

The Scope of Application of Analogical Reasoning in Statutory Law¹

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Abstract

This article addresses the scope of the potential applications of an analogical argument in the domain of statutory law. The author thus shows how analogy leads to the liquidation of different sorts of legal gaps: *extra legem*, *intra legem*, *contra legem*, technical, logical and constructional. He also highlights the role which analogy can play as a universal method of applying particular statutory provisions in concrete cases, the way of coping with obsolete statutes with the help of an analogical inference, or the clarification of the wordings of statutory rules by recourse to reasoning from similarity. In the article, allowance has also been made for the linking of an analogical pattern of thinking with specific legislative techniques such as the “*ejusdem generis canon of construction*” and “*pertinent application of statutory law*”. In addition, the analogical basis of comparative arguments, the possibility of expanding the domain of statutory law with the use of analogy at the expense of the room reserved for customary and precedential law as well as special forms of analogical reasoning: *argumentum a fortiori* and *analogia iuris* have been discussed.

Keywords: analogy, analogical, reason, reasoning, statute, statutory, gaps, legal, law, applying, application, scope, pertinent, notions, conflicts, rules, lacuna, *iuris legis*, *a fortiori*, *ejusdem generis*

Introduction

Analogical reasoning is commonly associated with precedential law, the core idea of which – exactly like analogy itself – consists in proceeding from the particular to the particular, from one case to another. The province of precedential law may – without exaggeration – thus be considered the natural home of analogical reasoning.³ Inference from analogy, however, features in the domain of statutory law as well. As Neil MacCormick points out, “argument from analogy is by no means uncommon or unimportant in the application and interpretation of statutes”.⁴ In this paper, I subscribe to the aforementioned thesis, endeavoring to highlight all the possible usages of analogical reasoning in the area of statutory law.

Analogy employed here – apart from being preceded by the adjective *statutory* – is sometimes called “*argumentum a simile (a simili)*”,⁵ i.e. an argument from similarity (or an inference based upon similarity),

¹ This article is connected with the research project the Author carried out in the United Kingdom as a guest researcher at Aberystwyth University as part of the Polish governmental programme: “Mobilność Plus” [“Mobility Plus”].

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³ Cass R. Sunstein, *Legal Reasoning and Political Conflict*, Oxford University Press: New York 1996, p. 62.

⁴ Neil MacCormick, *Legal Reasoning and Legal Theory*, Clarendon Press: Oxford 1978, p. 193.

An interesting comparison is made by Gunnar Bergholtz and Aleksander Peczenik, who compare precedential law to a casuistic statute, by stating that: “In interpreting precedents, use is made of a number of reasons which in part resemble argument by analogy in statutory interpretation. Practice as a source of the law resembles a markedly casuistic statute, the application of which calls for conclusion by analogy on a large scale”. See Gunnar Bergholtz and Aleksander Peczenik, *Precedent in Sweden, Interpreting Precedents: A Comparative Study*, eds. Neil MacCormick, Robert S. Summers, Ashgate/Dartmouth: Aldershot 1997, p. 305.

⁵ Lech Morawski, *Zasady wykładni prawa*, 1st ed., TNOiK Dom Organizatora: Toruń 2006, p. 196, 203, Lech Morawski, *Wstęp do prawoznawstwa*, 10th ed., TNOiK Dom Organizatora: Toruń 2006, p. 192, Lech Morawski, *Wykładnia w orzecznictwie sądów : Komentarz*, TNOiK Dom Organizatora: Toruń 2002, p. 288, 293, Tatiana Chauvin, Tomasz Stawecki and Piotr Winczorek, *Wstęp do prawoznawstwa*, 7th ed., Wydawnictwo C.H. Beck: Warszawa 2012, p. 248, Oktawian Nawrot and Filip Przybylski-Lewandowski, *Wnioskowania prawnicze*, in: *Leksykon współczesnej teorii i filozofii prawa : 100 podstawowych*

argument/reasoning “*a pari*”⁶, “*argumentum a similibus ad similia*”⁷ or “*argumentum (inference) per analogiam*”.⁸ Moreover, it can also be conflated with an argument *ab exemplo* (i.e. an argument from paradigmatic examples).⁹

1. Filling the gaps

In the province of statutory law, analogical reasoning is recognized above all as a means for the liquidation of the so-called legal gaps (*lacunas*), which – incidentally – can be of a different, and sometimes quite sophisticated and sublime, sort.

1.1. *Extra legem gap*

According to the orthodox theory, a legal gap occurs whenever there is no statutory rule that can be applied to the case at hand, although it is socially desirable to have such a rule and the case at hand being provided for.¹⁰

