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Restrictions on the Use of Analogy in Law

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Abstract This article touches on the issue of the restrictions and bans concerning the use of analogical reasoning in law. In order to clearly present this topic, the Author appeals to different branches of law, having thus a separate regard for criminal law, tax law, administrative law, private law and legal procedures. In this context, he also pays attention to the domain of the constitutional law and the practice of the Court of Justice of the European Union. Additionally, allowance has been made for some other interpretative directives that aim to truncate the potential usage of an analogical argument in law such as the principle that exceptions should not be extended, the requirement not to meddle with the plain and precise meaning of the wording of statutory provision or a ban on negating the 'exhaustive' nature of some statutory enumerations through extending them analogically.

Keywords Analogy · Restrictions · Limits · Law · Applying · Scope

Introduction

Analogical reasoning has vast—if not enormous—potential in terms of applications in statutory law, as well as in precedential. However, depending on the particular field of law, this scope is often deliberately confined, notably in civil law countries. Values such as certainty of law and respect for the position of the legislator as the

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exclusive law-maker come to the fore and often at the expense of the possible usage of analogical inference.

In this paper, I will thus focus on the restriction and limits that are commonly imposed on the employment of analogy in legal matters, beginning with criminal law and tax law and ending with private, constitutional and procedural law. The point of reference shall be mainly, but not solely, the continental legal systems of Western Europe.[1]

Criminal Law

In general, it is commonly accepted that analogy should not be availed of in criminal matters whenever its outcome would be to the detriment of the accused/suspect. Such a ban is considered to result from the very principle: "*nullum crimen, nulla poena sine lege*", the principle which is understood in the way that there cannot be a crime (punishment) that is not expressly envisaged by a statutory provision. The foundation of this principle and its aforementioned interpretation—apart for the usually constitutional nature of this principle—is the respect paid for legal security and freedom of citizens, the values which are traditionally deemed to be of paramount importance in the province of penal law.[2] Also another principle that is held in high esteem with regard to criminal affairs, namely "*in dubio pro reo*", which mandates to resolve doubtful points in favor of the accused, provides the grounds for having the ban on analogy whenever its outcome would not be in the interests of the accused.[3] It follows, however, that in criminal matters analogical reasoning ought to be permitted when the conclusions reached by it are favorable for the accused or at least do not worsen the legal situation of the accused.[4]

Thus Oliver Wendell Holmes, for instance, denied the employment of an analogy that would lead to the extension of the coverage of a criminal statute beyond the plain meaning of this statute, arguing that when criminal penalties are involved, a fair warning should be given to others, in language common people understand, of what the law intends to do.[5] In Sweden, however, the recourse to analogical

[1] On some attempts to formulate some universal preconditions of the deployment of analogical reasoning in the legal domain see Nowacki (1966, 223–226).

[2] In general see: Summers and Taruffo (1991, 472), Nowacki (1966, 76–80, 213–216, 221), Chauvin et al. (2012, 248), Rosmarin (1939, 122–123), Zaccaria (1991, 60–61), Mastalski (2008, 120). In Poland see: Wróblewski (1991, 276–277), Wróblewski (1992, 226), Smoktunowicz (1970, 59–60, 67–71), Pulka (2008, 146–147), Nowacki and Tobor (2007, 182), Nowacki (1966, 213–216), Morawski (2002, 289–290, 292, 303–306, 2006a, 198, 201, 205–206, 2006b, 195), Wolter and Lipczyńska (1973, 237, 240), Leszczyński (2004, 255). In Sweden see: Bergholtz and Peczenik (1997, 318), Peczenik (2009, 325–326). In Argentina see: Zuleta-Puceiro (1991, 47, 62). In Germany see: Alexy and Dreier (1991, 81, 106, 109–110). In France see: Troper et al. (1991, 200). In Italy see: La Torre et al. (1991, 219, 243) and Zaccaria, 61.

[3] See Morawski (2006a, 205), Pulka, 146–147.

[4] See Pulka, 147.

[5] See Burton (2007, 76); cf. also Sunstein (1996, 85–89).

