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Legal Analogy as an Alternative to the Deductive Mode of Legal Reasoning[2]

1. Introduction

Deduction from legal rules is undoubtedly one of the most familiar methods of legal reasoning. It is – especially in civil law countries – commonplace that statutory rules are to be applied deductively by the use of the scheme of the so-called legal syllogism. Moreover, legal deduction is sometimes supposed to bring objectively correct outcomes if only its premises are valid/true. In the bargain, the deductive line of inference in law presents itself as extremely easy in application. One may be under the impression that everyone, not only judges and lawyers, can – without any special training and preparation – reason in this manner.

In this paper, I will try first to reveal some weak points of the aforementioned attitude and, secondly, to advance an alternative to the deductive mode of legal reasoning in the form of legal analogy.

2. The mechanism of deduction

In logic, deduction – in contrast to analogy and non-complete induction (i.e. one which is not based upon the full range of events) – is a method that guarantees the truthfulness of the conclusion provided the premises are also true. As is said, the very scheme of its inference leads to the infallibility of the outcomes that are here reached. This scheme can be presented as follows: all A is B (the major premise), C is A (the minor premise) and C is B (the conclusion); i.e. like in Aristotle's example: All men are mortal, Socrates is a man, therefore Socrates is mortal too.

In the legal domain, deduction takes a slightly different form. The major premise is constituted by a legal norm (or rule). The case at hand (also called pending, instant, sub judice or under argument case) forms the minor premise The conclusion, in turn, are legal consequences for this case. Accordingly, if only a norm that forms major premises is valid (binding, in effect) and the case at hand is true (its facts are proven or posted as such), the legal outcome the deductive leads to is correct as well. In that sense, the deductive mode of legal reasoning can be deemed to be of a

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infallible or unchallengeable nature, and the whole construction, as such, is called a legal syllogism as opposed to an 'ordinary' ('logical') syllogism.[3]

The above thesis as to the infallible nature of legal deduction is, however, nothing more than a utopian – while high-flown and really enchanting – idea; so to speak window dressing, the very best example of legalistic illusion. Indeed, deduction can be infallible but in virtual and closed systems, like those of numbers, signs or symbols or other entities that are defined in advance and posses fixed unequivocal meaning (e.g. in the world of mathematics, formal logic, IT sciences). It is, however, utterly impotent when dealing not with the conceivable or the theoretical but real reality, with all its diversity, flux and immeasurability. All the more so, deduction is in a miserable position to link the normative sphere (the realm of ought) to the ontological sphere (the realm of be). The transition from one of these spheres to the other is by no means automatic, being in essence a very complex and intricate process.

3. Legal deduction misconception

Apart from the requirement that the rule that serves as a major premise has to be infallible in the sense that whenever the antecedent occurs the legal consequence prescribed by that rule cannot be non-entailed, the precondition of the success of legal deduction is that that the symbols, objects, persons which are mentioned in the major premise have to be exactly the same as the symbols, objects and persons present in the minor premises. In the example with Socrates, we have,

[3] As for deduction in legal applications see: Aleksander Peczenik, *On Law and Reason*, Springer: 2009, pp 14-15; Steven J. Burton, *An Introduction to Law and Legal Reasoning*, 3rd ed., Wolters Kluwer: Austin 2007, pp 43-58; D. Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, Oxford University Press: Oxford 2005, pp. 32-48, see also pp 49-77; D. Neil MacCormick, *Legal Reasoning and Legal Theory*, Oxford University Press: Oxford 1978, pp 19-72; Ruggero J. Aldisert, *Logic for Lawyers A Guide to Clear Legal Thinking*, 3rd ed., National Institute for Trial Advocacy: 1997, pp 53-88; Martin P. Golding, *Legal Reasoning*, Broadview press: Peterborough 2001, pp 39-42; Bartosz Brożek, *Rationality and Discourse: Towards a Normative Model of Applying Law*, a Wolters Kluwer business: Warszawa 2007, pp. 39-54, 54-59; Jerzy Wróblewski, *The Judicial Application of Law*, Kluwer Academic Publisher: Dordrecht 1992, pp 30-35, see also pp 229-232; Scott Brewer, Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy, Harvard Law Review no. 109 (1995-1996), pp. 930-931 and footnote 13 on these pages; Rupert Cross, *Precedent in English Law*, The Clarendon Press: Oxford 1968, pp 176-181; Rupert Cross and James W. Harris, *Precedent in English Law*, 4th ed., Oxford University Press: Oxford 1991, pp 187-192; Sharon Hanson, *Legal Method & Reasoning*, 2nd ed., Cavendish Publishing Limited: London 2003, pp 215-217; Kazimierz Opałek and Jerzy Wróblewski, *Zagadnienia teorii prawa*, Państwowe Wydawnictwo Naukowe: Warszawa 1969, pp. 308-315.