pojęć, ed. Jerzy Zajadło, Wydawnictwo C.H. Beck: Warszawa 2007, p. 345, Ryszard Mastalski, *Stosowanie prawa podatkowego*, Oficyna a Wolters Kluwer business: Warszawa 2008, p. 118, Zbigniew Pulka, *Podstawy prawa : Podstawowe pojęcia prawa i prawoznawstwa*, Wydawnictwo Forum Naukowe: Poznań 2008, p. 142, Kazimierz Opatek and Jerzy Wróblewski, *Zagadnienia teorii prawa*, Państwowe Wydawnictwo Naukowe: Warszawa 1969, p. 317, Sławomira Wronkowska and Zygmunt Ziemiński, *Zarys teorii prawa*, Przedsiębiorstwo Wydawnicze Ars boni et aequi: Poznań 1997, pp. 168-169, Andrzej Redelbach, Sławomira Wronkowska and Zygmunt Ziemiński, *Zarys teorii państwa i prawa*, Wydawnictwo Naukowe PWN: Warszawa 1992, p. 208, Chaim Perelman, *Logika prawnicza : Nowa retoryka*, translated by Tomasz Pajor, Państwowe Wydawnictwo Naukowe: Warszawa 1984, p. 37 (he uses this term also in relation to the analogy employed in precedential law; see p. 38), Marek Lechniak, *Elementy logiki dla prawników*, Wydawnictwo KUL: Lublin 2006, p. 96, 97, Jerzy Stelmach, *Kodeks argumentacyjny dla prawników*, Zakamycze: Kraków 2003, p. 72, Jolanta Jabłońska-Bonca, *Wprowadzenie do prawa : Introduction to law*, LexisNexis: Warszawa 2008, p. 166, 167, Andrzej Korybski, Leszek Leszczyński and Antoni Pieniążek, *Wstęp do prawoznawstwa*, Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej: Lublin 2007, p. 178, Zygmunt Ziemiński, *Problemy podstawowe prawoznawstwa*, Państwowe Wydawnictwo Naukowe: Warszawa 1980, p. 294, Władysław Wolter and Marta Lipczyńska, *Elementy logiki : Wykład dla prawników*, 3rd ed., Państwowe Wydawnictwo Naukowe: Warszawa 1980, p. 237, Józef Nowacki, *Analogia legis a sprawiedliwość legalna*, in: *Valeat aequitas : Księga pamiątkowa ofiarowana Księdzu Profesorowi Remigiuszowi Sobańskiemu*, ed. Maksymilian Pazdan, Wydawnictwo Uniwersytetu Śląskiego: Katowice 2000, p. 325.

⁶ See Chaim Perelman, *Imperium retoryki : Retoryka i argumentacja*, translated by Mieczysław Chomicz, edited by Ryszard Kleszcz, Wydawnictwo Naukowe PWN: Warszawa 2004, p. 90 and Jacques Lenoble, *The Function of Analogy in Law: Return to Kant and Wittgenstein*, in: *Legal Knowledge and Analogy : Fragments of Legal Epistemology, Hermeneutics and Linguistics*, ed. Patrick Nerhot, Kluwer Academic Publishers: Dordrecht 1991, p. 117.

⁷ See Giuseppe Zaccaria, *Analogy as Legal Reasoning – The Hermeneutic Foundation of the Analogical Procedure*, in: *Legal Knowledge and Analogy : Fragments of Legal Epistemology, Hermeneutics and Linguistics*, ed. Patrick Nerhot, Kluwer Academic Publishers: Dordrecht 1991, p. 51.

⁸ Stelmach, p. 72, Chauvin, Stawecki and Winczorek, p. 248, Nawrot and Przybylski-Lewandowski, p. 345, 346.

⁹ Stelmach, p. 73, 76.

¹⁰ As for the notion of legal gap in general see: Jerzy Wróblewski, *The Judicial Application of Law*, Kluwer Academic Publisher: Dordrecht 1992, pp. 224-225, Józef Nowacki, *Normy sprzeczne a problematyka luk w prawie*, in: *Studia z teorii prawa*, Zakamycze: Kraków 2003, pp. 305-320, Józef Nowacki, *Koncepcja luk contra legem*, in: *Studia z teorii prawa*, Zakamycze: Kraków 2003, pp. 321-334, Józef Nowacki, *O tzw. pionowych „lukach” w prawie*, *Zeszyty Naukowe Uniwersytetu Łódzkiego*, v. 85 (1972), pp. 55-62, Józef Nowacki, *O tzw. konstrukcyjnych lukach w prawie*, *Zeszyty Naukowe Uniwersytetu Łódzkiego*, v. 51 (1967), pp. 4-7, Chauvin, Stawecki and Winczorek, p. 137, 138, Opatek and Wróblewski, *Zagadnienia...*, pp. 108-111, Eugeniusz Smoktunowicz, *Analogia w prawie administracyjnym*, Państwowe Wydawnictwo Naukowe: Warszawa 1970, pp. 31-38, 46-58, Robert Summers, *Precedent in the United States (New York State)*, in: *Interpreting Precedents : A Comparative Study*, eds. Neil MacCormick, Robert S. Summers, Ashgate/Dartmouth: Aldershot 1997, p. 333, D. Neil MacCormick, *Rhetoric and the Rule of Law : A Theory of Legal Reasoning*, Oxford University Press: Oxford 2005, pp. 206-207, Joseph Raz, *The Authority of Law : Essays on Law and Morality*, Oxford University Press: Oxford 1979, pp. 181-183, 193-194, Morawski, *Wstęp...*, pp. 178-179, Andrzej Munczewski, *Reguły interpretacyjne w działalności orzeczniczej Sądu Najwyższego*, Wydawnictwo Naukowe Uniwersytetu Szczecińskiego: Szczecin 2004, pp. 170-171, Andrzej Redelbach, Sławomira Wronkowska and Zygmunt Ziemiński, *Zarys...*, pp. 221-223, Maciej Koszowski, *O lukach w prawie rzadko spotykanych słów kilka*, *Archiwum Filozofii Prawa i Filozofii Społecznej* no. 1/2013, pp. 111-112. In Polish law see: Morawski, *Zasady...*, pp. 131-133, 208-211, Morawski, *Wykładnia...*, pp. 314-318, Jerzy Wróblewski, *Statutory Interpretation*