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reasoning in criminal affairs and stretching already existing crimes to cover new factual settings seems to be quite possible.[6] Similarly in France, where when confronted with a new sort of mischief, especially one connected with technological advances and innovations, a judge can essentially reason through analogy in order to criminalize it. As pointed out, however, the French courts never use the very name of analogy then, pretending that they are only guided by the legislative intention or the spirit of law.[7] The situation seems to be alike in Italy, where judges actually employ analogical reasoning in criminal matters under the guise of extensive interpretation. The latter—contrary to the analogy—is here permitted when deciding cases upon penal law.[8]

It is also intimated that from the viewpoint of static theories, one may argue that analogy has to be allowed in private law and prohibited in penal law because of the need for law to be certain and for law subjects to have prior knowledge of what acts he or she can be punished for. From the perspective of dynamic theories, however, the use of analogy ought to be permitted in criminal matters too due to the necessity of accommodating the penal law to broadly comprehended 'life' and the exigency to prevent bad people from taking advantage of the existence of legal gaps (and thus, being in conformity with law, committing misdeeds). Otherwise, criminal law would not be effective enough.[9]

Moreover, it is sometimes maintained that the employment of analogy in favor of the accused should also not be permitted, especially if it violates the interests of other persons involved, above all the injured or aggrieved party.[10]

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[6] Thus in Swedish literature the exploitation of analogy to the detriment of the defendant is allowed and in the penal law works in the following manner: "(1) a statutory provision existed at the time when the crime was committed and (2) this provision could be extended *by analogy* to cover the action in question." In Sweden there are also tangible examples from the contemporary judicial practice in which the Swedish Supreme Court takes advantage of analogical reasoning in order to penalize similar unregulated behaviors. The positive actions the Criminal Code referred to are, moreover, to be applied here analogically to the omission to act [negative actions] that leads to the same effect. See Peczenik and Bergholtz (1991, 352–353); on analogy in Swedish penal law see also Peczenik (2009, 325–326) and Zaccaria, 61.

[7] Troper et al. (1991, 201), Kratochwil (1989, 225).

[8] La Torre et al. (1991, 219) and Zaccaria, 61.

As for a historical example concerning the 'milking' of a electricity meter in which a criminal statute was extended by analogical reasoning in order to criminalize such an act in Holland see: Maris (1991, 71) and Holland and Webb (2010, 382).

As for a counter-example from the UK in which stealing electricity was deemed by a court to not be susceptible for being 'appropriated', nor amendable to be qualified as 'property', conditions necessary for committing theft, see Holland and Webb, 382. (Similar attitudes—contrary to France—were also taken in Germany and Switzerland; see Maris, 77).

General permission of the use of analogy in criminal law was envisaged in article no. 16 of the Russian Penal Code of 1926; see Nowacki (1966, 225).

[9] See Opałek and Wróblewski (1969, 323).

[10] See Morawski (2006a, 206) and Pulka, 146–147; cf. also Jamróz (2011, 206, 210) (who in the context of the ban on analogical reasoning does not distinguish analogy which acts in favor of the accused/suspect).

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Tax Law

In a similar fashion to criminal affairs there is a common agreement that analogy should be applied with restraint in the domain of tax law. Just as *nullum crimen, nulla poena sine lege* prevents the extension of criminal liability, the principle: "*nullum tributum sine lege*" poses a general ban on the employment of analogy that would cause an increase in taxation or whose results would—for some other reason(s)—be unfavorable to the interests of the taxpayer.[11] Similarly, the second well-known maxim: "*in dubio pro tributario*" (as an opposition to: "*in dubio pro fisco*"), which requires doubt to be removed in tax law to the taxpayer's advantage, argues against the usage of analogy to the detriment of those who are obliged to pay taxes or are liable in tax law for other reasons.[12]

However, in this context one must once more mention Sweden, where it seems quite feasible to reason by analogy against the interests of the taxpayer. This possibility pertains to the part of Swedish tax law that sets penalties as well.[13] In Argentina, in turn, the legal doctrine appears not to be unanimous as to the proper interpretative approach that is to be adopted in tax law matters and analogy or at least an extensive interpretation to the detriment of the taxpayer may sometimes be allowed here.[14]

In Polish tax law, analogy can only be used in favor of the taxpayer. This rule does not embrace, however, the so-called "technical" ("constructional") gaps.[15] Also in the financial law of the USA, not least in this its part that concerns budget expenditures, the utilization of analogy seems to be unpopular.[16]

It is also sometimes claimed that analogy in tax law should be completely banned, since legal regulations are closed here not only in relation to the burdens and obligations but also to the rights and privileges of the citizens.[17]

Administrative Law

Certain restrictions on the use of analogical arguments also occur in the field of administrative law. It seems to be a particularly common stance that extending by analogy those provisions of administrative law that confine human rights and the rights of the citizens (especially the so-called "individual rights" or "basic rights")

[11] In general see: Summer and Taruffo, 472 and Mastalski, 118, 124–127. In Sweden see: Peczenik and Berghotz (1991, 346). In France see: Troper et al. (1991, 201–202). In Poland see: Morawski (2002, 290, 292, 306–310, 2006a, 198, 201, 206–207, 2006b, 195), Pulka, 147.

