use analogical reasoning [in situations of everyday life – M. K.] to resolve a question about how one ought to behave or ought to have behaved in a specific situation. Such a question is prescriptive, like the question before a court"[7]. But in this passage, he appears to ignore that the normativity (prescriptiveness) in everyday life and natural science is empirically verifiable when prescriptiveness/normativity in law is not. And in effect the tasks of a judge and an everyday life reasoner are actually quite different even if they pertain to the way one should or should not act in a given set of circumstances.

III. THE MERELY OPTIONAL CHARACTER OF THE USE OF ANALOGY IN EMPIRICAL SCIENCE AND EVERYDAY MATTERS

Thirdly, it must be stressed that in everyday life and in empirical science we are not under any obligation to make use of analogy[8]. Here the recourse to analogical reasoning is up to the analogiser, being optional. In law, on the contrary, there is a requirement to treat similar cases alike, a requirement which appears to render the use of analogy mandatory.

Hence Grant Lamond notices that:

[6] See: C.R. Sunstein, *Legal Reasoning and Political Conflict*, Oxford University Press: New York 1996, p. 66. Rupert Cross in turn remarks that: "[…] for the scientist, the instant case is relevant either to his formulation of the general proposition from particular instances because it is one of the instances, or else to the testing of the rule which he had already formulated because it is part of the material by which that rule is tested. For the judge, on the other hand, the purpose of the rule is to aid in the decision of the instant case" (see: R. Cross, *Precedent in English Law*, The Clarendon Press: Oxford 1968, p. 180). And Steven J. Burton adds that legal reasoning "focuses on best of the available alternative actions in concrete circumstances, not verifiable generalities, as in the science" (see: S.J. Burton, *An Introduction to Law and Legal Reasoning*, 3rd ed., Wolters Kluwer: Austin 2007, p. 84).

[7] L.L. Weinreb, *op. cit.*, p. 74.

[8] Cf. G. Lamond, *Precedent and Analogy in Legal Reasoning*, [in]: *The Stanford Encyclopedia of Philosophy*, http://seop.illc.uva.nl/entries/legal-reas-prec [access: 20.05.2016], pp. 2, 3.

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> [I]nstitutional decision-makers [for example, the judges – M. K.] often regard earlier decisions as being relevant even when the decision at hand is different from the original ones, by citing them as analogies. They will argue that since an earlier decision was made on some matter, it would be inconsistent now to decide the present case differently. Individuals, by contrast, will often simply attend to the merits of the particular question before them and try to get the decision right. If it is pointed out that their current decision seems to be inconsistent with how they treated an earlier question, this may prompt them to reconsider, but is not in itself a reason to change their decision[9].

> An individual [instead] may give weight to what she has done in the past, e.g. because she believes the decision was made under optimum conditions, or she should not or does not disappoint someone's expectations, or there are special reasons to treat the two situations identically. Similarly, the comparison of the problem at hand with another situation may help clarify one's thinking, but one's judgment on the other case is only relevant to the extent that it is correct[10].

Specifically, the obligatory character of the employment of analogy in a legal setting appears to stem from three independent sources:

- the practical impossibility of prior exact determination of the legal consequences of the cases that arise in life by establishing the set of deductively applicable general rules,
- the commonly adopted requirement on the part of the judges to pass judgments upon the law, not something other,
- the adoration of the principle of equal treatment that comes in here under the name of 'formal justice' or simply 'justice'.

It seems to be commonplace that the task of prescribing in advance the determinate legal outcome of every case one may potentially encounter is not feasible. First of all, if we wished to attain such a goal by means of the establishment of a pertinent set of general rules, these rules would have been so numerous, casuistic, complex and elaborated that no-one would be able to learn and become acquainted with them or even identify those ones among them which are relevant for the given case. There would thus be an unmanageable plethora of them. Moreover, legislatures – and the human beings which they are composed of – have no capacity to predict all possible situations and events that may occur in life, irrespectively of the effort they put into doing so. An unexpected case can always occur for which no squarely crafted rule has been envisaged.

One may even argue that each case is in a sense a unique one and hence it deserves individual, not 'general' ('universal'), treatment. Thus Weinreb contends that: "However comprehensive the wording of a rule specifies the circumstances in which it is to be applied, it cannot specify all the facts of a particular concrete case without losing the quality of a rule. Inevitably, if words are to communicate

[9] *Ibidem*.
[10] *Ibidem*, p. 25.

