Analogy and Exemplary Reasoning in Legal Discourse

van der Velden, Bastiaan, Kaptein, Hendrik

Published by Amsterdam University Press

van der Velden, Bastiaan and Hendrik Kaptein.
Analogy and Exemplary Reasoning in Legal Discourse.
Amsterdam University Press, 2018.
Project MUSE. muse.jhu.edu/book/66373.

For additional information about this book
https://muse.jhu.edu/book/66373

For content related to this chapter
https://muse.jhu.edu/related_content?type=book&id=2346108
4. Analogical reasoning and extensive interpretation*

Damiano Canale and Giovanni Tuzet

Hendrik Kapein and Bastiaan van der Velden (ed.), Analogy and Exemplary Reasoning in Legal Discourse. Amsterdam University Press, 2018
DOI: 10.5117/9789462985902/ch04

Abstract
In most legal systems, reasoning by analogy is prohibited in criminal law (unless it is in favour of the accused) whereas extensive interpretation is not. Hence it is crucial in criminal adjudication to distinguish the two arguments, although they seem to serve the same purpose. The problem however seems to be that it is very unclear whether there is a real difference between the two and where it might lie. Against such confusion an original account of the distinction between analogical reasoning and interpretive extension is proposed, based upon the principle of semantic tolerance and its inferential structure in legal argumentation, with hopefully constructive implications for criminal justice adjudication.

Keywords: extensive interpretation, criminal law, vagueness, semantic tolerance

... logic does not prescribe interpretation of terms ...
(Hart, 1983, p. 67)

1 Introduction

The present essay focuses on the tension between analogical reasoning and extensive interpretation in law. These two techniques of judicial decision-making permit ruling on a case that is not explicitly considered by a legal provision and still is worth being regulated on the basis of it.1 In most legal

* This chapter was published previously in Archiv für Rechts- und Sozialphilosophie, 103, 2017: 117–135.

1 Although ‘analogical reasoning’ and ‘extensive interpretation’ are often used in judicial discourse to denote two fungible techniques of decision-making, legal theory clearly differentiates
systems, however, reasoning by analogy is prohibited in criminal law (unless it is in favour of the accused) whereas extensive interpretation is not.\(^2\) Hence, it is a crucial point in criminal adjudication to distinguish the two arguments, although they seem to serve the same purpose.\(^3\) Indeed, if a trial court justifies a criminal decision arguing by analogy, the decision will be reasonably quashed on appeal because it is contrary to the law. The same decision is justified, however, when it can be considered an extensive interpretation of a criminal provision, even when this is the same provision that the court could have used analogically. The problem is that in legal practice one can hardly distinguish analogy from extensive interpretation. It is very unclear whether there is a real difference between the two and where it might lie. On the one hand, some scholars claim that they differ from a theoretical point of view, since they do not have the same argumentative structure. On the other hand, analogical reasoning and extensive interpretation come to the same result starting from the same legal materials: they justify the extension of a regulation to a case that is not explicitly considered by the law.

As a consequence, one might have the suspicion that judges deploy these canons of argumentation strategically. When a judge intends for whatever reasons to punish conduct that is not explicitly regulated by a criminal provision, then he justifies his decision as the compelling upshot of an extensive interpretation of the provision. But, when a judge is not willing to punish the same conduct, then he claims that the extension of criminal liability is not permitted, since this would be a case of analogical reasoning. As a result, these canons of decision-making would be susceptible to random manipulation for purposes of social protection and control: judges would make criminal law up as they go along on the basis of ‘what seems to them an ideally just form of society’ (MacCormick, 1978, p. 107).

the two classes of entities they refer to. As we shall point out in Section 2, ‘extensive interpretation’ makes reference either to the interpretive process that extends the standard meaning of an interpreted legal provision, or to the outcome of this process. By contrast, ‘analogical reasoning’ denotes an argumentative technique inferentially articulated. In this article we shall look at these subjects from the point of view of the theory of legal argumentation: these labels will single out two arguments that are used to justify a judicial decision.

\(^2\) This is the case, for instance, in Spain, France, Germany, and Italy: see e.g. Quintero Olivares, 1989, pp. 136–139; Robert, 2001, pp. 191–201; Hassemer, 1992; and Caiani, 1958. Common law countries face the same problem in the interpretation of statutes and precedents: see e.g. McBoyle v. United States (1931) and MacCormick, 1978, ch. 8. It is true that common law rules lack the canonical form of statutory ones: but even if they cannot be ‘interpreted extensively’ in the same sense of statutory law, they can be construed extensively.

All this being true, it is worth looking at whether there are any constraints on the judicial application of these argumentative canons in legal practice. If it were to turn out that no constraint is put on the judge, and the divide between analogical reasoning and extensive interpretation is just a matter of strategic manoeuvring in argumentation, then the conceptual distinction we are considering is not consistent with the principle of legality and the rule of law. When constraints are given and a straightforward line can be drawn between the two canons, then the legality of a criminal decision based upon them is not compromised.

To address these issues, we shall focus first on the theoretical distinction between analogical extension and interpretive extension, as it is traditionally conceived by legal scholars. Then we will concentrate on a recent Italian case (the ‘Vatican Radio Case’) where the Italian Court of Cassation, in declaring that the accused could have been legally convicted of a criminal offence, claimed to argue from extensive interpretation and not from analogy. We shall assess, in this respect, whether the argumentation of the Court was sound. Finally, we will propose an original account of the distinction between analogical reasoning and interpretive extension, based upon the principle of semantic tolerance and its inferential structure in legal argumentation. In doing this, we will highlight the different constraints put on the interpreter who makes use of these arguments to underpin a judicial decision.