[12] See Morawski (2006a, 207), Pulka, 147.

[13] See Peczenik and Bergholtz (1991, 346–347) and Peczenik (2009, 326).

[14] See Zuleta-Puceiro (1991, 63).

[15] Mastalski, 126–127.

[16] See Burton, 76.

[17] See Pulka, 147.

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are not to allowed.[18] In addition, it is sometimes pointed out that analogy generally should not be used in order to enlarge the burdens (obligations) that administrative law imposes on citizens.[19] The exclusion of analogical reasoning may also be at stake when it would have to be applied in order to expand the scope of the liability this law stipulates.[20] All the restrictions of above-mentioned sort find their footing in the principle: "*in dubio pro libertate*", which literally requires that when having doubts, one should give priority to freedom (in other words, the doubts which have arisen ought to be resolved in favor of the person whose freedom is threatened).[21] Moreover, they can also be inferred from the maxims: "*odia sunt restringenda*"[22] and "*in dubio mitis*". The latter envisages that in the case of doubt a premium should be put on mildness. Hence, as such it can pertain both to the question of penalties in criminal law and to the question of the obligations and burdens that the non-penal branches of law lay on its subjects.[23]

It is also intimated that the invoking of analogical arguments in administrative law is forbidden if these arguments are used in order to expand the field of competence of a public institution or authority. That is, the statutory provisions that determine such a field are in general not supposed to be susceptible to extensive interpretation, having to be expounded strictly (narrowly). To have a rule of law, the scope of power of the public agency or authority needs thus to be stated expressly; or else it shall be regarded as being non-existing.[24]

The universal prohibition—modeled on its counterpart that obtains in penal law—of employing analogy in administrative (public) law, not least when it would be to the detriment of the subjects of this law, is also sometimes mentioned.[25]

It is also noteworthy that incontrovertibly, a state organ or institution may avail itself of analogy while acting within the scope of the so-called discretion (latitude) which statutory provisions confer to it. All provisions of such kind, however, must not be—by any means—extended via analogical reasoning, much less if that was to be at the expense of the freedom of citizens. Such an extension would violate the very principle of the rule of law (legality) as well as causing a disturbance of the status quo which the tripartition of powers demands. That is, it would lead to the

[18] See in Germany: Alexy and Dreier (1991, 81–82), Smoktunowicz, 110–112: in Poland: Morawski (2002, 292, 2006a, 200, 201, 2006b, 195), Wróblewski (1991, 276–278), Pulka, 153, and Smoktunowicz, 103–107, 112–129, 151–152; in Argentina: Zuleta-Puceiro (1991, 47, 62). Cf. also Smoktunowicz, 110–112.

[19] See Jabłońska-Bonca (2008, 166–169), Leszczyński, 255, Peczenik (2009, 325), Mastalski, 120, Morawski (2002, 292, 2006b, 195).

[20] See Nowacki (1966, footnote no. 38 on pp. 217–218).

[21] See Morawski (2002, 290, 2006a, 200–201, 208, 2006b, 195); see also Peczenik (2009, 324).

[22] See Peczenik (2009, 325).

[23] See Lechniak (2006, 100).

[24] See Morawski (2002, 312–313, 2006a, 199, 207–208, 2006b, 167), Pulka, 147 and Jabłońska-Bonca, 168, 169; cf. also Smoktunowicz, 129–136, 152.

[25] See Rosmarin, 121–122, Smoktunowicz, 101–102, Nowacki (1973, 37, 45) and Nowacki (1966, footnote no. 38 on 217); cf. also Chauvin, Stawecki and Winczorek, 249.

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self-empowerment of the administrative organs in the law-making capacity, the capacity which is constitutionally reserved for the legislature.[26]

Exceptions and *lex speciali*

The other limitation of the use of analogy in law pertains to the extension of statutory provisions that envisage exceptions to more general statutory regulation/provisions. This restriction is reflected in the well-known, especially in civil continental legal systems, Latin maxims: "*exceptiones non sunt excendentae*", "*exception est strictissimae interpretationis*" and "*singularia non sunt extendenda*".[27] It applies also to the instances of the so-called *lex speciali*, i.e. the statutory rule that addresses a subcategory of circumstances (things, acts, persons or relations), while prescribing legal consequences to them that are different from those provided for by another statutory rule which refers to the more general category which this subcategory falls under.[28]