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at all beyond merely pointing to something that is immediately present (»Not this, that!«), they are more or less general"[11]. And Sunstein states that: "[…] legal thought is pervaded by prototypical cases"[12].

Additionally, the construction of such overarching and exact rules is impeded by the fact that the circumstances in which legal rules operate are far from stable, sometimes changing considerably with time. The conditions and needs which a particular community lives under and has can drastically fluctuate and hence a rule that was utterly sound and beyond any doubt reasonable when first introduced may turn out to be plainly absurd or unjust at present. The obsolescence or unfitness of legal rules is indeed one of the most important problems of societies nowadays. The present doctrine of the welfare state that took the place of the doctrine of a night watchman results in today's legal systems dealing with an enormous number of challenges and phenomena of a diverse – social, ecological, economical, ethical, political etc. – nature such as: state and factual monopolies, consumer and environmental protection, supervision of companies that are run by the governmental agencies, health protection, biotechnological interventions into natural order, new possibilities of committing crimes (*vide* cyber criminality) and so forth[13]. In consequence, the change in the preference of interests, goals or aims in such areas may rapidly make the current law far behind the spirit of the times. As a result of the above, the legal domain appears to be a paradigmatic example of the milieu to which Holyoak and Thagard refer when emphasizes that:

> […] analogies will be especially important when the decision maker is unable to base a decision on simply rules and principles. Such situations arise when the basis for the decision is changing dynamically and when each case is unique in some important way. In domains with these characteristics, analogy is not simply a way for a novice to get started – it is also a basic form of reasoning by domain experts[14].

The next reason why analogy in law is not a mere option but a must seems to lie in the fact that though in legal thought and reasoning, an observation and experiment as well as deductive and inductive mode of inference play rather a mar-

[11] L.L. Weinreb, *op. cit.*, p. 88.

[12] C.R. Sunstein, *Legal…*, p. 76.

[13] Cf. M. Troper, C. Grzegorczyk, J.-L. Gardies, *Statutory Interpretation in France*, [in:] *Interpreting Statutes. A Comparative Study*, eds. D.N. MacCormick, R.S. Summers, Dartmouth Publishing Company Limited: Aldershot 1991, pp. 178–179. That is also why White helps himself with the following passage from Plato: "Law can never issue an injunction binding on all which really embodies what is best for each; it cannot prescribe with perfect accuracy what is good and right for each member of the community at any one time […] The variety of man's activities and the inevitable unsettlement attending all human experience make it impossible for any art whatsoever to issue unqualified rules holding good on all questions at all times". See: J. White, *op. cit.*, p. 583.

[14] K.J. Holyoak, P. Thagard, *Mental Leaps: Analogy in Creative Thought*, The MIT Press: Cambridge 1996, pp. 146–147.

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ginal role, the decision-makers are expected not to be unconstrained in their jobs. They are, for instance, not allowed to decide on pending cases by flipping a coin[15] or by recourse to the free play of their imagination or a sheer sense of justice. Instead they are supposed to be bound by the law and to deliver judgments that are anchored in it[16]. At the same time, they are also not allowed to postpone their decisions until the law deductively tells them the answer in the case sub judice, being thus compelled to reach these decisions in some other way[17]. In consequence, legal analogy presents itself as one of the viable alternatives – if not the only resort – in order for the judges and other law officials be constrained, having curtailed their discretion, and to uphold the legality of the decision they made[18].

The most vital cause of the mandatory nature of the use of analogy in the legal setting appears, however, to be the requirement of treating similar cases alike. This requirement is in the province of law so central and welcome that is often equated with justice itself, especially this manifestation of it that is called formal (as distinct from the substantial one)[19]. By that way, based on judgment of similarity, analogical reasoning is coming to the fore, pretending to be the main means by which such justice can be dispensed[20].

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[15] Cf. R.A. Posner, *The Problems of Jurisprudence*, Harvard University Press: 1990, p. 77.

[16] Hence Weinreb comprehends the idea of the rule of law in the following way: "It speaks most directly, however, not to those who comply but to those who declare the law. They are not to decide for themselves what the law is but are to seek it out, to discover and apply it as it is". See: L.L. Weinreb, *op. cit.*, p. 148.