2 The traditional standpoint

In legal argumentation and practice, ‘restrictive’ and ‘extensive’ interpretations are often described as techniques that are used when the literal meaning of a legal provision (hereafter standard meaning) does not correspond to the intended meaning of the legislature. It may be the case that the legislature, by enacting a statute, says one thing but means another. In the legal jargon, it is commonly claimed in these circumstances either that *lex magis dixit quam voluit* (the law said more than it wanted to say) or that *legis minus dixit quam voluit* (the law said less than it wanted to say). Now, when the standard meaning of a legal provision differs from the

---

4 The distinction between what is said and what is intended has been pointed out by Grice (1989). Here we make abstraction from the ontological and epistemological worries about legislatures, namely whether there are such entities and how it is possible to know their intentions.

5 We shall use the expression ‘standard meaning’ to refer to the meaning that an expression assumes most times according to the rules governing the use of this expression in a given language.
intended meaning, a court that decides a case according to the former will fail to enforce the law that the legislature intended to make. Restrictive and extensive interpretation address this issue. These interpretive techniques give the judge the opportunity to set aside the standard meaning of the statute in order to bridge the gap between what is said and what is intended. And they do this either narrowing the set of cases that the statute would have ruled if the judge had interpreted it literally, or expanding this set. In the latter circumstance, one or more cases that do not fall under the standard meaning of the statute will be ruled according to it nevertheless.

As a consequence, what does happen when a legal provision is interpreted extensively? A case is not regulated by the law according to the standard interpretation of a legal text, but it becomes such on the basis of a second way of interpreting the same text.

\[ C \text{ does not fall under } N_1 \text{ obtained via } I_1 \text{ of } P. \]

But, \[ C \text{ falls under } N_2 \text{ obtained via } I_2 \text{ of } P. \]

\( I_2 \) is the extensive interpretation of provision \( P \), according to which the content of norm \( N_1 \) is extended to \( N_2 \). For example, this happens when a provision about ‘vehicles’ is about motor vehicles according to \( I_1 \) and extends to devices that perform the same function even if they lack a motor (e.g. skateboards) according to \( I_2 \).

Given this explanation, it is clear that an interpretation is not ‘extensive’ \( \textit{per se} \) but with respect to some standard interpretation.\(^6\) How does this work? \( N_2 \) is a justified interpretive extension of \( N_1 \) when an interpretive canon permits to extend the standard interpretation of \( P \). If \( I_1 \) is the standard (literal) interpretation, \( I_2 \) might be an extensive interpretation argued from the intention of the legislature, from the purpose of the regulation, from a legal principle, etc.\(^7\) Therefore, strictly speaking, ‘extensive interpretation’ and ‘restrictive interpretation’ do not denote argumentative canons. These

---

6 ‘Extensive interpretation (interpretation by analogy) is the term used when pragmatic considerations result in the application of the rule to situations which, regarded in the light of “natural linguistic reading”, clearly fall outside its field of reference’ (Ross 1958, p. 149); note that Ross does not distinguish between analogy and extensive interpretation.

7 Ross (1958, p. 150) claims that extensive interpretation has two presuppositions: (i) that a legal evaluation is in favour of applying a rule not only to sphere (a) but also to sphere (b); (a) that there is no difference between (a) and (b) that could justify a different treatment of the two cases. See also Silving, 1967, p. 313: ‘though words have outer limits of social meaning, beyond which their extension might appear absurd, their meaning in a statute is very often sufficiently flexible to include or to exclude certain items, depending on purpose’.
expressions simply qualify the upshot of interpretation: in particular, they mark the fact that the scope of the norm so stated is larger or narrower than it would have been had the provision been interpreted literally. In this sense, such interpretive techniques do not justify a judicial decision, although they are sometimes employed in legal argumentation as if they could. Extensive interpretation is in need of justification: it is not itself an argumentative tool. In fact, it simply brings into operation those argumentative canons that justify giving up literal interpretation, and thus leads the judge to defeat the principle of strict construction in criminal law. By making reference to the intended meaning of the legislature, which can be determined using different argumentative tools, the range of criminal liability may be both expanded and reduced.

What happens instead in analogical reasoning? A gap in the law is filled by arguing analogically from a source case to a target case, thereby creating a new norm. To put it differently, a first norm regulates a source case which is relevantly similar to a target case that lacks a legal regulation. On the basis of this relevant similarity and the lack of relevant dissimilarities, the regulation of the source case is extended to the target one. In this way, the gap is filled by the judge by generating a second norm that goes beyond the first, and hence can be seen as created by the judge:

- $C_1$ falls under $N_1$.
- $C_2$ does not fall under any actual norm of the system (there is a gap in the law).
- There is a relevant similarity between $C_1$ and $C_2$.
- $C_2$ falls under $N_2$ obtained by analogical reasoning (filling in the gap).

In this scheme, $C_1$ is the source case, whose regulation is extended analogically to the target case $C_2$. $N_2$ is a new norm created by analogy from $N_1$. For example, to use the famous American decision Adams v. New Jersey Steamboat Co. (1896), the issue of the liability of steamboat companies for the loss of money or other personal effects of their passengers (target case) is treated by analogy with the liability of innkeepers for such losses suffered by their guests (source case), considering that a steamboat is a ‘floating inn’

---


9 Relevance is determined by legal purpose (ratio legis in civil law systems), as we tried to show in Canale and Tuzet 2009. See also Cardozo 1921, pp. 28–30, and 1924, pp. 79–80, on analogy and ratio decidendi in case law.
in the light of such purpose as the protection of guests or passengers from ‘fraud or plunder’ from the proprietor.\textsuperscript{10}

3 Different traits, and common ones

What are the distinguishing traits of extensive interpretation and analogical reasoning? According to the theoretical demarcation we have just outlined, they have at least four different features.\textsuperscript{11} First, analogical reasoning presupposes a given interpretation of the relevant provisions, which is at stake in extensive interpretation. Interpretation comes first. That is, one argues analogically after having interpreted the relevant provisions and having established that the case is not regulated, despite the interpretive method the judge could call on. On the contrary, extensive interpretation is precisely about the way in which such provisions ought to be interpreted, or have been construed as a matter of fact.