The aforementioned restriction is, however, not regarded as an absolute one, and if there are good reasons for that, one is allowed to disregard it.[29] Moreover, as is sometimes pointed out, the principle that exceptions should not be extended seems to be—to an appreciable extent—value-laden (evaluative). Determining what constitutes an exception and what is a general rule as well as what serves as *lex generalis* and *lex specialis* is not an objective task. It depends instead on the evaluations (assessments) one makes. Even the mere adoption of the very directive stating that *exceptiones non sunt excendentae* is to be of a purely evaluative nature. If the same reasons as those which had decided about passing an exceptional provision called for making an exception the lawmaker had unforeseen, why should one not take advantage of analogical reasoning in order to add such an exception?[30]

Enumerating Provisions

It could be also forbidden to make the use of analogical argument in relation to the statutory provisions that enumerate something. By that token, one is not allowed to expand analogically the meaning of a statutory term by adding to the instances listed in a statutory definition of this term some further instances which have been not

[26] See Smoktunowicz, 140–143 and Nowacki (1973, 37–49).

[27] See: Summer and Taruffo, 472, Wróblewski (1991, 276–277, 1992, 227), Morawski (2002, 292, 313–314, 2006a, 199, 201, 208), Rosmarin, 125–126, Nowacki (1965, 753, 758–761), Wolter and Lipczyńska, 237, 239, Zuleta-Puceiro (1991, 47, 63), Peczenik and Bergholtz (1991, 319–320), Lechniak, 98–99, Pulka, 148, 153, Municzewski (2004, 201–202).

[28] See Lechniak, 98–99, Morawski (2002, 292, 313–314, 2006a, 208), Wróblewski (1991, 276–277), Wolter and Lipczyńska, 237, Pulka, 148, 153.

[29] See Nowacki (1965, 760–761), Morawski (2002, 313–314, 2006a, 208).

[30] See Nowacki (1966, 172–174, 2000, 325–326), Rosmarin, p. 125.

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expressly mentioned.[31] Naturally, this restriction does not apply to the situation of the "*ejusdem generis* canon of construction", i.e. the statutory enumerations that—deliberately—are formulated in the way which make them only exemplary (being for instance of the form of: "*x*, *y*, *z* and others" or: "…, especially *x*, *y*, *z*").

Other Principles Confining the Use of Analogy in Law

There are also some other directives that aims at confining the plausible usage of analogical reasoning in legal matters.

First, as related to the principle: "*exceptiones non sunt excendentae*", one may mention the principle prohibiting the extension by analogy of these statutes, their provisions, that were enacted for special purposes.[32]

Second, an analogical inference is advised to be approached with distrust and reluctance when the wording of a statutory rule is precise. For example, given that the definition of a minor stipulates that to this category belong people who are under 18 years old, it would be quite unusual if one were to try to argue—by recourse to reasoning by analogy—that minors are also people whose age in years is 19 but they behave like they were only 17 years old.[33]

Third, it is to be prohibited to extend by analogy those statutory provisions that indicate that the Legislator intended to regulate some matters in an "exclusive" manner. Such a manner is especially at stake when the wording of a statutory provision comprises such pointers as: "only", "exclusively", "solely", "always", "never".[34]

Fourth, one may argue in general for the non-employment of analogy against the clear and plain meaning of a given legal regulation. That is, the analogy that aims to negate such a meaning should not be permitted. If a case, therefore, unequivocally falls under a statutory rule, it cannot be withdrawn from the coverage of this rule even when an argument from (dis)analogy speaks for doing so.[35] One ought also not to use analogy to stretch "provisions establishing sufficient conditions for not following general norm" unless there are strong reasons to do otherwise.[36] There is also no basis for the analogical conclusion—unless very pervasive reasons call for it—that assumes errors (flaws) in the structure of the legal text.[37]

Fifth, it is sometimes also maintained that the use of analogy is permissible only in the so-called "technical" ("constructional") gaps, which stem from the

[31] As Edward H. Levi put that, "[t]he specification of particular instances indicates that similar but unmentioned instances are not to be included" (see Levi 1949, 28). A similar view is expressed by Morawski (2006a, 217).

[32] Against the Italian legal system, see La Torre et al. (1991, 219).

[33] See Peczenik (2009, 324).

[34] See Nowacki and Tobor, 186, Morawski (2002, 292, 325, 2006a, 198, 201, 208, 2006b, 194), Korybski et al. (2007, 177), Chauvin, Stawecki and Winczorek, 249, Ziembiński (1980, 294), Wolter and Lipczyńska, 240.

[35] Municzewski, 206–207; see also Nowacki (1966, 178–180) and Burton, p. 76.

[36] Peczenik and Bergholtz (1991, 319) and Peczenik (2009, 324–325).

[37] Peczenik and Bergholtz (1991, 319) and Peczenik (2009, 325).