[17] As Burton aptly asserts, "[a] scientist can conclude that the answer to question remains unknown for decades or centuries; however, a judge should decide a law case according to the law and without undue delay". See: S.J. Burton, *op. cit.*, p. 84.

[18] Thus Weinreb contends that in a situation of the absence of a settled rule that prescribe an outcome, a judge is obliged to decide the case according to the law, not by resort to considerations that are outside the law, and reasoning by analogy enables the judge to so (see: L.L. Weinreb, *op. cit.*, footnote on p. 81). And D. Neil MacCormick indicates that: "[…] if we seek a reason why arguments from analogy or from principle have the force they have in legal argument, the answer is the existence of a highly desirable conventional rule conferring power on judges to extend the law to cover circumstances not directly or unambiguously governed by established mandatory rules, but imposing limits on the extent of that power", and points out that one possible criterion to distinguish interstitial (legitimate and allowed) from architectural (illegitimate and not allowed) legislation on the part of courts is "that either a relevant analogy or an established principle is a necessary element of justification of an innovative decision" (see: D.N. MacCormick, *Legal Reasoning and legal Theory*, Clarendon Press: Oxford 1978, p. 188).

[19] As to formal justice see C. Perelman, L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, transl. J. Wilkinson, P. Weaver, University of Notre Dame Press: Notre Dame 1969, pp. 218–220.

[20] As a result White, against the precedential law, set out: "[I]t is not merely the case that reasoning from analogy is *sometimes* involved in legal judgment. It must *always* be involved, whether explicitly or by implication, because: 1. justice requires that like cases be treated alike; and 2. no two cases are identical". See: J. White, *op. cit.*, p. 584.

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By the same token, legal analogy is deemed to also be strictly connected with the pursuit of coherence within the legal system, the state which in short means that particular values and goals should be consistently protected and accomplished by the operating law[21]. It is noteworthy that reasoning based upon analogy is supposed to contribute to the certainty of law or even to the rule of law as well[22].

IV. LEGAL ANALOGY DOES NOT SEEM – AT LEAST OVERTLY – TO HINGE ON COMPLEX UNDERLING DOCTRINES OR THEORIES

Fourthly, it is also worth noting that legal analogy – as opposed to analogy in empirical science – seems to be able to operate without deep, complex and sublime theories that underline and justify its conclusions.

In empirical science, scholars are, as it appears, usually able to explain in terms of some broader theory or doctrine why they have drawn a particular analogy, demonstrating thus why this analogy is – according to its proponents – likely to be a successful one. Then, by turning to a theory which underlies an analogical conclusion (especially a causal relation involved in such theory), we are enabled to assess the tentative value of a given analogical conclusion and to evaluate the chances for it proving to be an apt one. In law instead – be it good or not – people, the lawyers and judges, many times advance analogies which are guesses, hunches, intuitions and so on. They, if asked, may find it very difficult to give any complex theory which can demonstrate why the analogy they proffer is a good one, preferring not to go beyond mere statements that they consider this analogy just right or appropriate (e.g. content themselves with a concise announcement that the case at hand is similar to one of the precedential cases or that an inn is similar to a steamboat provided with couchettes).

That does not mean that analogical reasoning in law cannot be backed by an underlying doctrine or theory that argues for the correctness of its outcome. The reasons for adopting a given analogical conclusions can be grounded in aims,

[21] Thus MacCormick argues that analogy is helpful "to secure a value-coherence within the legal system" and that „[t]he requirement of coherence can then be further understood as delimiting the field within which judicial law-making is legitimate", and Sunstein elucidates that "analogizer is committed to consistency and equal treatment […] This idea operates as a barrier to certain forms of prejudice and irrationality". See: D.N. MacCormick, *Legal…*, p. 153, see also pp. 187–188; C.R. Sunstein, *Legal…*, p. 76 (respectively). On the notion of coherence in law see, for instance, D.N. MacCormic, *Legal…*, pp. 152–153; *idem*, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, Oxford University Press: Oxford 2005, pp. 190–205.

[22] According to Sunstein: "[A]nalogical reasoning, if based on precedent, promotes the important interests in fostering planning, maintaining predictability, and protecting expectations. Past cases encourage people to believe that the law is a certain way, and that they may act safely on that belief. A commitment to following precedent, and to reasoning analogically, enables those expectations to be vindicated and in that sense too it is associated with the rule of law". See: C.R. Sunstein, *Legal…*, p. 76.