Secondly, analogical reasoning presupposes a gap, which is absent in extensive interpretation. This gap actually depends on the interpretive process itself: the case at hand in not regulated by the law in the sense that no available interpretation of a valid legal provision has been able to set up a norm that covers it.

Thirdly, analogical reasoning creates a new norm to fill the gap, whereas extensive interpretation extends the content of the standard reading of the relevant provision. Let’s say that $N_1$ regulates cases of type $A$ and $B$: with extensive interpretation $N_2$ regulates cases $A$, $B$, and $C$. With analogical reasoning, on the contrary, $N_1$ regulates cases $A$ and $B$, while $N_2$ regulates cases $C$. The scope of $N_2$ with extensive interpretation is necessarily greater than that of $N_1$, which is not the case with analogical reasoning.\textsuperscript{12}

Fourthly, as is the case in almost every contemporary legal system, analogical reasoning is prohibited in criminal law while, as we already pointed out, extensive interpretation is not. A basic legal principle is

\textsuperscript{10} Adams v. New Jersey Steamboat Co., 151 N.Y. 163, 45 N.E. 369. As scholars know, a disputed question was whether the relevant similarity of steamboats was with inns or with railroads; in the former case companies were liable for such losses, in the latter they were not. See e.g. Weinreb, 2005, and Posner, 2006. For a similar problem, see Sunstein, 1993, p. 772: is hate speech analogous to physical assault or to political dissent?

\textsuperscript{11} See e.g. Bobbio, 1994, ch. 1. See also Carcaterra, 1988, pp. 16–18; Gianformaggio, 1997; and Peczenik, 2005, pp. 20–24.

\textsuperscript{12} But analogical reasoning presupposes a principle or a value related to the ratio and applicable to all those cases.
behind this: it is the ‘rule of law’ principle in common-law countries and the ‘legality’ principle in civil law ones. It is the shared idea that judges shall not create new law in criminal matters, but just decide on the basis of already established and cognizable norms. As the slogan has it, they have to apply the law. This idea is commonly represented by the maxim nullum crimen sine lege, nulla poena sine lege. But this is not meant to exclude all margins of judicial appreciation and discretion; flexibility is a felt need of law in general and also, with more caution, of criminal law. So both laxity of construction and vagueness of criminal statutes may sometimes be useful or even necessary. As a consequence, legal scholars in general think that extensive interpretation is admissible in criminal matters, provided that judges do not create new law but confine themselves to the admissible interpretations of given provisions. This view is reasonable if the two techniques at stake are different indeed. The different traits we outlined above seem to support the view that they are not the same, and rule out as a theoretical confusion the label ‘analogical interpretation’.

But extensive interpretation and analogy have common traits too. First, they share the need of settling, one way or another, the case in hand. A decision must be made and an argument must be given in favour of it. In particular, they deal with a case that is not explicitly regulated by a legal provision, i.e. that does not fall under its standard meaning, but needs to be regulated for reasons of social protection and control.

Secondly, and more importantly, extensive interpretation and analogy have the same practical outcome. For $N_2$ (either obtained by extensive interpretation or analogy), it is admissible in criminal matters, provided that judges do not create new law but confine themselves to the admissible interpretations of given provisions. This view is reasonable if the two techniques at stake are different indeed. The different traits we outlined above seem to support the view that they are not the same, and rule out as a theoretical confusion the label ‘analogical interpretation’.

Note that this construction is more complex than mere extensive interpretation: it is analogical extensive interpretation.
interpretation or by analogy) extends the regulation to the case in hand. The practical outcome for the parties involved is the same, either if you argue from extensive interpretation or from analogy. Let us consider our previous examples. A skateboard might be qualified as a vehicle according to an extensive interpretation of the provision ‘No vehicles in the park’ whose standard meaning covers motor vehicles, to the effect that skateboards are not allowed in the park ($N_1$). But one might also argue in the following way: ‘vehicles’ is to be read as referring to motor vehicles (because of some interpretive argument to be specified, like the argument from literal meaning or from legislative intent); so the norm does not cover the case of skateboards entering the park; so there is a gap in the law; but there is also a relevant similarity between motor vehicles and skateboards (both represent a threat to the safety of pedestrians in the park); therefore the gap is to be filled by analogy extending to skateboards the regulation on motor vehicles, to the effect that skateboards are not allowed in the park ($N_2$). The same outcome that was arrived at by interpreting extensively the given provision could be reached by arguing analogically after having interpreted non-extensively the same provision. Or, conversely, one could turn an analogical argument into a form of extensive interpretation. The Court of Adams v. New Jersey Steamboat Co. (1896) argued there was a gap in the law and, because of the relevant similarity between steamboats and inns (a steamboat is a ‘floating inn’), the gap was filled by analogy. Now, assuming there is a provision about ‘inns’, one might also argue that the word ‘inns’ is to be interpreted extensively (because a steamboat is a ‘floating inn’) to the effect that the regulation about inns extends to steamboats and steamboat companies are liable as innkeepers are. It is perhaps for such common traits that some scholars, in the context of systemic interpretation and with reference to the issue of legal gaps, use the labels ‘analogy extra legem’ (analogical reasoning) and ‘analogy intra legem’ (extensive interpretation).¹⁶

All of this might not be a problem for thinkers who love theoretical distinctions as such. It does, however, pose a problem for pragmatist thinkers who are more interested in outcomes than in the ways they are arrived at. It is a pragmatist principle that, if the application of two concepts has

¹⁶ The problem of the completeness of a legal system is linked with that of extra-statutory analogy (“analogy extra legem”), where legal consequences are ascribed to facts, which are not singled out in enacted legal rules. In interpretation, there is a problem of using analogy intra legem, where one does not go “outside the valid law” but only tries so to fix the meaning of the legal rules that they constitute the most harmonious whole possible. Thus interpretation by analogy is singled out according to the reasoning it uses; Wróblewski 1992, p. 103.
the same practical consequences, they are the same concept under different names. 17 Now, if ‘extensive interpretation’ and ‘analogical reasoning’ produce the same practical consequences, one could say that they are the same argument and that it does not make sense to allow one and prohibit the other. Same consequences, same arguments.