This type of gap is commonly termed an *extra legem* or *praeter legem* gap¹¹, or “extrinsic gap”¹², or simply “statutory gap”¹³. It stands also in close affinity to the division into regulated cases/disputes and unregulated ones¹⁴ *alias* to the distinction between provided cases/disputes and unprovided ones (the occurrence of the so-called “*casus omissus*”).¹⁵ Sometimes gaps of this type may also be called: “an insufficiency gap”¹⁶ and “inconsistency or evolutionary gap.”¹⁷

Additionally, in certain circumstances, it can be linked with the phenomenon of undergenerality of the language that is implemented in the wording of a statute in relation to the purpose of this statute.¹⁸ That kind of gap is sometimes tagged also as: “axiological” (“evaluative”) or even “seeming” or “false” gap.¹⁹

in Poland, in: *Interpreting Statutes : A Comparative Study*, eds. D. Neil MacCormick and Robert S. Summers, Dartmouth Publishing Company Limited: Aldershot 1991, pp. 268-269; cf. also Józef Nowacki, *Luki w prawie. Ideologia*, Studia Prawno-Ekonomiczne, v. IV (1970), pp. 29-52. In Polish Administrative law see Smoktunowicz, pp. 38-46. In Polish tax law see: Mastalski, pp. 121-124. In Swedish law see: Aleksander Peczenik and Gunnar Bergholtz, *Statutory Interpretation in Sweden*, in: *Interpreting Statutes : A Comparative Study*, eds. D. Neil MacCormick and Robert S. Summers, Dartmouth Publishing Company Limited: Aldershot 1991, pp. 313-314. In UK law see: Zenon Bankowski and D. Neil MacCormick, *Statutory Interpretation in the United Kingdom*, in: *Interpreting Statutes : A Comparative Study*, eds. D. Neil MacCormick and Robert S. Summers, Dartmouth Publishing Company Limited: Aldershot 1991, pp. 362-364. In USA law see: Robert S. Summers, *Statutory Interpretation in the United States*, in: *Interpreting Statutes : A Comparative Study*, eds. D. Neil MacCormick and Robert S. Summers, Dartmouth Publishing Company Limited: Aldershot 1991, pp. 411-412. In German law see: Robert Alexy and Ralph Dreier, *Statutory Interpretation in the Federal Republic of Germany*, in: *Interpreting Statutes : A Comparative Study*, eds. D. Neil MacCormick and Robert S. Summers, Dartmouth Publishing Company Limited: Aldershot 1991, pp. 78-82. In Finnish law see: Aulis Aarnio, *Statutory Interpretation in Finland*, in: *Interpreting Statutes : A Comparative Study*, eds. D. Neil MacCormick and Robert S. Summers, Dartmouth Publishing Company Limited: Aldershot 1991, pp. 131-132. In French law see: Michel Troper, Christophe Grzegorzczuk and Jean-Louise Gardies, *Statutory Interpretation in France*, in: *Interpreting Statutes : A Comparative Study*, eds. D. Neil MacCormick and Robert S. Summers, Dartmouth Publishing Company Limited: Aldershot 1991, pp. 175-179. In Italian law see: Massimo La Torre, Enrico Pattaro and Michele Taruffo, *Statutory Interpretation in Italy*, in: *Interpreting Statutes : A Comparative Study*, eds. D. Neil MacCormick and Robert S. Summers, Dartmouth Publishing Company Limited: Aldershot 1991, pp. 218-220, 224-225.

¹¹ See Smoktunowicz, p. 34, Morawski, *Wstęp...*, p. 178, Opalek and Wróblewski, *Zagadnienia...*, p. 108, Nowacki, *Normy sprzeczne...*, p. 317, Nowacki, *Koncepcja...*, p. 322, Pulka, p. 76, Adam Jamróz, *Wprowadzenie do prawoznawstwa*, 2nd ed., LexisNexis: Warszawa 2011, p. 204, Koszowski, *O lukach...*, p. 111.

¹² Enrique Zuleta-Puceiro, *Statutory Interpretation in Argentina*, in: *Interpreting Statutes : A Comparative Study*, eds. D. Neil MacCormick and Robert S. Summers, Dartmouth Publishing Company Limited: Aldershot 1991, p. 38.

¹³ Aarnio, *Statutory...*, pp. 131-132.

¹⁴ See Raz, pp. 181-182.

¹⁵ See La Torre, Patarro and Taruffo, *Statutory...*, p. 225, Summers, *Statutory...*, pp. 420-421.

¹⁶ Peczenik and Bergholtz, *Statutory...*, p. 313.

¹⁷ Smoktunowicz, pp. 52-54.

An “inconsistency gap” is linked with the situation in which the case is unregulated by the law although the need of consistency within legal system calls for this case being provided for. An “evolutionary gap”, in turn, pertains to the setting in which a changed social environment has yielded a new factual configuration (of previously unknown shape) that should be regulated by the law yet, due to its unpredictability at the time of enactment of a pertinent statute, it is not. See Smoktunowicz, pp. 52-54.

Considered from a slightly different angle, gaps consisting in the lack of legal regulation for a given sort of cases are also divided into subjective and objective ones. According to Bobbio, the former results from “inadequate legislative regulation”, whereas the latter results from “the new formation of the relationship and of an institution”. See Patrick Nerhot, *Legal Knowledge and Meaning (The Example of Legal Analogy)*, in: *Legal Knowledge and Analogy : Fragments of Legal Epistemology, Hermeneutics and Linguistics*, ed. Patrick Nerhot, Kluwer Academic Publishers: Dordrecht 1991, pp. 188-189.