As for the notion of a legal norm (rule) see: Alf Ross, *Directives and Norms*, Routledge & Kegan Paul: London 1968, pp 78-138; Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Clarendon Press: Oxford 1991, pp 1-37; George C. Christie, *Law, Norms & Authority*, Duckworth: London 1982, pp 2-27; Hanson, pp. 210-213

On deduction (syllogism) in general see: John Stuart Mill, *A System of Logic, Ratiocinative and Inductive*: Being a Connected View of the Principles of Evidence and the Methods of Scientific Investigation, 8th ed., Harper & Brothers: New York 1882, pp. 126-157, Thomas Fowler, *The Elements of Deductive Logic*, 10th ed., The Clarendon Press: Oxford 1895, pp. 85-109.

As to human rule-based reasoning in psychology see: Steven A. Sloman, *Two Systems of Reasoning*, [in:] *Heuristics and Biases. The Psychology of Intuitive Judgment*, eds. Thomas Gilovich, Dale W. Griffin and Daniel Kahneman, Cambridge University Press: Cambridge 2002, pp 381-383 and Lance J. Rips, *The Psychology of Proof: Deductive Reasoning in Human Thinking*, The MIT Press: Cambridge 1994.

therefore, to be certain that Socrates is one of the men which the major premise is about. If there is even a grain of doubt in this respect, the whole infallibleness of deduction is smashed into pieces. In mathematics and formal logic, objects are determined and precise. We know that 2, 3, 4, 5... are numbers, we know that 2 plus 2 is 4 and it could not be otherwise. Similarly in board games, like chess, we have no doubt which piece is which or how it can move.

In legal deduction, however, we encounter a serious problem at the very beginning. First both major and minor premises are not ready. They need to be constructed in a way which is far from objective or even intersubjective. In order to obtain the major premise, a legal norm or rule, one has to derive it from judicial precedent or canonical text (i.e. text of statutes, regulations, constitutions, ordinances etc). The process of such derivation is, however, not standardized and free of choices that are to be individually made; different norms (rules) and of an uneven degree of generality and complexity can be constructed upon the same provision of a given legal act.

Even more serious difficulties occur when we turn to the minor premise of legal deduction. This premise is not given at all and we must construct it almost from scratch.

What we are dealing with are actually the raw facts of the case at hand. To obtain the minor premise, we must process these facts and put them into the description made in language so as to form a specific linguistic expression which may be subsequently used as a minor premise for legal deduction's sake. Yet since we may describe any factual situation in an infinite number of ways, we describe those facts not at large but in the terms of major premise (a norm/rule constituting this premise), or looking from a slightly different angle, we ascertain here whether the situation generally stated in the major premise (the norm/rule it is consisted of) also occurs in the case at hand.

It is noteworthy that the effect of such ascertainment/description leads directly to the application or non-application of a rule (norm) that forms the major premise to the case at hand, entailing as a corollary ascribing to this case a legal consequence this rule (norm) prescribes. Hence, one may say that after having made the aforementioned description in legal deduction there is no reasoning at all. The subsumption of the rule forming the major premise to the described factual situation that constitutes the minor premise is a mere illustration which has no effect on the very outcome of legal deduction. Everything which has been crucial and decisive for this outcome had been done previously, i.e. while the minor premises was constructed/the phenomenon present in the case at hand classified as one that the rule specified in the major premises encompasses.[4]

Before, however, making such a classification, the major premise of legal deduction is, as Burton metaphorically put it, 'dangling in the air'.[5] There is a gap between the facts of the case and the rule (norm) that, as Weinreb says, has to bridged.[6] In turn, after a classification has been made, no further mental operation is needed. So Cross may confidently elucidates that '...the crucial decision is made before the reasoning can be cast into syllogistic form. Not only is the syllogism

[4] See also Burton, p. 43; yet cf. Brewer, pp. 980-983, 994-998, 1000-1003.