We shall discuss this core issue by considering the Vatican Radio Case, where our concerns as to the distinction between interpretive and analogical extension come directly into play. Indeed, the proof of the pudding is still in the eating.

4 The Vatican Radio Case

Vatican Radio transmission towers emitted electromagnetic waves that, according to the public prosecution, threatened the population nearby. A first disputed issue was whether the emissions were within the environmental limits fixed by Italian administrative law, and a second was whether the case also had a criminal profile.

Article 674 of the Italian Criminal Code sanctions the dangerous emission of substances (getto pericoloso di cose, literally: ‘the dangerous throwing of things’), while no article of the Code mentions electromagnetic waves. Was the emission of such waves a ‘dangerous emission of substances’? The Court of Cassation (III Criminal Sec., decision no. 36845/2008) decided it was and claimed to argue from extensive interpretation and not from analogy.

Was the decision of the Court really the result of an interpretive extension of the regulation, or rather the hidden upshot of analogical reasoning? This case raised two interpretive problems in particular: (1) the meaning of ‘throwing’ and (2) the meaning of ‘things’. Is an emission an act of ‘throwing’ according to the law? Are waves ‘things’ according to the law? And consequently, is the act of emitting such waves a ‘dangerous emission of substances’?

Note that these questions, put in this order, imply a semantics that follows the ‘principle of composition’: first one has to determine the meaning of single words, then one has to put them together to determine the meaning of a whole sentence or complex expression. A semantics following the ‘principle of context’ would do things the other way round: first you determine the context, that is the meaning of sentences or complex expressions, then you extract from it the meaning of single words. 18 In our case the Court has

---

17 It was, in particular, Peirce’s pragmatic maxim. See e.g. S. Haack, 2005, pp. 75–77.
18 Searle, 1978. For an inferentialist picture of these issues, see Canale and Tuzet, 2007.
chosen to follow a compositional semantics, dividing the expression at stake into parts and determining the meaning of each part in order to establish the meaning of the whole.

4.1 On ‘things’

Clearly, according to standard usage, waves are not ‘things’. Therefore an argument is needed to support that interpretive conclusion. A significant argument provided by the prosecution and then used by the Court invokes another norm of the system: art. 624 (c. II) of the Criminal Code, on theft, states that electric power, as any other energy with economic value, legally counts as a thing; thus electromagnetic waves are ‘things’ according to the law. Against this argument the defence contended that, according to the intention of the legislature of 1930, when the Code was enacted, ‘things’ in art. 674 of the Italian Criminal Code refers to material objects. To that argument the Court added some scientific considerations as to the physical nature of waves.

Now, evidently, both interpretations seem admissible. The first is supported by a form of systemic argumentation (invoking other norms of the same legal system); the second is supported by a psychological argument (the argument from legislative intent). The first claims that defining waves as ‘things’ is an extensive interpretation justified by systemic considerations; the second claims that treating electromagnetic waves as material objects is an instance of an analogy, since a psychological argument justifies a strict interpretation of art. 674 and the interpretive conclusion that there is a gap: in fact, such waves were not even considered in the 1930 legislature.

Note that if both interpretations are admissible there seems to be room to accept the extensive interpretation thesis as correct: there is no need to argue from analogy, as the case could be settled by selecting one of the admissible interpretations of ‘things’, namely the extensive one.19 This is applicable to the object of the conduct in question. But what about the conduct itself?

4.2 On ‘throwing’

Again, the argument of the prosecution and the Court about ‘throwing’ is that art. 674 of the Italian Criminal Code can be interpreted extensively. An emission falls under the notion of ‘throwing’ because there are linguistic

uses of the latter referring to the former; for instance, says the Court, to describe the act of emitting a cry one can use the expression ‘throwing out a cry’. You might also think of phrases such as ‘throwing light’ on something or ‘throwing suspicion’ on somebody, which share with ‘throwing out a cry’ the fact of extending the meaning of the expression.

The defence replies that according to standard usage ‘throwing’ refers to the act of flinging something, for instance out of the window, with some physical effort, and that a ‘dangerous emission of substances’ refers to the act of dangerously flinging material objects in public space (or in private spaces that are open to the public); metaphorical uses are not at stake here and no interpretive canon permits construing the provision as referring to an emission of waves. So there is a gap in the law, which could be filled only by analogy; but analogy is prohibited in criminal law.

It is worth noting that the interpretive argument of the defence seems to be inspired by a contextualist semantics: the meanings of ‘throwing’ and ‘things’ cannot be determined in isolation and should be fixed with reference to the meaning of the whole sentence in that context. As a result, the term ‘things’ only refers to material things, and the meaning of ‘throwing’ is restricted to its non-metaphorical acceptations.

Finally, note that if both interpretations are admissible there is also room to think that extensive interpretation is a correct solution. However, one may have legitimate doubts about the admissibility of such an extensive interpretation of ‘throwing’. The Court said there are linguistic uses of ‘throwing’ that refer to the act of emitting something, for instance a cry. The Court used Dante’s poetic language as an example of this. But one wonders if the definition of a word in a line of verse by a poet who lived eight centuries ago can be used to determine the admissible interpretations of a provision in a present-day legal controversy.

Nevertheless, the Court contended that the emission of electromagnetic waves can be a dangerous emission of substances and, after settling this interpretive issue, it quashed the appellate decision and ordered a new appeals trial of two Vatican Radio officials in order to settle the relevant factual question, that is, to ascertain if the waves were in fact dangerous for the people living nearby.