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principles, rules, and goals that are discernible in the workings of a legal system. Advancing (revealing) such reasons may even render particular analogies more compelling or appear less arbitrary. However – even if it is an exaggeration – there is also much which is true in Sunstein's opinion that legal analogy can be incompletely theorized[23] and that in it "deep theories about the good or the right are not deployed. […] Such theories seem too sectarian, too large, too divisive, too obscure, too high-flown, too ambitious, too confusing, too contentious, too abstract"[24].

Obviously also in everyday life[25] and even in empirical science, untheorized analogies from gut feelings, dreams or other kinds of internal insight can be drawn. In these provinces, however, untheorized analogies are treated more as hypotheses than as theses. And, those who are authors of such analogies are fully aware that what they propose cannot be treated as trustworthy and – after put to an empirical test – may prove to be utterly inept.

V. MORE SERIOUS CONSEQUENCES OF THE EMPLOYMENT OF ANALOGICAL REASONING IN THE LEGAL DOMAIN

Fifthly, the consequences of applying analogical reasoning in law appear to have been far reaching, and far more serious than making an argument from analogy in natural science and everyday life.

When delivered via analogical reasoning, judicial legal decisions directly influence the vivid interests of the litigants or accused or even the society at large.

[23] See: *ibidem*, p. 62.

[24] *Ibidem*, p. 63. Weinreb seems to go further when he claims that legal analogies can be not incompletely yet utterly deprived of any backing theory or policy. Thus according to him, judges who reasoned by analogy in instances invoked by him "studiously avoid embarking on that kind of inquiry [into what would be a sound policy or instrumental arguments to achieve it – M. K.], because it was not necessary to the argument being made and also, […] because it was inappropriate to their task". See: L.L. Weinreb, *op. cit.*, p. 61.

[25] "As Weinreb points out: "In a sense, practical analogical reasoning is »incompletely theorized«, as Sunstein describes the outcome of analogical legal reasoning. Most of the time, however, it would be more accurate to say that it is not theorized at all". See: L.L. Weinreb, *op. cit.*, p. 71. This thesis Weinreb further elucidates by remarking that: "Edna and Charlie [the characters who appear in the Weinreb's examples with the need of removal of stains from a tablecloth and the need of repairing a broken lawn mower respectively – M. K.] have practical problems, for which their experience suggests practical solutions. Having gotten that far, a theory is beside the point. The observed similarity between past experience and present problem or, in the language of analogy, between source and target is itself enough to prompt the connection between them, without mediation by a general rule". And though he admits that such a rule comprising a more general theory can be framed, he nonetheless insists that it would be unnecessary since Edna and Charlie "are interested for the moment in solving a particular problem, and speculation beyond that is not to the purpose" and what is – in his opinion – even more important, Edna and Charlie may just do not possess knowledge necessary to explain why their analogies are to be correct ones. See: *ibidem*, pp. 71–73.

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That is, someone has to pay compensation, go to prison, or if he/she is acquitted another cannot take relief for the incurred damage or harm. Such consequences of judgments reached by analogy are often irreversible and if afterwards – i.e. after when the judgment is uphold or appeal inadmissible – they are even regarded as a grave mistake, they cannot be undone.

Moreover, especially in common law legal systems, where the principle of *stare decisis* obtains, the conclusions judges come to via analogy influences the judgments which will be delivered in the future. Thus the result of analogy pertains to the parties, but it is also of great importance to others whose case is or will be similar to the pending one.

On the contrary, in empirical science, as a rule the propositions reached by analogy patiently wait for their verification and are not accepted before such verification proves to be credible on strong empirical evidence. Similarly, in everyday life, though the use of analogy can be risky and undesirable consequences may befall someone who puts an analogical conclusion in force, analogical outcomes are usually not coercive and may be easily abandoned if there is a suspicion of a pernicious or irretrievable effect.

VI. EASILY RECOGNIZABLE BASE POINTS IN THE CASE OF LEGAL ANALOGY

Sixthly, in the legal setting, it seems to be much easier to find points which lend themselves to serve as a basis for analogy. Namely, in the province of empirical science and in everyday matters, the quest for such base points may require highly-developed skills and be an art in itself.