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incomplete legal regulation that results from the unintended legislative error, while banned in "axiological" ("seeming") and "sui generis" gaps. The latter two consist in: (a) one's evaluation as to what the law should be like and (b) the lack of the provisions which according to law should be established but they have been not out of the negligence of the empowered organ respectively. However, even if argued for, that restriction does not seem absolute and some exceptions from it can be admitted.[38]

Sixth, a stance has been taken that the employment of analogy is only allowed if it is congruent with the will of the broadly comprehended Sovereign[39] or that analogical conclusions cannot exceed the (internal) sense of a legal provision.[40]

It is also commonplace that while invoking an argument from analogy one automatically does not employ an argument *a contrario* (*argumentum a contrario*), and when argument *a contrario* is permitted, the argument by analogy is not.[41] The rationale that stands behind the argumentum a contrario may be found in the Latin maxim: "ubicumque lex voluit dixit, ubi tacuit noluit" that can be translated as follows: If the Legislator wished to say something, he would do that expressly; therefore, its non-mentioning about something should be understood in the way that he wanted to be silent in a given matter.[42] The very sense of this argument is, however, captured in another Latin maxim, i.e.: "Qui dicit de uno, negat de altero" ("Qui dicit uno, negat de altero"), which literally means: who says one thing negates the other one.[43]

In instances in which the use of analogy is excluded, the legal regulation/rule is said to be closed. As a result, the cases which are not covered by this rule/regulation are supposed to be regulated negatively in the sense that their legal consequences are to be determined according to the principle: what is not prohibited is permitted.[44]

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[38] See Morawski (2002, 292, 296, 305, 314–318, 2006a, 133, 201, 208–211), Mastalski, 120, Municzewski, 170–171, 208, 209; of a similar view seems to be Redelbach et al. (1992, 221–223), Ziembiński (1990, 196), Pulka, 77, 79, 143, 148; cf. also Chauvin, Stawecki and Winczorek, 141.

[39] See Rosmarin, 115–132.

[40] See Nowacki (1966, 73–74).

[41] See Peczenik and Bergholtz (1991, 318), La Torre et al. (1991, 220), Wróblewski (1992, 226), Smoktunowicz, 17–18, Nowacki and Tobor, 186–187, Morawski (2002, 289, 292, 324–325, 2006a, 197, 201–202, 216–219, 2006b, 194), Leszczyński, 248, Perelman (1984, 90–91), Lechniak, 98–99, Stelmach (2003, 73–74), Jabłońska-Bonca, 166, 167, Chauvin, Stawecki and Winczorek, 249, Ziembiński (1980, 294), Peczenik (2009, 322–323), Pulka, 151, 153, Nawrot and Przybylski-Lewandowski (2007, 347).

However, it is worth noting that sometimes it is also intimated at the possibility of non-applying at the same time either of these arguments; see Wolter and Lipczyńska, 240–241.

[42] La Torre et al. (1991, 220).

In the USA an argument *a contrario* can be linked with the maxim: "*expressio unius exclusio alterius*" [*expressio unius est exclusio alterius*]; see Summers (1991, 418).

[43] See Nowacki and Tobor, 186, Korybski, Leszczyński and Pieniążek, 176 and Korybski and Grzonka (2014, 134).

[44] As for the notion of a "closure rule" see Raz (1979, 192–193).

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The Peculiarity of Private Law

General Permission of the Use of Analogy

As opposed to criminal, tax and a large measure of administrative law, analogy is looked at with reverence—if not even with sheer hope as a last resort—in the province of private law, being especially welcome in contract and commercial law. Sometimes, this positive attitude spreads onto the field of labor law as well.[45]

Indeed, in the domain of private law, analogy is let in in all its length and width. Thus, for instance, the bill of the German Civil Code (BGB) contained such a provision as: "In cases for which the law contains no rules, those rules are to be applied analogically which apply to legally similar cases. In default of such rules, the case should be decided according to principles embodied in the spirit of the legal system." What is, however, even more remarkable, during the legislative works on this bill that took place in the so-called second commission this provision was eventually abandoned due to the reason that—as it was brought up—any authorization for the usage of analogy in matters of private law is unnecessary [i.e. since the presence of this kind of reasoning is here pretty obvious].[46]

As another meaningful example of an overt incentive—if not an obligation—to make use of analogical reasoning in the area of private law, one may invoke article no. 4 of the French Code Civil that states that: "The judge who refuses to decide a case under the pretext of silence, obscurity or insufficiency of the Law can be prosecuted for *déni de justice*." Moreover, as is pointed out, a French judge who does not act in accordance with this article may be punished by a fine or even become excluded from performing public functions.[47]