5 Vagueness and the location problem

On the basis of the arguments provided by the Italian Court of Cassation, it is actually far from clear whether its decision was the result of an interpretive
extension of an undeclared extension by analogy. Actually, it is the standard account of the distinction between the two that seems to be unsatisfactory or even lacking altogether. In particular, the distinctive features of extensive interpretation in the standard account seem to provide little or no guidance at all for legal interpreters, thereby giving rise to misuses of this interpretive technique.

In the following two sections we shall try to put forward a different explanation of the interpretive practices on which we are focusing in order to shed some light, as it were, on the issues that have been under consideration from the outset.

As the Vatican Radio Case clearly demonstrates, the question whether a legal provision is to be interpreted extensively presupposes that such a provision (or its content) is vague. This is true by definition. Extensive interpretation is possible if, and only if, the interpreted legal provision allows for some changes in the cases to which it can be meaningfully applied. In other words, if a legal provision is interpreted extensively, it will yield borderline cases. As Grice puts it, ‘To say that an expression is vague (in a broad sense of vague) is presumably, roughly speaking, to say that there are cases (actual or possible) in which one just does not know whether to apply the expression or to withhold it, and one’s not knowing is not due to ignorance of the facts’ (Grice, 1989, p. 177). The words ‘things’ and ‘throwing’ are examples of this phenomenon, at least according to the Italian Court of Cassation. In the Court’s view, it is not immediately clear whether the term ‘things’ applies to electromagnetic waves, nor whether the word ‘throwing’ applies to their emission. Consequently, art. 674 of the Italian Criminal Code is vague: it is not definitely true that electromagnetic waves are things nor that they are not; similarly, it is not definitely true that the emission of waves is a kind of throwing, nor that it is not.

Now, the word ‘definitely’ assumes quite different meanings in the philosophical literature on vagueness. As Stewart Shapiro has put it, ‘each theorist has his or her own definition of definiteness, and the various concepts have little in common. There seems to be no way to make further progress in defining “borderline case” or “definitely” without begging the question against some view or other.’

20 Some authors claim that vagueness is a property of (some) words, others claim it is a property of (some) contents. See below for some references.
21 Shapiro, 2006, p. 2. As a matter of fact, most theorists claim that vagueness involves a form of ignorance, so that the different accounts of this phenomenon depend on what such ignorance amounts to. For instance, epistemicists claim that with borderline cases we are ignorant of facts that actually we cannot know (Williamson, 1994); a supervaluationist holds that we are
Regardless of the controversial nature of vagueness and related concepts, a thorny issue that we will not take up in this article, one may outline the linguistic problem faced by the Italian Court by means of the following uncontroversial scheme:

This scheme represents the extension and anti-extension of a legal provision such as art. 674 of the Italian Criminal Code.\textsuperscript{22} Let $A$ be the set of cases that clearly fall under the legal provision according to its standard meaning and which thus belong to its extension. We have no doubts that a bottle or a hammer is a thing that can by thrown and thus falls within the scope of the provision. Similarly, let $C$ be the set of cases that clearly do not fall under the standard meaning of the same provision, i.e. that belong to its anti-extension. A trust or a deal is not a thing that can be ‘thrown’ like a bottle. Similarly, Mount Everest is definitely a thing but it cannot be ‘thrown’ either. Therefore, the case of the Mount Everest belongs to $C$ and not to $A$. Finally, $B$ is the set of borderline cases that come between clear ‘positive’ and ‘negative’ ones.\textsuperscript{23} When $x$ is a borderline case, the task for legal interpretation is to determine whether $x$ ought to be treated as a ‘positive’ or ‘negative’ case from the legal point of view. In the first circumstance, the content of the provision shall be extended so as to include $x$: the boundary between $A$ and $B$ moves to include $x$ within the meaning of the provision as far as the singular case at hand is concerned. In the second circumstance, the content of the provision will be restricted: the boundary between $C$

\textsuperscript{22} The extension and anti-extension of a sentence $S$ should not be confused here with the extensive interpretation of $S$. The extension of a sentence is the set of objects, events, or states of affairs $S$ refers to, whereas the anti-extension is the complementary set thereof. An extensive interpretation of $S$ actually modifies its standard extension and anti-extension.

\textsuperscript{23} See Endicott, 2000, p. 55. See also (obviously) Hart, 1994 [1961], ch. 7.

ignorant because a vague sentence is neither true nor false (Fine, 1975); an incoherentist claims that we do not know whether a vague term apply to a case, because our language sometimes is incoherent (Dummett, 1975); a contextualist assumes that we are (apparently) ignorant of the conditions of application of vague terms because these conditions shift with context (see Raffman, 1994; and Soames, 1999). For a discussion of these accounts of vagueness as to legal language, see Endicott, 2000; Jönsson, 2009; and Poscher, 2012a.
and $B$ is shaped so as to include $x$ in $C$. Obviously, all this requires that the boundaries between $A$, $B$, and $C$ are flexible in the sense that they have no sharp cut-off points.\textsuperscript{24} By interpreting the legal provision for decisional purposes, however, the judge is called upon to set up these boundaries and to determine where the case at hand is located. As a result, \textit{after} legal interpretation, $x$ shall be qualified as belonging to $A$ or $C$ as a matter of fact. This will not get rid of vagueness; the vagueness of the interpreted provision will simply be reduced to such an extent as to permit legal adjudication in the given case.

Now, the crucial point is to determine whether $x$ belongs to $A$, $B$, or $C$ according to the standard meaning of the legal provision. If $x$ is located in $B$, then extensive interpretation can be worked out from a semantic point of view. Conversely, if $x$ is located in $C$, extensive interpretation is not semantically admissible. This does not imply that the regulation provided by the legal provision cannot be extended to $x$ by a court, being $x$ located in $C$. The case could be so regulated by means of analogical reasoning, when legally permitted. But the starting point of analogical extension is quite different. Indeed, if $x$ is located in $C$ it is definitely not covered by the interpreted legal provision. Case $x$ could still be regulated according to the law on the basis of its relevant similarity to the standard cases of application, although the interpreted legal provision does not rule $x$ at all.