In the legal domain, the points that may be use as a material for comparison and drawing analogical conclusion are – usually – constituted by the constellations of facts with attached legal consequences. They consist thus of previously made legal decisions in concrete cases or instances to which a particular statutory or precedential rule is applied beyond any doubt. In addition, as a base point of legal analogy, one may use any real or hypothetical situation whose legal consequences are known and difficult to challenge for the members of his/her legal community.

As a result, the material which may form and from which one may pick up the basis for potential analogy is thus familiar to everyone. Although the value of such a point may be questioned – e.g. by pointing out that a given judicial decision is not a binding precedent, having been overruled or being only persuasive from the very beginning – there is a common understanding between all analogizers in law as to how the base point looks[26].

[26] Cf. C.R. Sunstein, *Commentary on Analogical Reasoning*, "Harvard Law Review" 1992–1993, No. 106, pp. 770–771.

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In everyday life and empirical science, the base points for potential analogies seems to be more often than not latent and awaiting discovery. The mere conceiving of it can be a huge step forward, a very flash of genius. There is also no common agreement where and among which such points can be searched for.

VII. EXTENSION OF AUTHORITY BY LEGAL ANALOGY

Seventhly, since – as it appears – authority and its observance play a far greater part in law than in empirical science[27], it should be not a surprise that such an authority is extended beyond its prior scope largely by recourse to legal analogy.

Analogy is second-to-none for making decisions made by a judge of high standing (sitting in the court of last resort) applicable to cases whose facts are not exactly the same as facts present during making these decisions. The authoritative opinion comprised in such decisions is thus spread upon other instances which its author did not have – at least directly – in mind.

The authority which consists of statutory rules is also extended by analogy. Owing to analogical inference from them, these rules are applied to situations which do not lie within their exact scope. The authority of the decision made by a legislator in the enactment of some provision is by that way expanded, able to cover many more cases than if analogical reasoning had been not employed.

In empirical science, the different nature of authority combined with a non-probative function of analogical reasoning and its non-obligatory character render the extension of authority by analogy pointless. It looks more or less similar in every day matters. However, in governor-subject relations the extending of authority through analogy can here be regarded as similar to that in law.

VIII. BEING TRAINED AND EDUCATED IN THE USE OF LEGAL ANALOGY

Eighthly, lawyers, especially those from common law countries, are taught how to reason by analogy while scientists and everyday reasoners are not. Analogy is thus connected with the so-called ‘case method’, the method of teaching which is copiously applied in law schools in the USA. As Weinreb confidently states, analogical arguments “are also a standard feature, one might almost say defining feature, of legal education”[28]. He elucidates also that: “In class, however, under the direction of someone who is knowledgeable about the law, the case

[27] On authority in empirical science and law see: R.A. Posner, *op. cit.*, pp. 79–86; M. Koszowski, *Why Legal Reasoning Has to Be Unique?*, “The Indonesian Journal of International & Comparative Law” 2016 (June), pp. 569–570.

[28] L.L. Weinreb, *op. cit.*, p. 12.

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method proved to be an excellent pedagogical technique to exercise students' capacity for analogical reasoning at the same time that they acquire the knowledge of the law that informs the capacity"[29].

The above thesis does not, however, lead to the assertion one may suspect that the lawyers, students or judges are taught how to reason by analogy in a complex or sophisticated way. On the contrary, learning that seems to be to a large extent intuitive in the sense that the skill how to analogizes is usually grasped and perfected rather not through attending lectures on theory of analogy but through taking part in discussions and doing other exercises that presuppose that their participants will engage in analogical reasoning, being under the supervision of someone who has already mastered this skill. Not all are content with such a state of affairs and some, such as Dan Hunter, even lament that though "analogy plays a central role in legal reasoning", that how to analogize is "poorly taught and poorly practiced". And "when it comes to explaining why certain analogies are compelling, persuasive, or better than the alternative, lawyers usually draw a blank. They have little idea how to create an analogy, what an analogy is, or why one analogy might be more effective than any other". As he seeing a reason of that, "[t]he teaching of analogies reinforces this sense that analogies are a mystery: the teacher suggests that the student will learn what is a good analogy only through experience"[30].