[5] Burton, p. 57.

[6] Lloyd L. Weinreb, *Legal Reason: The Use of Analogy in Legal Argument*, Cambridge University Press, 2005, p. 90.

constructed after the facts have been found, but it is also constructed after any legal problems concerning the scope of the rule have been solved.'[7]

4. The internal normative element

The above charge is, however, only a part of the bigger picture. Legal deduction is in fact far more complicated than logicians may suppose. The building of its major premise, as well as the building of its minor premise (the classification involved in the latter), do not happen in vain. The reasoner constructs both premises with a special aim that is well known for this reasoner in advance. This special aim, the known purpose, is not to ascertain what could be linguistically or logically extracted from the canonical text. Nor is it to state how the persons, objects or items present in the case at hand can be best described from the point of language – be it ordinary or sophisticated or official. That purpose/aim is to determine what is to be prescribed, ordered, allowed or prohibited by the law in the case at hand: what are to be the duties and obligations of the litigants, which of them is to win and which is to lose the case. This awareness accompanies the reasoner along all the way in which both premises emerge.[8]

I venture to say that this, let us call it 'normative', element is intrinsic to legal deduction and cannot be separated and put aside despite all efforts made towards that goal. During the whole process of the building of major and minor premises one is fully aware what it is all about and what the consequences of his/her choices involved therein will be. In effect, consciously or subconsciously, this indissoluble awareness influences – at least to some extent – the emerging of each of the premises.

Furthermore, the legal culture, especially in civil law countries, becomes an unexpected ally here, offering a wide array of means by which one may interpret the canonical text while deriving a rule (norm) before it will form a major premise. The choice of the deductive reasoner is rich: ranging from different literal, teleological and systemic principles of interpretation without any definite order of priority between them; not to mention about such legal concepts as that of the 'rational legislator' or different interpretative presumptions (e.g. of ordinary language or conformity with EU law). To have a major premise in a desirable shape, it suffices thus to pick – among the available options – the one which best conforms to one's 'normative' preference.

In turn, while creating the minor premise (making classification), in addition to the features of language such as vagueness, ambiguity[9], indeterminacy[10] and context dependence[11] that make a

[7] Cross, p. 178 (R. Cross and Harris, p 189); see also Cross, pp 178-179 (Cross and Harris, pp 189-190).

[8] The goal-oriented nature of legal deduction (classification involved therein) seems to be also discerned by Golding. He asserts that the question of classification which judges deal with is not of form: "Is *X* a *Y*?" but rather of form: "Is *X* a *Y* for certain legal purposes?" or – what he prefers even more – of form: "Should *X* be treated as a *Y* for certain legal purposes?". See Golding, p. 106.

[9] As for ambiguity and vagueness of terms present in language see, for instance, Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*, Harvard University Press: Cambridge 2009, pp. 18-23, Schauer, *Playing…*, pp. 31-37, Burton, p. 52, Brewer, p. 993-994 and Brożek, pp. 25-28.

vast room for personal choices to be made, one may take also advantage of the latitude that stems from the rules of evidence, including the assessment of the credibility of witness testimony or the presence of more than one probable course of events.[12]

As already stated, this normative element of legal deduction presents itself as indispensible and inescapable. If one tries to separate and abandon it, for instance, in favour of the purely linguistic meaning of a canonical text, the legal outcomes would become haphazard and many times patently absurd or unjust to an extent that no-one of sound mind can accept.

Summing up, the passage from the specific to the general, from the very 'is' to the very "ought', is not only not automatic but to a large extent dependent on the particular person who makes it. The ways this person can follow are up to it, rather than confined by logic/mathematics. The deductive scheme of inference serves here, in turn, only as a schematic illustration of what has been done previously. It also doesn't show the real sequence of reasoning nor does it justify the outcome reached.