We shall label the problem we have just outlined as ‘the location problem’. The divide between extensive interpretation and analogical extension basically depends on it. If we had some criteria for locating a given case within $A$, $B$, or $C$, it would be possible to determine under what conditions extensive interpretation is allowed and analogical extension is not. Do such criteria exist?

6 Extension and tolerance

To answer this question, let us return to the features of vague terms or contents. We have seen that a vague term allows for some content changes in the cases to which it can be meaningfully applied. The term ‘hammer’ applies to the hammer in my toolbox even if I paint it pink. However, the term ‘hammer’ would no longer apply if I removed the handle, or you would at least hesitate to call it a hammer. If you say ‘Pass me the hammer’ when

\begin{footnote}{24} This claim is countered, however, by the epistemic theory of vagueness and by supervaluation theory as well: Williamson, 1994. On supervaluationism and its logic see Varzi, 2007.\end{footnote}
repairing your house and I hand you something without a handle, you would probably respond with ‘This is not what I asked for!’ Now in this sense we may say that the term ‘hammer’ is tolerant to a certain extent as to its application conditions, and that the same holds for ‘things’ and ‘throwing’, as claimed by the Italian Cassation Court. The tolerance metaphor is used here to point out that certain terms or expressions are less precise than others in a given context, allowing them to be meaningfully used to denote cases that do not fall under their standard meaning. As a consequence, semantic tolerance is a matter of degree and depends on context. Returning to our example, when a case is slightly different from the standard one in the light of the contextual constraints put on the use of ‘things’ and ‘throwing’, these terms nevertheless apply to it. However, if the difference is contextually relevant, these terms do not apply. Given all this, the Tolerance Principle can be framed as follows:

\[ P \text{ being the set of relevant properties for a term } T \text{ in context } C, \text{ if } x \text{ and } y \text{ do not share all their properties but are indiscernible with respect to every member of } P, \text{ then if } T \text{ applies to } x \text{ it applies to } y \text{ as well.} \]

A pragmatic refinement of this principle could be obtained as follows: when two cases in the field of \( P \) differ only marginally within the tolerance range of \( T \), so that they share the same relevant properties, and if a competent speaker judges the first case to have \( P \), then he cannot competently judge the other case in any other manner (see also Shapiro, 2006, ch. 1). Therefore, if having \( P \) justifies the ascription of the legal consequence \( q \) to \( x \), it justifies the same consequence in the case of \( y \). Note that as far as the standard meaning of \( T \) is concerned, the interpreter might permissibly go either way with respect to a borderline case \( y \). The principle of tolerance gives the interpreter a good reason for applying \( T \) to \( y \) in context \( C \).

The Tolerance Principle reframes the problem of vagueness of legal terms and expressions in a way that is particularly helpful for our purposes in this chapter. This principle sets out the conditions under which the extension of a regulation to a borderline case is justified. These conditions depend on the properties of the subject of regulation that are taken to be relevant within a given context. By pointing out that such conditions are satisfied, therefore, a court sets out the boundaries between the extension and anti-extension of the interpreted provision in a way that is coherent with the semantic content of the provision within the context of adjudication.

One might ask here: why are those properties relevant? The relevance criterion cannot be determined by the standard meaning of the vague term. Indeed, the standard meaning is not sufficient to determine semantic extension and anti-extension in case of vagueness by definition: the rules governing the use of linguistic expressions will not lead to a definite verdict.

As we have just pointed out, relevance is rather a function of context. More precisely, contextual constraints put on language uses determine what properties of a given case are relevant in adjudication. These constraints are typically made explicit by means of legal arguments. The argument from intention, the argument from purpose, the argument from legal history, and the various sorts of systemic argument used in legal argumentation highlight different contextual constraints that the judge can take into account in interpreting a statute, which in turn make some properties of the case relevant according to the law. When interpreting the term ‘things’ so as to include in its extension the case of electromagnetic waves, for instance, the judge is committed to give a reason for content extension, which sorts out the properties of the case at hand: some properties will turn out to be relevant according to the argument that the judge resorts to, others will not. If this commitment is satisfied from the point of view of the participants in the argumentative practice according to the accepted argumentative standards, then the word ‘things’ correctly applies to electromagnetic waves, since the latter are taken to have the same relevant properties as the standard instances of things. In this sense, the sort of tolerance we are focusing on here can be called ‘semantic tolerance’. The argumentative process aims at determining the semantic content of a vague term in a borderline case on the basis of the contextual constraints that are made explicit by legal arguments.26

As to analogical extension, on the other hand, the starting point of judicial reasoning is that the case is not within the scope of meaning of the legal provision, and thus no interpretation can include it in the extension of the provision. The tolerance principle does not hold in the case at hand, which in fact is not a borderline case. In this sense, the argument from analogy takes for granted that extensive interpretation has failed: analogy is a remedy for the lack of success of any interpretive effort. Despite this, there might be further reasons justifying the extension of the regulation. In this respect, the argumentative process does not seek to determine the

26 In light of this, the semantic content of a legal provision can be conceived of as the set of inferences in which the provision is involved in legal argumentation. We have discussed this idea in Canale and Tuzet, 2007.
semantic content of an interpreted term or expression: the content is taken for granted and the case falls under the anti-extension of the interpreted term or expression. Argumentation aims to flesh out whether the purpose of the interpreted legal provision justifies the analogical extension of the regulation beyond the semantic boundaries of language.

One might oppose to this the claim that analogical reasoning is also based on a relevance criterion. Analogical extension of a given regulation is admitted only if there are relevant similarities between the source and the target, i.e., if the two cases share the same relevant properties. This being true, in what does analogical extension differ from interpretive extension?