IX. EXTRAORDINARY APPEAL TO ANALOGY IN LAW

In law, interest held in analogical reasoning seems to be conspicuously greater than interest posed in analogy in empirical sciences and everyday life. Analogy is regarded as omnipresent in legal settings, finding here its natural home, or even claimed to be a special unique legal method lawyers may be proud of. It is beloved and gains respect no other argument ever received – not least if we are considering common law legal system.

Thus, for instance, Keith J. Holyoak and Paul Thagard indicate that: "One of the most important domains in which analogy is routinely used is the law"[31].

[29] *Ibidem*, p. 142. He also explains that: "Learning the law means more than memorizing the rules that have been set down in past cases, even a very large number of them; it means understanding how the rules would be applied to other case with different facts. […] [T]he genius of the case method is that it equips students to understand legal doctrine in use, not only the »black letter rule« but also what specific details in a novel situation may have a bearing on whether and how the rule is applied". See: *ibidem*, p. 145.

[30] See: D. Hunter, *Teaching and Using Analogy in Law*, "Journal of the Association of Legal Writing Directors" 2004, Vol. 2, www.alwd.org/wp-content/uploads/2013/04/pdf/jalwd-fall-2004-hunter.pdf [access: 20.05.2016], p. 151.

[31] K.J. Holyoak, P. Thagard, *op. cit.*, p. 149.

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Douglas Walton remarks that: "Arguments from analogy are common in law"[32]. Weinreb states that despite of relevance of other forms of legal reasoning "[a]nalogical arguments are, however, especially prominent in legal reasoning, so much so that they are regarded as its hallmark"[33]. Sharon Hanson maintains that argument by analogy is the most common form of argument in law[34]. Ruggero J. Aldisert claims that: "The importance of legal reasoning by analogy cannot be overstated. It is the heart of the study of law […]"[35]. Sunstein contends that it is legal reasoning within the court system where analogical reasoning finds its natural home[36], saying also that: "Analogical reasoning lies at the heart of legal thinking and for good reasons"[37]. Brewer points out that: "[L]egal argument is often associated with its own distinct method, usually referred to as »reasoning (or argument) by analogy«, indeed, if metaphor is the dreamwork of language, then analogy is the brainstorm of juris'-diction"[38]. Eileen Braman speculates that "[p]erhaps the best-known domain where analogy operates is legal reasoning"[39] and observes that "[a]nalogical reasoning is clearly a fundamental aspect of legal decision making"[40]. Hunter is of opinion that: "Analogy plays a central role in legal reasoning"[41]. Barbara A. Spellman argues that "law school is largely about analogy; law schools just fail to tell students that explicitly. And the reason law school is largely about analogy is because common law – and the principle of precedent – is totally about analogy"[42]. In a similar vein, Kevin D. Ashley enunciates that:

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[32] D. Walton, *Informal Logic: A Pragmatic Approach*, 2nd ed., Cambridge University Press: Cambridge 2008, DOI: http://dx.doi.org/10.1017/CBO9780511808630, p. 312.

[33] L.L. Weinreb, *op. cit.*, p. 4.

[34] S. Hanson, *Legal Method & Reasoning*, 2nd ed., Cavendish Publishing Limited: London 2003, p. 218.

[35] R.J. Aldisert, *Logic for Lawyers: A Guide to Clear Legal Thinking*, 3rd ed., National Institute for Trial Advocacy: 1997, p. 96.

[36] C.R. Sunstein, *Legal…*, p. 62.

[37] *Ibidem*, p. 99.

[38] S. Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, "Harvard Law Review" 1995–1996, No. 109, p. 926. It is also noteworthy that according to Brewer, there are many forms of argument of analogy in law which are not commonly recognized (as e.g. an argument by counterexample, argument under the ejusdem generis canon of construction or the doctrine of equal protection). Moreover, according to him, "[p]erhaps the most important of these unrecognized analogical arguments is the argument that proceeds by effecting a »reflective equilibrium« between general norms and particular application of those norms". See: *ibidem*, pp. 927–928.

[39] E. Braman, *Law Politics & Perception. How Policy References Influence Legal Reasoning?*, University of Virginia Press: Charlottesville 2009, p. 84.

[40] *Ibidem*, p. 111.

[41] D. Hunter, *op. cit.*, p. 151.