¹⁸ See Summers, *Statutory...*, p. 412, 420.

One may fill an undergenerality gap by treating instances that literally would be outside the scope of statute as regulated ones, which, as is said, can be done “in the light of the ultimate purpose and the specific implementive approach embodied in the undergeneral statute itself” and often “will call for little more than characterization and reclassification of instances otherwise outside the statute.” See Summers, *Statutory...*, p. 420.

¹⁹ See Municzewski, pp. 170-171, Morawski, *Wykładnia...*, p. 314, Morawski, *Zasady...*, pp. 131-132, Redelbach, Wronkowska and Ziemiński, *Zarys...*, pp. 221-222, Pulka, pp. 76-77, Andrzej Korybski and Lesław Grzonka, *Wiedza o*

The filling of such gaps by resorting to analogical reasoning consists in principle in finding a statutory rule that embraces cases that are similar to the case at hand and then – although this case does not fall under its coverage – applying the so-selected rule to the case at hand.²⁰ In consequence, in such a setting, an argument from analogy may be said to “extend the force of existing rules beyond their direct range of application.”²¹ Such an extension can be justified here by the very requirement of equal treatment, known also as the so-called principle of formal justice, which prescribes that: when in a similar position one should be treated as others are. Having transferred this idea to legal matters, it means the cases that are alike ought to be decided on in the same or similar manner [regardless of their being provided for or not]. That requirement/principle is all the more important when combined with the assumption that the events transpiring in the law are universalizable in the sense of their capability of being brought under the general categories (kinds, classes, genera). The filling of *extra legem* gaps by analogy also has its foundation in the pursuit – in legal practice and theory – of the coherence and completeness [closure] of the legal system.²²

The sort of analogy that is used to fill this kind of gap sometimes takes its own name, then being called: “*analogia legis*”²³ or “statutory analogy”.²⁴ One may also – as Nowacki and Jamróz do – use a more precise term here:

państwie i prawie : Zarys wykładu, a Wolters Kluwer business, Warszawa 2014, p. 134, Chauvin, Stawecki and Winczorek, pp. 139-140. As to the question whether all types of legal gaps are evaluative (value-laden) see Nowacki, O tzw. konstrukcyjnych..., pp. 3-17 and Nowacki, O tzw. pionowych..., pp. 55-62.

²⁰ Thus Robert S. Summers and Michele Taruffo point out that “when a case is not provided for or is only at best dimly provided for in statute, the case is to be treated in the same fashion that closely analogous case are treated in the statute” (see Robert S. Summers and Michele Taruffo, *Interpretation and Comparative Analysis*, in: *Interpreting Statutes : A Comparative Study*, eds. D. Neil MacCormick and Robert S. Summers, Dartmouth Publishing Company Limited: Aldershot 1991, p. 467). Wróblewski states that “[i]f the existence of gaps is admitted, the task of court is to fill them by using statutory provisions which regulate essentially similar problems or cases” (see Wróblewski, *Statutory...*, p. 268). Peczenik and Bergholtz maintain that “[b]y virtue of ‘*analogia legis*’, a statute should be applied not only to the case covered by its linguistic meaning but also to relevantly similar cases” (see Peczenik and Bergholtz, *Statutory...*, p. 318). And Summers notes that “[s]ometimes a statute will purport to treat a topic exhaustively but an ‘unprovided case’ will arise. Here the court may treat this case analogously to the way in which ‘provided’ case are treated in the statute” (see Summers, *Statutory...*, p. 420). See also Smoktunowicz, pp. 23-24, Józef Nowacki, *Analogia legis*, Państwowe Wydawnictwo Naukowe: Warszawa 1966, p. 9, Morawski, *Zasady...*, p. 203, Morawski, *Wykładnia...*, p. 294.

²¹ Raz, p. 199.

²² Thus Summers and Taruffo contend that the relatively universal appeal of statutory analogy “is presumably rooted not only in considerations of coherence and unity but also in the ideal of equality before law”. See Summers and Taruffo, p. 467; see also Zaccaria, p. 55 and Cornelis Willem Maris, *Milking the Meter – On Analogy, Universalizability and World Views*, in: *Legal Knowledge and Analogy : Fragments of Legal Epistemology, Hermeneutics and Linguistics*, ed. Patrick Nerhot, Kluwer Academic Publishers: Dordrecht 1991, p. 73, 74. On principle of universalisability (equal treatment) in ethics cf. Maris, pp. 88-101, 103-104.