The difference rests upon the source of relevance. As far as interpretive extension is concerned, relevance has a *semantic* source: it depends on the rules governing the uses of language and the contextual constraints put on them. In the case of analogical extension, however, relevance has a *pragmatic* source: relevance conditions are fixed by the purpose of the law in its standard circumstances of application. When analogical extension achieves the same goal that the provision was assumed to achieve in standard cases, then the extension is justified. These conditions, therefore, are fixed by the legislature or by the legal system as a matter of policy; they do not merely depend on language and context of use. As a consequence, pragmatic relevance might vary from semantic relevance. And these are precisely the circumstances in which analogical reasoning comes into play.

Accordingly, extensive interpretation and analogical reasoning can be seen as distinct argumentative games, inferentially articulated, in the most interesting cases, by means of a chain of arguments. As we have seen in the previous sections, extensive interpretation is simply an interpretive technique that relies on some argumentative canons: it is normally justified on the basis of the argument from intention, the argument from purpose, or a sort of systemic argument. These standards, in turn, rely on further arguments that justify their premises, often building a complex argumentative framework. It has to be noted, however, that the commitment undertaken by using these argumentative techniques is determining the semantic content of a legal provision, it is not realising any regulatory function in society nor assessing whether the application of the norm so stated is just and fair. Analogical reasoning is connected to interpretive canons and has a complex argumentative structure as well. The argument from analogy does not get off the ground if the interpreter does not show that he is facing a gap in the law. Equally, the similarity relation between source and target case is normally backed by an argument from purpose, a systemic argument, or the assessment of the consequences of regulation. Nevertheless, the
commitments assumed by using analogical reasoning strongly differ from those characterizing extensive interpretation. The arguer from analogy commits himself to determine the aim of a legal provision and to draw a normative conclusion assuming that like cases ought to be treated alike, although their relevant similarity is not captured by language usage in a given context.

To sum up our analysis, the two argumentative games considered in this chapter are similar. First of all, they pursue the same goal: extending a regulation to a case that is not explicitly considered by the law. Moreover, some argumentative constraints are pretty much alike. For instance, relevance is a necessary condition for getting a regulation extended according to the law in both games. Notwithstanding this, they are not the same game: argumentatively they are quite different, both in theory and in practice. In order to justify a judicial decision, it is up to the judge to decide what game to engage in, assuming that extensive interpretation comes first and analogical extension is (normally) not allowed in criminal law.

On the basis of these findings, one may claim that analogical reasoning and interpretive extension actually do not have the same upshot. Their outcome is the same in the sense that they justify the extension of a regulation to a case that is not explicitly considered by it. But this is only one part of the story. With extensive interpretation one claims that the case is within the scope of meaning of a legal provision: there is no gap in the law in the case at hand, and this is so on the basis of a certain reconstruction of legislative intent, the considered legal system, or the goal pursued by the legal provision under interpretation. Engaging in this argumentative game commits the interpreter to a systemic view of the regulation. Conversely, analogical reasoning assumes that the case is beyond the scope of meaning of the interpreted legal provision: the court faces a gap that has to be filled. And this follows from an alternative systemic view of the same regulation, a view in which purposes or principles certainly play a significant but different role. From a pragmatic point of view, this fact has important

27 On interpretive games see Chiassoni, 1999.
28 ‘Extensive interpretation’ may not be distinguishable from ‘analogy’ in the sphere where the inclusiveness or exclusiveness of a word is uncertain. But where the outer limits of word meaning are exceeded, only ‘analogy’ can be said to be applicable if the statute is to be extended to conform to its apparent purpose’; Silving, 1967, p. 315; this in turn recalls the Hartian core and penumbra of meaning.
29 ‘The decision whether to interpret a statute restrictively or extensively, or the decision whether to explain and distinguish or follow by extending a case-law rule is, as a matter of observation, in part at least based on arguments from legal principles, as that we can’t tell
consequences for future interpretations of the same provision in similar cases, and on the evolution of relationships between norms within the legal system as well. In a nutshell, the proof of the pudding is still in the eating, but also in the consequences that the latter triggers after dinner.

7 Conclusions

On the basis of the framework just proposed, one can critically assess the justification provided by the Italian Court of Cassation in the Vatican Radio Case.

In our analysis, the Court did not provide sufficient elements in this case to justify its decision. The Court claimed that the emission of electromagnetic waves falls within the extended meaning of the expression ‘dangerous emission of substances’ but this conclusion could be clearly considered as the upshot of an argument from analogy.

As far as the word ‘things’ is concerned, the Court satisfied its argumentative commitment to extensive interpretation providing suitable reasons. The Court argued that the case of electromagnetic waves falls under the extension of the predicate ‘things’ according to a systemic argument that relies, in turn, on scientific considerations as to the physical nature of waves. The counterargument provided by the defence, stating that the legislature intended the term to refer to material things only, is not complete, since the defence provided no evidence for this standpoint. The argument from legislative intention was not properly used, since its premises were lacking: the defence just expressed its own intuition, not unwarranted in itself, about what the 1930 legislature intended to say. As a consequence, the Court was entitled to claim that ‘things’ applies to the electromagnetic waves released by Vatican Radio according to the interpretive standards accepted in the Italian judicial community. These standards, in particular, single out the relevant properties of the subject of regulation and thus the conditions of application of the term ‘things’ in the case at hand.

Conversely, the qualification of waves emission as an act of ‘throwing’ was highly questionable. The Court merely claimed that the standard usage of the term ‘throwing’ covers a number of different actions, so that the content of this term is not vague but general: it does not yield borderline cases as its extension is highly inclusive. As a consequence, the emission of whether the case we are faced with is easy or hard until we have reflected on the principles as well as on the prima facie applicable rule or rules; MacCormick, 1978, p. 231.
electromagnetic waves would clearly fall under the meaning of ‘throwing’, according to the Court, as supported by the poetic use of the term in the thirteenth century.