5. One more reason for the logical fallacy of legal deduction

Legal deduction also encounters one additional obstacle from the point of logic. As Cross and Harris noted, in syllogism the test of validity of conclusion consists in the principle that the denial of

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[10] The indeterminacy of terms present in language is their intrinsic feature to which dictionary definitions are of no aid. These definitions are by their very nature imperfect. Not only do they often amount to proffering chains of words which at some point overlap but such chains can also severely distort the real meaning.

To check this one may look up the meaning of some ordinary word with which meaning he/she is well acquainted; next turn to the definitions of the words that are used to define this word, and then proceed to the entries that elucidate the words used in the latter definitions. It is quite probable that what will have thus been received will be the same words that are present in the definition of the first word or something which – transposing into this definition – is in variance with the 'intuitive' meaning of that first word. The dictionary definitions, terms and phrases included therein, give only an approximate meaning of the words being defined and when you go deeper and deeper, the original meaning is so deformed that the defective nature of the lexical definitions is clearly visible. Defining one word by resort to another which is – at this or some further step – defined by the first word in a row is also unreliable. We know the meaning of particular words mainly from the use of these words in a number of contexts, not from their dictionary definition.

This problem of the indeterminacy innate in terms of language cannot also be resolved, much less completely, by their legal definitions, i.e. definitions which are included in statutes in order to explain words and phrases used therein. Cf. Burton, pp 54-55.

As to the observation that it is impossible to find two words in a language that have an 'exactly' identical meaning (are real synonyms) and the problems one encounters while building lexical definitions see Tomasz Gizbert-Studnicki, *Wieloznaczność leksykalna w interpretacji prawniczej*, 1st ed., Wydawnictwo Uniwersytetu Jagiellońskiego: Kraków , pp. 31-32 and 34-37 respectively.

[11] Maciej Koszowski, Intricacies, Fallacy and Madness of Legal Deduction, Archiv für Rechts- und Sozialphilosophie no. 4/2017, pp. 497-502.

[12] Incidentally, in legal deduction, the derivation of a rule (norm) that forms the major premise and the determining of the facts that constitute the minor premise seem to be done simultaneously.

As to the lack of difference from the standpoint of pure logic between the interpretation of the wording of a legal rule (ascertaining of this rule meaning) and the classification of a given phenomenon under such rule cf. MacCormick, *Legal...*, pp. 93-97.

the conclusion entails the denial of one or other of the premises.[13] If we treat this requirement strictly, such a test would mean that in legal syllogism the denial of the conclusion must entail the denial of the truthfulness of the facts of the case at hand or the denial of the validity of the legal rule (norm) that constitutes the major premise. If, therefore, there would be a rule at the entrance to a bus banning dogs and if a bus driver permitted one to enter with a guide dog nonetheless, the whole rule would thus be automatically made invalid (legally void). Such an attitude does not, however, fit the common understanding of how legal rules operate, i.e. lawyers as well as the addressees of law know that despite allowing a guide dog to go on a bus, the rule banning entry to dogs can still be in force in relation to a vast variety of dogs that are not guide ones.

6. Corollaries: the alternative seen in legal analogy

If legal deduction is either a fallacy from the logical point of view or a mere illustration of another kind of mental operations that occurred previously, what is, therefore, the real mode of legal reasoning by which the law is applied in concrete cases? Having to answer such a question, it may be wise to rest on the assertion that this mode consists of the internal human ability to take into account a number of divergent factors that are regarded by the reasoner as relevant in law, viz.: the intention of the legislator, historical events that preceded the given legislation and the mischief which this legislation springs from, the past judicial decisions rendered in similar cases, values and goals that are generally protected and pursued in a given legal system, common sense and the sense of justice, socially accepted outlooks and socially desired outcome for the case at hand, etc.[14] If one perceives legal deduction as an all embracing collective name for considering such mixed factors, not as something grounded in logic, that stance may be apt.[15] However, one other legal method presents itself as more adequate and promising here, namely: legal analogy. All the more so, if we comprehend such an analogy as being complex, multidimensional, dependent on broad socio-political context and hard-wired into the human mode of unstandardized thinking.

Thusly understood, analogy works through the judgement of the similarity between cases being compared, where judgment is a result of the resemblance between the raw or selected facts of

[13] See Cross, pp 177-178 and Cross and Harris, pp 188-189.