A similar statutory obligation to employ both *analogia legis* (statutory analogy) and *analogia iuris* (analogy from the general principle(s) or the spirit of law) when being faced with unprovided cases obtains in Italian private law.[48] In Argentina, in turn, the commitment of that kind is to be found in labor law.[49] The most

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[45] In general see: Nowacki (1965, 753–756, 1966, 218–221) and Smoktunowicz, 61–67. In Sweden see: Peczenik and Bergholtz (1991, 318–319), 347. In Argentine see: Zuleta-Puceiro (1991, 62–63). In Germany see Alexy and Dreier (1991, 79). In France see Troper et al. (1991, 200–202). In Poland see: Nowacki (1965, 756–757, 1966, footnote no. 43 on p. 219), Smoktunowicz, 61–67, 73–78, Morawski (2002, 289, 2006a, 198, 2006b, 194–195), Chauvin, Stawecki and Winczorek, 248, 249.

Jabłońska-Boncko explains the differentiation in this respect between public and private law, indicating that "if the law awards rights to citizen, in the event of doubts, *argumentum a simili* is applied, because it is consistent with the *in dubio pro libertate* principle (every doubt is in favour of freedom)"; see Jabłońska-Bonca, 167, 169

[46] See Alexy and Dreier (1991, 89, 109); see also Nowacki (1966, 218–219, 2000, 323), Smoktunowicz, 64–65.

[47] See Troper et al. (1991, 174, 175–176); see also Smoktunowicz, 61–62 and footnote 7, Nowacki (2000, 322).

The fourth article is even said to constitute, in French private law, "the fiction that there are no gaps," i.e. particularly the fiction that in this law no formal gaps occur since the French system of private law is supposed to be formally ('decisionally') closed; see Troper et al. (1991, 174, 175–176).

[48] La Torre et al. (1991, 225).

[49] Zuleta-Puceiro (1991, 38–39).

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paradigmatic in this respect seems the Austrian Civil Code of 1811. That is, according to its paragraphs no. 7, whenever it is not possible to decide the case at hand upon the language of wordings or natural meaning of a statutory text, one should either be under the direction of those statutory provisions that regulate the instances that were similar to this case or under the direction of principles of other close statutes; if, in turn, this too proves insufficient, one should decide the case at hand upon natural principle of law, having taken into account all of its scrupulously established circumstances.[50]

As to *analogia iuris*, it is also worth noting that the Swiss Civil Code of 1907 provides that: "If no regulation can be taken from statutory law, the judge shall decide in accordance with customary law, and if that is also missing, according to a rule he would make as legislator. In doing so, he follows approved doctrine and tradition."[51]

In Polish private law, despite a common stance among judges as well as in legal doctrine as to the permissibility of analogical reasoning in the province of private law, there is no expressly articulated obligation to make use of analogy in any statute. Such an obligation is nonetheless sometimes inferred from the article: 2 § 1 of the Polish Civil Procedure Code and/or from the article no. 189 (formerly 3) of this code. Namely, according to these articles, in Poland the courts are required to decide all cases falling within the scope of private law [regardless of their being regulated by a statutory provision or not); whence one may conclude that if a 'private law case' is an unprovided one, the judge—due the lack of other means—is condemned to turn to analogical thinking if this case is to be decided upon the law, not something other. Sometimes, the view is also taken that the obligatory application of analogical reasoning in Polish private law stems from certain principles of the Polish legal system, especially the one which presupposes the freedom of contracts.[52] (As a peculiar domain in which analogy has to be employed in Polish private law, one may intimate the instances of the so-called "*contracti innominati*", i.e. the contracts that are concluded in practice but there are neither statutory provisions which give them names, nor are such which are directly designed for them).[53] Deciding the unprovided case by recourse to analogical thinking which is premised on some statutory rule is also perceived here as a far

[50] See Nowacki (2000, 321–322) and Smoktunowicz, 62 footnote 8.

Regarding the historical question of the statutory permission of/ban on the use of analogy in Austrian, Prussian as well as in Russian private law see Smoktunowicz, 61–63 with footnotes 6 and 8.

Also the Code of Cannon Law of 1983 overtly makes room for both *analogia legis* and *analogia iuris*. In accordance with its can. no. 19, when confronted with a situation for which no explicit statutory provision or customary law exists, one should be guided—except for criminal matters—by, *inter alia*, statutory provisions that regulate similar instances and general legal principles. See Nowacki (2000, 322).

[51] See Alexy and Dreier (1991, 109–110), Smoktunowicz, 62, Nowacki (2000, 322).

[52] See Nowacki (1965, 756–757, 1966, 219 footnote 43), Smoktunowicz, 65–67.