²³ See James Holland and Julian Webb, *Learning Legal Rules*, 7th ed., Oxford University Press: Oxford 2010, p. 382, Chauvin, Stawecki and Winczorek, p. 248, Nowacki, *Analogia legis*, pp. 9-44, Józef Nowacki and Zygmunt Tobor, *Wstęp do prawoznawstwa*, 3rd ed, Oficyna a Wolters Kluwer business: 2007, pp. 182-184, Morawski, *Wstęp...*, pp. 192-194, Morawski, *Zasady...*, p. 203, Morawski, *Wykładnia...*, p. 293, Peczenik and Bergholtz, *Statutory...*, p. 318, Troper, Grzegorzczuk and Gardies, *Statutory...*, p. 201, La Torre, Pattaro and Taruffo, *Statutory...*, p. 218, Mastalski, pp. 118-119, Jamróz, p. 204, Jabłońska-Bonca, p. 166, 167, Andrzej Korybski, Leszek Leszczyński and Antoni Pieniżek, *Wstęp do prawoznawstwa*, Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej: Lublin 2007, p. 178, Sławomira Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa*, 3rd ed., Przedsiębiorstwo Wydawnicze Ars Boni et Aequi: Poznań 2005, p. 96, Munczewski, p. 169, Ziemiński, *Problemy...*, p. 294, Wolter and Lipczyńska, p. 237, Pulka, p. 142, 143, 144-146, 151, Leszek Leszczyński, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa*, Zakamycze: Kraków 2004, p. 249, Zaccaria, pp. 49-50, Maris, p. 75.

Such a meaning of *analogia legis*, i.e. as reasoning leading to the application of a statutory provision to similar instances that are unprovided for in the statutory law, is said to date back to the end of the 17th century and became almost completely accepted by the 19th century. See Nowacki, *Analogia legis*, p. 9 footnote 1.

²⁴ See Aleksander Peczenik, *On Law and Reason*, 2nd ed., Springer: 2009, p. 320, Pulka, p. 144, Jamróz, p. 204, Chauvin, Stawecki and Winczorek, p. 248 and Holland and Webb, p. 382.

“*analogia extra legem*.” The latter terminological proposition arises from the fact that the analogy (its conclusion) that liquidates the gap goes here beyond the very “lex” [Eng. law], by which one should understand valid statutory rules; not to mention the fact that the gap which analogy is used to fill here also has the name “*extra legem*”.²⁵

Although usually perceived as an instance of judicial development²⁶ or even the creation²⁷ of the law, *analogia legis* (statutory analogy) is well-known in civil law countries, in time receiving a relatively favorable reception. Its use is, for instance, recognized in: Argentina, France, Germany, Sweden, Finland, Poland and Italy.²⁸ At the same time, as Summers and Taruffo point out, this analogy seems far less influential in the UK and USA. Here, an unregulated case may be counted as belonging to the province of common law and as such resolved in the manner typical of that law, i.e. without any necessity or need to refer to some statutory rule that addresses similar case or cases.²⁹

1.2. Technical gap

Another kind of legal gap that can be filled by reference to analogy consists not in the lack of a single statutory rule, but in the lack of a larger part of statutory law. For instance, this can be the non-existence of some section in a statute (especially when, judging by the structure, table of contents or headings and subheadings, and this section should be included therein). Similarly, the lack of the procedure in which members of a public organ or agency should proceed, make a decision or be appointed testifies to the occurrence of just such a gap.

The same applies to the non-existence of rules following which the institution or legal act that is envisaged by law is to be established/issued. The most extreme instance of such a gap seems, however, to be the lack of the whole legal regulation (e.g. statute, regulation, ordinance) that should be adopted in accordance with a statutory or constitutional provision.³⁰

This kind of gap is called: an “intrinsic gap”³¹, “technical gap”³², “constructional gap”³³, “gap of passivity”³⁴, “vertical gap”³⁵ or “*sui generis* gap”³⁶. It might also be termed: “instrumental gap”, i.e. the gap that makes it impossible to execute the goals of a statute.³⁷

In German legal theory, statutory analogy (*analogia legis*) is termed: “*Gesetzesanalogie*”; see Alexy and Dreier, *Statutory...*, p. 89 and Holland and Webb, p. 382.

²⁵ See Nowacki, *Analogia legis*, p. 11 footnote 2 and Jamróz, p. 204; see also Józef Nowacki, Problem prawotwórczego charakteru rezultatów wniosku per analogiam, *Zeszyty Naukowe Uniwersytetu Łódzkiego*, v. 62 (1969), pp. 28-29, Józef Nowacki, Prawotwórczość a „stosowanie” prawa per analogiam i a fortiori, *Studia Prawno-Ekonomiczne*, v. 3 (1969), pp. 31-32 and Opałek and Wróblewski, *Zagadnienia...*, p. 317, 318.

²⁶ MacCormick, *Rhetoric...*, p. 206.

As for the question of whether the court still only applies the law in unregulated cases (legal gaps) or in fact creates (makes) it cf. Raz, pp. 181, 182, 193-195, 197-201.

²⁷ Cf. Nowacki, *Analogia legis*, pp. 47-50.

²⁸ See Summers and Taruffo, p. 467 (“This type of argument [statutory analogy] is in fact recognized to some degree in all countries within our study”) and p. 471.

As to the permissibility and obligation of a judge to fill a gap *extra legem* by recourse to analogical reasoning cf. however Munczewski, pp. 170-171, 209, Morawski, *Wykładnia...*, pp. 314-317, Morawski, *Zasady...*, pp. 131-132, Redelbach, Wronkowska and Ziemiński, *Zarys...*, pp. 221-222, Raz, pp. 199, 202-206.

²⁹ See Summers and Taruffo, pp. 471-472.

³⁰ See Summers, *Statutory...*, pp. 411-412, 420, Zuleta-Puceiro, *Statutory...*, p. 38, Troper, Grzegorzczak and Gardies, *Statutory...*, p. 177 and Koszowski, *O lukach...*, p. 119.

³¹ Zuleta-Puceiro, *Statutory...*, p. 38, Jerzy Wróblewski, *The Judicial Application of Law*, Kluwer Academic Publisher: Dordrecht 1992, p. 225.