[14] Also the attributes of the very reasoner cannot be ignored here. They influence the result of the application of law to a similar – if not even a greater – extent. In consequence, the beliefs, preferences of values and desired goals together with all of the data and information stored in the long-term and short-term memory of a judge would have some impact on the legal outcome he/she arrives at in a pending case.

[15] The necessity of taking into account different factors of the aforementioned kind is probably also a reason why legal rules are said to be never completely indicative in relation to the situation in which they apply. As for such assertions see, for example, Christie, pp. 7-8.

From psychological point of view, taking into account such a mixture of incommensurable factors is possible within the so-called intuitive (experiential, associative) reasoning that is here opposed to rational, deliberative, rule-based one. On this psychological division see, for instance, Seymour Epstein, Integration of the Cognitive and the Psychodynamic Unconscious, American Psychologist v. 49 (1994), pp. 709-724, Malcolm Gladwell, *Blink. The Power of Thinking without Thinking*, Penguin Books: London 2006; *Handbook of Intuition Research*, ed. Marta Sinclair, Edward Elgar: Cheltenham 2011; *Heuristics and Biases. The Psychology of Intuitive Judgment*, eds. Thomas Gilovich, Dale W. Griffin and Daniel Kahneman, Cambridge University Press: 2002; *Intuition in Judgment and Decision Making*, ed. Henning Plessner, Cornelia Betsch and Tilmann Betsch, Psychology Press Taylor & Francis Group: New York 2008.

these cases influenced by the factors mentioned in the paragraph above. The first outcomes reached by such an analogy – which are delivered almost automatically by intuition or hunch – can then be tested by reference to these factors, among which special prominence should be given to the rationale of the 'legal cases' that have been used as the points for comparison with the case at hand. These 'legal cases' may be here of a different origin: precedential ones, typical instances that a particular statutory provision applies to, cases – hypothetical or real – which legal consequences are known and difficult to challenge for a member of a given legal culture. In this way, legal analogy may lead to the application in concrete cases of already existing judicial precedents, statutory, precedential, constitutional or even customary rules as well as the law in general.

An analogical mode of applying the law thus comprehended may also a remedy for curtailing judicial discretion and making legal decisions seems less arbitrary. At least, as it appears, the giving of priority to the above-mentioned factors is more trustworthy and ordered when it is done in relation to the concrete facts of cases being compared than when it would be made in abstracto. If some rationale can speak for a specific legal consequence in one case, why they should not justify the same or similar legal consequence in another case that is identical or essentially similar to it?

The application of general rules via analogy in the place of legal deduction has also attracted the attention of a good deal of scholars, gaining their acceptance and often open admiration. Thus Weinreb states: "[w]ithout intervention of analogical arguments, legal rules and the rule of law itself would be only theoretical constructs."[16] Arthur Kaufmann is recognized as the proponent of the idea that "by its nature every application of law, every *Rechtsfindung*, consists not in a conclusion of formal-logical type identifiable as simple subsumption, but in a process of analogical type",[17] which concept has been later on endorsed by Jacques Lenoble.[18] According to Herbert Lionel Adolphus Hart, in turn, if a case does not belong to plain cases (i.e. those "constantly recurring in similar contexts to which general expressions are clearly applicable" /"where there is general agreement in judgments as to applicability of the classifying terms"), all that one called upon to answer can do is to consider "whether the present case resembles the plain case 'sufficiently' in 'relevant' respects."[19] In a similar vein, Bańkowski and MacCormick assert that: "Where the problem is whether or not to qualify a problematic phenomenon as instantiating some statutory term or another, analogy to less problematic instances covered by prior decisions is relevant."[20] And Burton explains that: "…analogical reasoning may be used to help interpret and apply an enacted rule. The analysis begins

[16] Weinreb, p 13.

[17] See Giuseppe Zaccaria, *Analogy as Legal Reasoning – The Hermeneutic Foundation of the Analogical Procedure*, [in:] *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics*, ed. Patrick Nerhot, Kluwer Academic Publishers: Dordrecht 1991, p 42, see also pp. 45-49.

[18] See Jacques Lenoble, *The Function of Analogy in Law: Return to Kant and Wittgenstein*, [in:] *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics*, ed. Patrick Nerhot, Kluwer Academic Publishers: Dordrecht 1991, p 118.