It has to be noted, however, that the term ‘throwing’ is not as general as assumed by the Court. The judges simply mentioned an idiomatic or metaphorical use of the term (‘throwing out a cry’) that is not sufficient to assess its extension in ordinary language. Moreover, the poetic use of this term in the thirteenth century is not relevant in legal interpretation: this is not an accepted canon of argumentation and statutory construction in Italian adjudication, since it does not single out a semantic standard, neither at the time in which the law was enacted (original meaning), nor at the time in which the law is applied (current meaning). Notwithstanding Dante’s greatness and his majestic use of thirteenth-century Italian, if even poetic and marginal uses fall within the framework of admissibility (together with ordinary and legally technical uses), one can expect serious violations of the rule of law or of the principle of legality in criminal law. If poetic language were to be induced into the repertoire of linguistic usage that serves to determine admissible legal interpretations, one could always find some marginal or eccentric linguistic uses that would justify an extensive interpretation.30

Aside from these considerations, we would like to emphasize that the theoretical framework proposed in this article could be used by courts as a methodological tool to assess whether extensive interpretation is possible, and if not, whether analogical extension could be brought into play.

But is this enough to warrant the claim that the distinction between analogical extension and interpretive extension is not just a matter of strategic

30 The Italian Court of Cassation has provided a second linguistic argument to underpin its decision. In art. 674 of the Italian Criminal Code the term ‘throwing’ is syntactically related to the term ‘things’ to form the expression ‘emission of substances’: given that the complement refers to immaterial entities such as electromagnetic waves, it would follow that the verb can be clearly predicated of the same set of entities. In this respect, it is true that syntactical relations help to reduce vagueness when a vague term is related to a term whose semantic content is not vague in a given context. As far as art. 674 of the Italian Criminal Code is concerned, however, this is not the case. Here, the term ‘throwing’ is predicatively related to the term ‘things’, but the fact that the latter applies to electromagnetic waves does not imply that the former applies too. On the contrary, the fact that electromagnetic waves cannot be thrown on the basis of the standard meaning of ‘throwing’ suggests that the expression ‘dangerous emission of substances’ does not refer to the emission of electromagnetic waves, at least on the basis of the compositional conception of semantics subscribed to by the Court, according to which if one term does not apply, the whole expression doesn’t apply either.
manoeuvring in legal argumentation? Aren't judges actually making up the law as they go along in cases like the one we have been discussing?

We do not believe that the discretionary choice of judges in borderline cases will be associated with judicial arbitrariness. In fact, there is not just one right decision in borderline cases such as the Vatican Radio Case: in such cases, a discretionary court decision cannot be avoided. Is this consistent with the principles of legality and the rule of law? The answer depends on how we conceive of these principles. Some final remarks on this issue can help to clarify some general premises of our analysis.

In contemporary constitutional states, these principles govern legislation, administration, and adjudication. With respect to legislation, in particular, they require ‘that new law should be publicly promulgated, reasonably clear, and prospective’ (Raz, 1990b, p. 331). Accordingly, with respect to adjudication, they require ‘that judicial decisions should be in accordance with law, issued after a fair and public hearing by an independent and impartial court, and that they should be reasoned and available to the public’ (Raz, 1990b, p. 331). But what does ‘in accordance with law’ mean in our context? It does not mean that borderline cases should be dismissed by courts, for in such cases, by definition, there is more than one possible right answer. Rather, these principles require that adjudication should be in accordance with ‘the exercise of reason’, assuming that ‘the exercise of reason’ is opposed to ‘the mere imposition of will’ (Kennedy, 1986, p. 527).

Now, in those circumstances in which a court faces a borderline case, the legality requirement is that, among the decisions that are not ruled out by legal texts according to their standard meanings, the court chooses ‘reasonably’, that is, on the basis of a justification process that is sound and public, and whose premises are open to challenge. This being done, a legal decision

31 One could actually oppose to this the claim that, when there is doubt, the lenity rule or in dubio pro reo principle applies: in doubtful criminal cases acquittal is the right answer. It can be pointed out, however, that according to the rule of lenity the court has to resolve the ambiguity in favour of the defendant when interpreting an ambiguous legal provision (see among others McNally v. United States, 483 U.S. 350, 1987). Even if one adheres to a strict interpretation of the rule of lenity, assuming that it compels courts to adopt the narrowest plausible interpretation of any criminal statute (Price, 2004, p. 889), this rule of interpretation, it could be argued, cannot be applied to the case at stake. We do not have here two plausible interpretations of the same statute. Actually, the interpreter does not know whether a norm applies to the case, because the content of the norm is lacking. It follows from this that the interpreter is first called upon to determine the content of the legal provision; it is only when this content is not univocal that the lenity rule could apply. In a nutshell, the lenity rule cannot apply in place of a criminal norm. According to this reading, it is a rule of interpretation among others, which helps a court to select the best interpretation of a criminal provision.
is ‘in accordance with law’ even if the text of the law is indeterminate and it is used to decide a case to which it does not explicitly apply. The legality requirement is satisfied, first of all, when the argumentative process is sound, i.e. when the interpreter satisfies the commitments she assumes by arguing a certain legal conclusion within a given argumentative context.32 As Kennedy once observed when describing the situation of a judge assigned to a borderline case, ‘I see myself as having promised some diffuse public that I will “decide according to law”, and it is clear to me that a minimum of meaning of this pledge is that I won't do things for which I don't have a good legal argument’ (Kennedy, 1986, p. 527).

About the authors

Damiano Canale is professor of philosophy of law, Bocconi University, Milan. He published extensively on legal interpretation and argumentation, philosophy of action, and on the history of legal and political concepts.

Giovanni Tuzet is associate professor of philosophy of law, Bocconi University, Milan. He published extensively on legal reasoning and legal argumentation, law & economics, epistemology, and on pragmatism.

---

32 Even if legal systems and judicial outcomes are largely indeterminate ‘argumentation frameworks provide a measure of at least short-term systemic stability to the extent that they condition how litigants and judges pursue their self-interest, social justice, or other values through adjudication’ (Stone Sweet, 2002, p. 125).