[42] B.A. Spellman, *Reflections of a Recovering Lawyer: How Becoming a Cognitive Psychologist – and (in Particular) Studying Analogical and Casual Reasoning – Changed my Views about the Field of Psychology and Law*, "Chicago-Kent Law Review" 2004, No. 79, p. 1190.

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Arguing from precedents is formally ensconced in Anglo-American law in the rule of *stare decisis*, that a court's decision in a previous case is binding on the same or a lower court in a similar case. In addition, an attorney's law school training and legal practice inculcate standards of legal argument that strongly prefer arguments whose conclusions are justified by citing analogous precedents[43].

Frederick Schauer admits that "[a]nalogies, after all, are a ubiquitous feature of legal argument and judicial opinions"[44]. Also for Edward H. Levi and Jan M. Broekman, "[t]he basic pattern of legal reasoning is reasoning by example"[45] and "the analogy remains a basic operation which establishes the legal discourse"[46] respectively. Similarly, analogy is regarded as one of the principle modes of legal reasoning by Lamond and Burton[47]. Robert Alexy, in turn, counts it – together with *argumentum e contrario*, *argumentum a fortiori* and *argumentum ad absurdum* – among special legal argument forms[48].

CONCLUSIONS

The differences enumerated above compel me to disagree with Burton's claim that "analogical legal reasoning is not fundamentally different from analogical reasoning in familiar situations"[49] as well as to be personally not in accord with Weinreb's equitation that "[n]otwithstanding the many aspects of legal argument and decision that have no counterpart in daily life, however, the form of reasoning – deriving the solution to a problem from the solution to another problem, on the basis of similarity between them – is the same in both"[50] inasmuch as by "the form" one should comprehend in this sentence something more than the

[43] K.D. Ashley, *Arguing by Analogy in Law: a Case-Based Model*, [in:] *Analogical Reasoning: Perspectives of Artificial Intelligence, Cognitive Science, and Philosophy*, ed. D.H. Helman, Springer-Science+Businesss Media: Dordrecht 1988, p. 206.

[44] F. Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*, Harvard University Press: Cambridge 2009, p. 85.

[45] E.H. Levi, *An Introduction to Legal Reasoning*, The University of Chicago Press: Chicago 1949, p. 1.

[46] J.M. Broekman, *Analogy in the Law*, [in:] *Legal Knowledge and Analogy: Fragments of Legal Epistemology, Hermeneutics and Linguistics*, ed. P. Nerhot, Kluwer Academic Publishers: Dordrecht 1991, DOI: http://dx.doi.org/10.1007/978-94-011-3260-2_10, p. 217.

[47] G. Lamond, *op. cit.*, p. 1; S.J. Burton, *op. cit.*, p. 25.

[48] See: R. Alexy, *A Theory of Legal Argumentation. The Theory of Rational Discourse as Theory of Legal Justification*, transl. R. Adler, N. MacCormick, Oxford University Press: Oxford 1989, p. 279.

[49] S.J. Burton, *op. cit.*, p. 27.

[50] L.L. Weinreb, *op. cit.*, p. 77. He also claims that: "Far from being special to the law, analogical reasoning is used by all of us constantly, to conduct the most ordinary affairs. Our lives depend on it". See: *ibidem*, pp. 73–74.

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mere formal scheme (sequence) of inference or the mere description in the vein like: reasoning from the particular to the particular or drawing a conclusion upon a discerned similarity between the cases being compared.

Burton's addition that "it [analogical legal reasoning – M. K.] is, however, more formal, rigorous, and uniform in expression"[51] is also – for my view – insufficient to show the real nature of legal analogy. The same goes for Weinreb's observations that: "[W]hile the use of analogical reasoning in ordinary affairs is likely and highly serviceable expedient, in adjudication it is more than that. It is indispensible"[52].

Indeed, the differences highlighted in this article lend support to the hypothesis that legal analogy, including the process in which the relevant similarity between the cases being compared is ascertained, has to be dissimilar to the analogical reasoning one employs in everyday matters and empirical sciences. (All the more so, legal analogy cannot be – as Posner argues – reduced just to basing decisions on all the available information, including information contained in previous decisions[53].) An analogy one uses in law is simply a form of reasoning about something that is totally different from the subject of the analogies we are acquainted in the empirical science and everyday matters, being plumbed to law's ontological and epistemological complexity. The differences I have sketched between analogical reasoning in law and these provinces do, however, tell us hardly anything as to that how this reasoning proceeds in the legal domain. Whether we are ever given to have such knowledge is, however, a doubtful question. The workings and the power of legal analogy seems – as well as the genius of a human mind – to have to remain in the shadow of conjectures and speculation[54]. If