[19] See Herbert Lionel Adolphus Hart, *The Concept of Law*, 2nd ed., Oxford University Press: Oxford 1994, pp. 126-127.

[20] Bankowski and MacCormick, *Statutory Interpretation in the United Kingdom*, [in:] *Interpreting Statutes. A Comparative Study*, eds. D. Neil MacCormick and Robert S. Summers, Dartmouth Publishing Company Limited: Aldershot 1991, p. 369.

with the enacted text. It may help to find base points in the context that can be used to reason analogically in a problem case."[21]

Levi also points out that: "It is only folklore which holds that a statute if clearly written can be completely unambiguous and applied as intended to a specific case. Fortunately or otherwise, ambiguity is inevitable in both statute and constitution as well as with case law. Hence reasoning by example operates with all three."[22] Murray and DeSanctis advise that: "Often the legal rules used in the rule-based reasoning syllogism require explanation and illumination to demonstrate for the reader why your prediction of the outcome is legally sound and likely to occur. Analogical reasoning is used within the rule-based reasoning syllogism to further the overall discussion by showing how the rule itself or elements of the rule are supposed to work by discussing and analogizing to or from certain actual circumstances (cases) where the rule was applied to produce a certain outcome."[23] And Eileen Braman contends that: "In statutory construction, for instance, when the "plain language" of a disputed provision is ambiguous, judges often look to previous application of the law, seeking to draw connections and/or distinction between past and pending scenarios. Using analogy in this way helps judges make reasoned decisions about whether or not a particular rule should apply to circumstances giving rise to litigation".[24]

Furthermore, legal analogy is also supposed to be able do that which legal deduction cannot, that is, to enable us to pass from the world of 'is' to the world of 'oughtness'. Thus Broekman turns our attention first to the fact that the presumption fundamental for legal thought is that which assumes the basic analogy between "non-legal reality" and "legal reality" and next argues that analogical reasoning is the preferred way by which one may connect these two spheres.[25] The

[21] Burton, p 77.

[22] Edward H. Levi, *An Introduction to Legal Reasoning*, The Univeristy of Chicago Press: Chicago 1949, p. 6.

[23] Michael D. Murray and Christy Hallam DeSanctis, *Legal Research and Writing*, Foundation Press: 2005, p. 10.

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

See also Cass R. Sunstein, *Legal Reasoning and Political Conflict*, Oxford University Press: New York 1996, pp. 79-90, Sunstein, Commentary on Analogical Reasoning, Harvard Law Review no 106 (1992-1993), footnote 147 on p. 785, Brewer, pp 990-1003, Weinreb, pp. 88-94, Levi, pp. 6-8, 28-32 and 27-102, MacCormick, Rhetoric…, pp. 212-213, Józef Nowacki, *Analogia legis*, Państwowe Wydawnictwo Naukowe: Warszawa 1966, pp. 49-51 and 62-67, Hart, p. 127, Golding, pp. 104-107, Burton, pp. 65-74.
Moreover Brewer discerns an analogical form of reasoning even in effecting the so-called: "reflective equilibrium" between general norms and the particular applications of these norms (see Brewer, pp. 927-928, 938-939). Also Sunstein, who has tried to grasp the commonalities between reflective equilibrium and analogy, despite describing analogy as less ambitious, for it does not require anything like horizontal and vertical consistency, eventually concludes that: "[a]nalogical reasoning might therefore be understood as a sharply truncated form of the search for reflective equilibrium…" (see Sunstein, Commentary…, pp. 752-754, cf. also pp. 777-778, 781-783). Such an approach is all the more noteworthy since "reflective equilibrium" is commonly not considered as something that involves an analogical pattern of inference (see, for instance, Larry Alexander and Emily Sherwin, *Demystifying Legal Reasoning*, Cambridge University Press: Cambridge 2008, pp. 32-39, 64-88).

[25] See Jan M. Broekman, Analogy in the Law, [in:] *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics*, ed. Patrick Nerhot, Kluwer Academic Publishers: Dordrecht 1991, pp. 217-218, 220, 243.