³² Troper, Grzegorzczak and Gardies, *Statutory...*, p. 177, Morawski, *Wykładnia...*, p. 292, 296, Morawski, *Zasady...*, p. 131, Pulka, p. 148.

³³ Mastalski, pp. 120, 126-127, Morawski, *Wykładnia...*, p. 292, 296, Morawski, *Zasady...*, p. 131, Munczewski, p. 170, Redelbach, Wronkowska and Ziemiński, *Zarys...*, pp. 222-223, Pulka, p. 78, 148, Korybski and Grzonka, p. 135 and Kamil Zeidler, *Luka w prawie*, in: *Leksykon współczesnej teorii i filozofii prawa : 100 podstawowych pojęć*, ed. Jerzy Zajadło, Wydawnictwo C.H. Beck: Warszawa 2007, p. 184.

³⁴ Smoktunowicz, p. 52.

To fill such a gap, one looks for statutory provisions or provisions that are comprised in other legal acts (statutes, regulations, ordinances, decrees etc.) which – thanks to addressing similar matters or serving similar goals – may constitute a model for supplementing the legal regulation which is lacking. Specifically, the provisions one may pattern may come from the so-called “uniform act”, “model act” or “federal prototype”, particularly as regards the legal system of the USA.³⁸ In turn, in civil law countries, a part of a binding legal act is usually used for that purpose, particularly a legal code, including such that regulates related matters in another branch of law. For instance, in this manner some provisions of the code of civil procedure can be applied *per analogiam* to the criminal proceedings in matters which, despite being vital, are unregulated by the code of criminal procedure.

Analogy which leads to the closure of this kind of gap might be called: *analogia intra legem* [analogy within the law].³⁹

1.3. *Contra legem* gaps

The next kind of legal gap that can be liquidated by recourse to analogical reasoning is linked to the situation in which, although the case at hand is undoubtedly within the scope of the application of a given statutory rule, one prefers not to apply this rule to the case at hand, applying instead to it a rule under whose scope it does not fall at all.⁴⁰ The reason for doing so lies here in the presupposition that this latter rule is more adequate for the case at hand, especially because it addresses cases that are more similar to those at hand than the ones usually handled by the rule which is directly applicable to this case.⁴¹

³⁵ Nowacki, O tzw. pionowych..., p. 57.

³⁶ Morawski and Opałek as well as Wróblewski, distinguish “technical” gaps from “*sui generis*” gaps. Accordingly, in their view, technical gaps encompass such instances in which the defects of statutes make it impossible to render a legal decision – for example the statute may have set up some institution but it does not provide for any provision referring to the way in which the members of this institution are to be appointed. The gaps “*sui generis*”, in turn, denote the lack of statutory provisions whose enacting/issuing is required by some other statute. This distinction is, moreover, to be of this practical value that in the view of these authors, “*sui generis*” gap cannot be liquidated by recourse to analogy. See Morawski, *Wstęp...*, pp. 178, Morawski *Zasady...*, pp. 131, 132, 208, 210-211, Opałek and Wróblewski, *Zagadnienia...*, p. 109, Morawski, *Wykładnia...*, p. 292, 296, 318, see also Pulka, pp. 78-79, 148 (he understands this differentiation in a very similar manner, in addition adding also that “technical” and “*sui generis*” gaps constitute two possible forms of the so-called “constructional gap”), Jamróz, pp. 208-209, Chauvin, Stawecki and Winczorek, pp. 138-139 and Koszowski, O lukach..., p. 119.

Incidentally, a constructional gap is defined in a similar vein by Munczewski, Ziemiński, Wronkowska and Redelbach, who understand under this notion a situation when the statutory law envisages the possibility of conducting some “conventional act”, yet it does not comprise any legal regulation as to how this act ought to be done. See Munczewski, p. 170, Zygmunt Ziemiński, *Wstęp do aksjologii dla prawników*, Wydawnictwo Prawnicze: Warszawa 1990, p. 196, Redelbach, Wronkowska and Ziemiński, *Zarys...*, pp. 221-222; cf. also Nowacki, O tzw. konstrukcyjnych..., pp. 11-16.

³⁷ See Morawski, *Wykładnia...*, p. 318.

³⁸ Summers, *Statutory...*, pp. 420.

³⁹ Opałek and Wróblewski, *Zagadnienia...*, p. 317.

As an aside, one may note that “constructional gap” is sometimes counted as an actual (real) gap – i.e. gap which is not “evaluative” or only “seeming” – and hence the possibility of its filling by recourse to analogical reasoning remains beyond doubt. See Redelbach, Wronkowska and Ziemiński, *Zarys...*, pp. 222-223; cf. also Nowacki, O tzw. konstrukcyjnych..., pp. 3-17, Nowacki, O tzw. pionowych..., pp. 57-62 and Pulka, p. 143

⁴⁰ As MacCormick states, “[w]hat is true is that a system of enacted positive law may be enacted in terms which are of such considerable generality that the application of a given enacted rule to a particular dispute situation may appear to unjust, unjust because the categories envisaged in the rule are insufficiently subtle. In such a circumstances it is obvious enough that there are good reasons for not applying the rule literally to the instant case, and that an exception ought to be made.” And as Douglas Walton explains, “[w]e also require that rules should not be rigidly applied by a thoughtless bureaucracy. If an exception is reasonably judged to be a relevantly different enough case to fairly qualify as an exceptional case, then we require that the rule should be broken.” See MacCormick, *Legal Reasoning and Legal Theory*, Clarendon Press: Oxford 1978, pp. 97-98 and Douglas Walton, *Informal Logic : A Pragmatic Approach*, 2nd ed., Cambridge University Press: Cambridge 2008, p. 316 respectively.