Overt allowance for the recourse to *analogia iuris* in Polish private law was made in the General Rules of Private Law comprised in the decree of 11.11.1946. In article no. 3, this legal act stipulated that when a statue or customary law could not constitute the basis for decision in the case under consideration, the court should set such basis itself, being guided by social interest and warranted interests of the parties. See Nowacki (2000, 322) and Smoktunowcz, 63.

[53] See Nowacki (1966, 219–220) and Nowacki and Tobor, 182.

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better option than having this case considered in a unconstrained (arbitrary, free) way. Moreover, the employment of analogy is not comprehended in Polish private law as standing in opposition to the value of certainty of law—for in this branch of law the concept of negative regulation does not hold sway and disputes cannot be left without an in-depth judicial deliberation.[54]

Generally, it is also worth mentioning that the source of the obligatory nature of using analogical reasoning in the province of private law might be sought in the will of Sovereign—as did the Polish writer, Stefan Rosmarin.[55]

Limits Put on the Use of Analogy in Private Law

Also in the province of private law, one may, however, encounter some specific directives which aim to truncate the employment of an analogical argument.

Thus, there can be, for instance, the prohibition to use analogy in relation to provisions regarding time limits.[56] It is sometimes even contended that generally analogical arguments should not be applied to those statutory provisions which envisage some obligations or burdens[57] or which order (mandate) something.[58] The plausible usage of analogy may also be considerably confined or even banned in the field of property law, especially when one wants to create some new property rights by it.[59] It is too sometimes maintained that there have to be a very strong reason for extending by analogy such statutory provisions whose terms are unambiguous and plain, e.g.: be of or under some age.[60]

Moreover, appealing to analogy in private law was once forbidden in the past. That was the case in Austrian and German (Prussian) legal orders.[61] For instance, according to article 26 of the Austrian Civil Code of 1786, judicial law-making was prohibited. That is, when having doubts as to whether the case at hand falls under a particular statutory provision, considered such a provision unclear, or having not found any statutory provision that could be applied to the case at hand, the Austrian judges were obliged to turn to the Monarch for a pertinent exposition or supplementation of the statute; in these configurations there was no option for these judges to act as a law-maker.[62]

54 Nowacki (1965, 754–756, 1966, 220–221).

55 Rosmarin, 126–132.

56 Peczenik and Bergholtz (1991, 319) and Peczenik (2009, 324).

57 See Nowacki (1966, 222, 1973, 45, 2000, 325).

58 See Nowacki (1966, footnote no. 46 on p. 221).

59 See Morawski (2006b, 194–195).

60 Peczenik and Bergholtz (1991, 319).

61 Smoktunowicz, p. 61 footnote 6.

62 Smoktunowicz, p. 61 footnote 6.

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Procedural Law

As a rule, the employment of analogy is permitted in regard to procedural law. For example, in Poland one may use analogy both in civil, administrative, tax and criminal procedures. Nonetheless, when concerning the so-called 'preventive measures', particularly temporary arrest, and other forms of detention and interference into personal freedom and property, analogy is expected to be discarded if its outcome is not in favor of the concerned citizen. The same goes for the techniques and means of acquiring proofs which public prosecutors and the Police are empowered to apply. With reference to the procedure in criminal and tax matters, however, a general ban on analogy is sometimes also intimated where the results are against the accused/suspect or the taxpayer respectively.[63]

Constitutional and European Union Law

Many of the aforementioned principles concerning the (dis)allowance of analogy seem to be adequate for the province of constitutional law. That is, contingently on the subject matter touched by a given constitutional provision, the use of analogy will be permitted or restricted.[64]

Analogy is also availed of in the practice of the Court of Justice of the European Union. Examples of it being used are to be found in EU private and commercial law, but are discernible in EU public law, tax law and custom law as well. Apart from its classical form, an analogical pattern of reasoning occurs here in form of *argumentum a fortiori* and *analogia iuris*. Withal, the Court of Justice is perceived as generally reluctant to employ an *argumentum a contrario* and as one who treats this argument rather only as a last resort.[65]

Other Forms of Analogical Reasoning in Law

It must be stressed that the above-mentioned restrictions and bans concerning analogical reasoning refer to the so-called *analogia legis* and *analogia iuris*, i.e. analogy which is based upon a statutory rule or general principle (spirit of law) and

[63] See Nowacki (1966, 216–217 with footnote no. 37 on these pages), Morawski (2002, 291, 2006a, 199, 206, 207, 2006b, 195), Smoktunowicz, 71–72, 107–109, Pulka, 146–147.

[64] Cf. Morawski (2006a, 199, 2006b, 195).