Weinreb sees connecting these two spheres in a fairly interesting way. Namely, the application of law – according to him – appears to consist of the adjustment of the facts of an instant case and a general legal rule

passage of this kind is – whether it is within legal deduction or analogy – all the more necessary since the factors I referred to in the opening paragraph of this section are frequently of a very general character. The reasoner in law, in the main, deals with general intention, general history, general plain meaning, general moral principles and so on. These generalities ought to be somehow processed in order to yield a result (legal consequence) for the case at hand.[26]

Obviously the outcomes of legal analogy – as outcomes of legal deduction – are not logical, objective or true. Legal analogy does not, however, purport to be able to do that which legal deduction allegedly can do. It is by definition far less ambitious and modest. Instead, it seems to be better suited to making the law and its application more bearable and less haphazard than it would be without using it. At the same time, legal analogy provides the law and its application with the considerable flexibility and reasonableness that they need anyway.[27] In addition, legal analogy appears to correlate with the reality far better than legal deduction does due to the credo which runs: *similar cases should be treated alike.* The leading thought of legal deduction seems to be, in turn, that: "identical cases ought to be treated identically".[28] As we know, in real life identical cases rarely – if ever – occur.[29]

Incidentally, it is even believed that names present in language (common terms, attributive and abstract terms, singular and collective terms) owe their existence to comparison, being made in order to capture some resemblance or difference between objects or groups of objects.[30] Yet another thing are the attempts made in order to demonstrate that both of the types of reasoning mentioned in this paper, deduction and analogy, are dependent on the same kind of comparative reasoning.[31]

7. Conclusions

Summing up, legal deduction turns out to be a fallacious mode of legal reasoning insofar as it is supposed to be thoroughly logical and mechanical. Deduction is a method of great significance and

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in order to close each together with the aim of obtaining the rule that "squarely" or "uniquely" applies to the facts of this case. Even, however, after the construction of such a well-fitted rule, there is still a gap between this rule and the facts of the pending case that no further statement of the rule-like manner or the specification of the facts can close completely. See Weinreb, pp. 86-94, see also pp. 82-83.

[26] Cf. Burton, pp. 55-57.

[27] See also Golding, p. 48, 107-111.

[28] For this aphorism as a counterpart of the maxim: "like cases ought to be treated alike" in the context of the deductive pattern of legal reasoning see Bernard S. Jackson, A*nalogy in Legal Science: Some Comparative Observations*, [in:] *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics*, ed. Patrick Nerhot, Kluwer Academic Publishers: Dordrecht 1991, pp. 149-150.

[29] The other issue is, however, that the some pattern these cases involve is often repeated; as for the problem of universalizability in law see for instance: MacCormick, *Rhetoric...*, pp. 146-152.

[30] See Fowler, pp. 13, 16-17.

[31] As for Spencer's conception of how to base deduction, analogy and induction upon the comparison of two proportions see Władysław Biegański, *Wnioskowanie z analogii*, Polskie Wydawnictwo Filozoficzne: Lwów 1909, pp. 38-41.

service in mathematics, IT and other virtual words. However, it is unsuitable for the legal domain because of the links of the latter with real life and this life's flux and variety. As a method of applying the law, it may serve almost only as a boilerplate one may use to disguise the real kind of reasoning which is dependent upon many divergent factors. A more accurate way of capturing how lawyers think seems to be legal analogy. It consists in comparing instances for which we know legal outcomes with instances whose legal consequences we try to ascertain. An analogical form of reasoning – due to the judgement of similarity which may be based on different variables – seems to be more suitable for an incommensurable and complex legal environment. Recently, its use as a universal legal method has also received much attention on the part of legal theorists and philosophers, especially those looking on from the vantage point of the common law legal system.

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The abstract:

This article demonstrates the inadequacy of legal deduction as a method that guarantees the certainty and predictability of law and its outcomes in concrete cases. *Inter alia*, the Author brings our attention to the far lesser role that the deductive pattern of inference plays in legal thought than one may suppose, since it is rather only a schematic illustration of the decisions that were previously made by recourse to the mental operations of a non-logical nature. In return, he proffers legal analogy as an alternative by which he understands a mode of thinking which helps the reasoner take into account a mass of different factors that are traditionally deemed to be relevant for legal thought and decision-making.

Key words: **analogy, deduction, legal, law, applying**