[51] S.J. Burton, *op. cit.*, p. 27. He also elucidates here: "What can count as a base point or an important factual similarity or difference is constrained by the law, in principle if not always in practice. Underlying good legal reasoning of this kind are well-accepted rules identifying the authoritative base points, vocabulary and method encouraging rigorous consideration of both similarities and differences, and a form of expression for framing the issue to be decided. Strict analogies, however, leave the crucial judgment of importance – determining whether the factual similarities or differences should control the outcome – unconstrained by the law and open to abuse". See: *ibidem*, p. 27.

[52] L.L. Weinreb, *op. cit.*, p. 77. However, he at the same time seems to assert that analogical arguments purport to be "arguments valid on their own terms". See: *ibidem*, p. 108, cf. also pp. 107–122.

[53] R.A. Posner, *op. cit.*, p. 78.

[54] As White unsurprisingly notes: "[…] at present we do not understand how these processes [of judgment of similarity included in analogical reasoning] work – whether in law or in other kinds of knowledge acquisition. In particular, we do not understand how similarity recognition interacts with normative legal judgment in case-by-case adjudication". See J. White, *op. cit.*, p. 589. This, however, does not contradict – in any way – the Weinreb's statement in which he argues that: "The evidence is convincing that capacity for analogical reasoning is hard-wired in us (and, incidentally, in animals), and develops initially at a very early age – within the first twelve months. It is not fundamentally distinct from the capacity, also hard-wired, to recognize the general in particular – the

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they indeed stay unrevealed, this would be the most favorable course of events for legal theorists and philosophers of law who are in the best position here to fluff up their feathers.

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redness of apple, a fire engine, and a clown's nose – without which we should be unable to describe or to refer to anything that is not immediately present and which, therefore, is implicit in all learning". See: L.L. Weinreb, *op. cit.*, pp. 124–125.

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STRESZCZENIE

W artykule zostały omówione różnice, jakie zachodzą pomiędzy rozumowaniem *per analogiam* w prawie oraz w naukach przyrodniczych i życiu codziennym. W efekcie w stosunku do analogii stosowanej w prawie zwrócono w nim uwagę na: a) brak możliwości empirycznej weryfikacji wniosków stawianych za jej pomocą, skutkujący bądź koniecznością zaakceptowania pełnienia przez nią zarówno funkcji heurystycznej, jak i dowodowej, bądź odmówieniem jej możliwości pełnienia którejkolwiek z tych funkcji, b) względny brak potrzeby uzasadniania (wyjaśniania) takich wniosków za pomocą jakichś rozbudowanych teorii (doktryn), c) jej obligatoryjny (w sensie konieczności sięgania do niej) oraz normatywny (preskryptywny) charakter, d) poważniejsze konsekwencje, jakie wiążą się z korzystaniem z niej w praktyce, e) łatwiej identyfikowalną podstawę dla przeprowadzanych w jej zakresie porównań, f) służenie jako środek do rozciągania tego, co posiada „autorytet", g) bycie przedmiotem profesjonalnego nauczania, h) szczególne zainteresowanie się nią ze strony ludzi nauki, połączone często z jej uwielbieniem, jeśli nie wręcz kultem.

Autor przejawia nadzieję, iż przez wyszczególnienie wyżej wymienionych różnic wykazał jednocześnie unikalny charakter prawniczej analogii na tle analogii występującej w naukach empirycznych i życiu codziennym. W treści artykułu nie stawia on jednak tezy, iż wiadome jest, jak dokładnie przebiega rozumowanie z takiej analogii, tudzież w jaki sposób dochodzi do określania w jej ramach zaistnienia istotnego podobieństwa pomiędzy porównywanymi stanami (sprawami, sytuacjami). Niejako w zamian twierdzi on, iż jeśli pełna wiedza w tym zakresie pozostanie dla ludzi nieosiągalna, to tym lepiej dla filozofii prawa i tych, którzy oddają się jej uprawianiu.

Słowa kluczowe: analogia; prawo; różnice; nauka; przyrodnicze; empiryczne; życie; codzienne; prawniczy