⁴¹ See Nowacki, *Analogia legis*, p. 58-61, Smoktunowicz, pp. 24-27, Koszowski, O lukach..., pp. 112-113.

Gaps of this kind are called an “axiological gap”⁴², since the ascertainment of its occurrence is anchored in evaluation (is value-laden), or a “*contra legem* gap”, since it is aimed against the operating law, i.e. contradicts an already existing valid rule the case at hand falls under.⁴³

An analogy which is employed to fill a gap of this sort is counted as “*analogia intra legem*”, since the cases it affects were previously regulated by law and remain so after it has been used⁴⁴, or “*analogia contra legem*.”⁴⁵ By referring to the rule which regulates cases similar to the case at hand, one resolves not only the case which has already been provided for but also does that contrary to the legal consequence which – at least *prima facie* – the law prescribes for this case. Such an analogy is also sometimes numbered amongst the so-called systemic arguments.⁴⁶ However, this may not seem accurate. It is also particularly noteworthy that the aforementioned kind of analogy is even more creative than *analogia extra legem* which helps with liquidating *extra legem* gaps, for not only does it expand the already existing laws but it also corrects and improves them if they are not optimal or just.⁴⁷

2. Extending statutory provisions at the expense of precedential and customary law

In Anglo-Saxon legal systems, analogy may also be used in order to diminish the sphere of the so-called precedential law (case law, common law). That is, the statutory rule can be extended by analogy at the expense of the existing or will-to-be judicial precedent(s). The same, *mutatis mutandis*, applies to truncating the range of customary law by analogy.

In general, such an extension can be done in a twofold manner. First, a case hitherto controlled by a judicial precedent may be regarded as similar to cases falling under a particular statutory provision with the effect of having applied such a provision to this case despite its scope of application not embracing it. Second, when there is no constraining precedent for the case at hand, one may seek a solution not among other precedential cases that resemble the case at hand, but among the statutory provisions which regulate cases similar to it.⁴⁸

The question of whether and when to use an analogy which restricts the current ambit of precedential law seems, however, to be debatable in Anglophone countries.⁴⁹ It is also quite plausible that the classifying of a concrete case under those which belong to the domain of precedential law or those which belong to the province of statutory law can prove difficult in practice and hence analogies to precedential cases may be regarded as equally good to those provided for by the statute.⁵⁰

⁴² Peczenik and Bergholtz, *Statutory...*, pp. 313-314, Pulka, pp. 76-77.

⁴³ See Smoktunowicz, p. 34, Morawski, *Wstęp...*, pp. 178-179, Opałek and Wróblewski, *Zagadnienia...*, p. 108, Nowacki, *Koncepcja...*, pp. 323-334, Pulka, pp. 76-77, Jamróz, p. 208.

⁴⁴ Nowacki, *Analogia legis*, pp. 45-61, Opałek and Wróblewski, *Zagadnienia...*, p. 317; cf. also Nowacki, *Prawotwórczość...*, p. 32.

⁴⁵ Nowacki, *Analogia legis*, pp. 60-61 footnote 35.

⁴⁶ Aarnio, *Statutory...*, p. 140.

⁴⁷ On the critique of the concept of “*contra legem*” gap based upon the charge that the admittance of such gaps would diminish reverence for law, threaten the legal order and violate the very requirement that everyone is required to abide by the law, see Nowacki, *Koncepcja...*, pp. 333-334.

⁴⁸ See, Summers, *Statutory...*, pp. 421-422, Bankowski and MacCormick, *Statutory...*, pp. 362-364; cf. also Summers and Taruffo, pp. 471-472 and Rupert Cross, *Precedent in English Law*, 2nd ed., The Clarendon Press: Oxford 1968, pp. 164-166, 168.

⁴⁹ See Summers, *Statutory...*, pp. 421-422.

⁵⁰ Thus, for instance, Cross asserts that: “Whether the courts regard legislation as the equal or superior of judge-made law when it is cited as an analogy upon which to found a decision must be regarded as an open question” ... “Legislation should surely only be regarded as the superior of case-law in this respect when there are competing analogies of equal force from each of these sources.” See Cross, p. 168.

As for the relation in which the province governed by precedential law stands to the province governed by statutory law in the UK and the USA see: Bankowski and MacCormick, *Statutory...*, pp. 362-364, Summers, *Statutory...*, pp. 421-422 and Summers and Taruffo, pp. 471-472.