As for various examples of the use of analogical reasoning from Polish judicial practice in cases concerning criminal, tax, social security, antitrust, family, private and constitutional law matters see: Municzewski, 184–208, Leszczyński, 268–278, Morawski (2002, 296–344), Korybski, Leszczyński and Pieniążek, 179, Morawski (2006a, 204–222), Nowacki (1965, 756–758 with footnotes 17 and 19, 1966, pp. 11–12 footnote 4, pp. 22–29 footnotes 23, 28, 29, 35, 41–44, pp. 39–42 footnotes 68–71, pp. 58–60 footnotes 31–34, pp. 68–72 footnotes 1, 5, 12 pp. 96–97 footnotes 17, pp. 122–126, 2, 3, 14, 21, p. 167 footnote 4, p. 169 footnotes 5, pp. 171–173 footnotes 11, 14, 15, p. 176 footnotes 19, 20, pp. 181–182 footnote 30, pp. 200–204 footnotes 4–7, pp. 216–217 footnotes 37), Smoktunowicz, 86–101, Wróblewski (1991, 299).

[65] See Kalisz (2007, 96–100).

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supplements the lack of statutory regulation or replaces an already existing one. These restrictions, however, do not encompass the employment of analogical legal reasoning taking other forms, especially the so-called: *analogia intra legem*, which helps to clarify the equivocal meaning of words and expressions used in statutory rules without changing ('creating') the already existing law. They also do not address the very possibility of applying statutory provisions through analogical inference—i.e. at least insofar as the results of such application remain within the possible linguistic (lexical) meaning of the wording of a statutory rule.

Basically, the same goes for analogy taking the form of the so-called "*argumentum a fortiori*". Namely, *a fortiori* seems to be—in principle—permitted in all provinces of law, including penal law and tax law. It is also allowed in relation to an exceptional statutory provision and *lex specialis*.[66] However, as is sometimes pointed out, in criminal affairs *argumentum a fortiori* ought to be confined in a fashion similar to the restrictions that are imposed therein upon classical analogy.[67]

Conclusions

Plausible use of analogical reasoning in the legal domain encounters many restrictions and obstacles. Some provinces of law, particularly criminal and tax law, are as to such use remarkably vulnerable and above all analogical arguments should not be—as a rule—utilized in them to the detriment of the accused or taxpayer. Private law seems far more liberal in this respect. However, the ambit of the potential use of analogical reasoning here is also not without any limitation.

Incidentally, the restrictions that forbid the extension of statutory rules by analogy do not appear to be pertinent when dealing with rules of precedents (*rationes decidendi*). Precedential rules are generally maintained to be of a different nature than their statutory counterparts. The latter may be perceived as establishing two spheres: one that is covered by them and one that is not covered by them. *Rationes decidendi*, in turn, seem not to possess—unless they are specified in them expressly—internal limits to their possible application. That is, they do not establish the sphere of their non-application by definition and as such lend themselves to be far more freely extended by the argument from analogy. This is even to the extent that after analogical extension a precedential rule may embrace cases that at first glance are evidently uncovered by this rule wording.[68]

In precedential law, nonetheless, the Latin maxim: "*nullum crimen, nulla poena sine lege*" also exerts some pressure against the creation of new crimes via analogical reasoning. It follows that if some behavior is not controlled by any precedent (it does not fall under any rule constituting *ratio decidendi*), the judge cannot treat the pending case as the so-called case of first impression and decide it—by analogy to the precedent which penalizes the most similar behavior—against the person being accused. In other words, this behavior should be regarded as allowed

[66] See Morawski (2006a, 221), Pulka, 155.

[67] See Morawski (2002, 342–343).

[68] See Peczenik (2009, 327).

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and those who commit it cannot be legally punished.[69] Similarly, in the instances that involve human rights and civil liberties, the potential employment of analogy in precedential law might be, to a lesser or greater extent, moderated when its results would be to the detriment of the citizen.

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[69] See Summers (1997, 367–368) and Raz, 192–193; cf. also Zaccaria, 61.

Raz points out that we are dealing here with a "closure rule", i.e. in this case the rule which states that "what is not prohibited is permitted"; an assertion he preceded with the following remark: "After all silence may speak louder than words, and a change in the law is a change in the law, regardless of the way the legal situation came to be. People rely on the law when it is based on silence as much as on the common law." He also notes that assuming that all courts have complete freedom to change the law when it rests on nothing more than silence, i.e. absence of sources, is a mistake: a dispute can be regulated not only due to legal regulation but also by virtue of the absence of such regulation in combination with the existence of a closure rule. See Raz, 192–193.

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