3. *Crystallizing the meaning of a statutory rule (provision)*

Quite another way of using analogical reasoning in statutory law is connected with the act of comparing two or more statutory provisions (the rules derived from them) in order to establish their appropriate meaning. The juxtaposition of such provisions enables us to see both or one of them in the light of the other and thus crystallizing or harmonizing their wordings. Such a maneuver can be particularly useful when one of the statutory provisions used for comparison is – due to some reason – much plainer, more determined or more understandable than the second. Then, the proper meaning of an equivocal word or phrase included in the latter may be ascertained by turning to an identical or similar word or phrase that occurs in the former. Incidentally, in this process, the circumstances of the enactment (the context) of the provisions being compared should also be taken into account and only if these circumstances (contexts) are sufficiently similar will the aforementioned fashion of finding the meaning well-founded.⁵¹

Naturally, one can employ analogical reasoning in order to establish the meaning of the wording of a given statutory provision (rule) also through likening the words used in such a provision to identical or similar words from other statutes that have been explained in judgments, especially those among them that have the status of so-called binding or persuasive precedents.⁵² With reference to common law countries, however, it must be noted that a judicial decision which interprets statutory provisions is not considered here as binding with regard to other statutes, even if they involve exactly the same word or phrase. Such judicial interpretations can only be of some guidance, leaving room for other more justified interpretive propositions if they arise.⁵³ Utilizing analogical reasoning in statutory law in the above-mentioned way might be termed interpretive analogy or rule (norm)-comparing analogy or even – as Nowacki terms it – “*analogia intra legem*”.⁵⁴

This usage of analogical inference can also be counted among systemic methods of interpretation (systemic arguments), i.e. the methods that base upon the observation that legal rules operate not in a vacuum as separate entities, but are interconnected with each other, composing a bigger picture.⁵⁵

4. *Drawing a comparative argument*

Analogy also constitutes the basis for the other forms of comparative argument that one may employ in statutory law. To determine the meaning of the provisions of a domestic statute, the interpreter sometimes refers to foreign statutory regulations. The precondition of such a venture is, however, the assumption that first the foreign regulation deals with the same or similar matter as the matter regulated by the domestic law and, second, that the foreign legal system (milieu) resembles the one in which the reference is made.⁵⁶

⁵¹ “One statute may be construed on analogy to the way another statute is construed” (Summers and Taruffo, p. 467). “The terms of one statutory provision may be used as the ground of a conclusion concerning the construction of another statutory provision” (Cross, p. 167). “The governing idea here is that, if a statutory provision is significantly analogous with similar provisions of other statutes, or code, or another part of the code in which it appears, then, even if this involves significant extension of or departure from ordinary meaning, it may properly be interpreted so as to secure similarity of sense with the analogous provision either considered in themselves or considered in the light of prior judicial interpretations of them” (MacCormick and Summers, *Interpretation and Justification*, in: *Interpreting Statutes: A Comparative Study*, eds. D. Neil MacCormick and Robert S. Summers, Dartmouth Publishing Company Limited: Aldershot 1991, pp. 513-514).

See also Bankowski and MacCormick, *Statutory...*, p. 369, Summers, *Statutory...*, p. 414, Nowacki, *Analogia legis*, pp. 51-54, Smoktunowicz, pp. 24-25 and Munczewski, pp. 202-203; cf. however Opałek and Wróblewski, *Zagadnienia...*, pp. 108-109 (where these authors maintain that in case of gap *intra legem* analogy is not at work).

⁵² In such a setting, argument by analogy does its work in the following manner: “a word should be interpreted in a given way because this will treat similar cases similarly under related statutory provisions” (see Summers, *Statutory...*, p. 414). That does, however, not impair Cross’s warning that “[i]t is fatally easy to adopt some such line of reasoning as the following: the instant case is concerned with the meaning of such and such an expression. That expression was interpreted in such and such a way in a previous case, therefore that interpretation should be applied in the instant case. It is unnecessary to enlarge upon evils of such an approach” (see Cross, p. 189).

⁵³ See Bankowski and MacCormick, *Statutory...*, p. 378.

⁵⁴ Nowacki, *Analogia legis*, pp. 47-50, Jamróz, pp. 204-205.

⁵⁵ See, D. Neil MacCormick and Robert S. Summers, *Interpretation...*, p. 513; cf. also Zaccaria, p. 59.

⁵⁶ See Bankowski and MacCormick, *Statutory...*, p. 369.

Thus, if the foreign conditions, including cultural, social and political factors, are analogues to those that prevail in the state of the interpreter, comparative arguments based upon foreign statutes will be of some force. If not, however, arguments of this kind seem more or less pointless. The same principle applies to situations in which in order to elucidate the canonical text, one refers not to statutes from other jurisdictions but to the foreign judicial or doctrinal interpretations of them.⁵⁷

5. *Coping with obsolete statutes*

One more usage of analogical reasoning in statutory law may be discerned in the following settings. The case at hand falls under an old statute that, despite its obsolescence, is still in force. The new statute addressing the similar subject matter has been enacted, yet it does not make the older one invalid and is not directly applicable to the case at hand. Nonetheless, in lieu of applying a provision from the older statute which the case at hand falls under, a court resolves to base the decision upon the new statute, i.e. its provisions that embrace cases similar to the case at hand, its underlying principles or its spirit (ideas, purposes, leading thoughts). The court may also be enlightened here by the governmental note that was attached to the bill (draft) of the new statute in order to explain the need and reasons for its being subsequently enacted by the legislature. *Mutatis mutandis*, the same goes for the application of the provision(s) of a new statute which would be directly applicable in the case at hand, but have not come into force at the time of the judicial decision.⁵⁸

6. *Application of statutory law*

The most controversial is, however, the presence of analogical reasoning in the general process of the application of statutory law. According to this idea, there are obvious (typical) instances which a given statutory rule applies to and whenever the case at hand is not identical to such obvious/typical instances, one has to ascertain whether it is relevantly similar to at least one of them or not. If such a similarity obtains, it means that the statutory rule should be applied to the case at hand as well. The typical/obvious instances of the application of a given statutory rule may have their origin in the intention of the legislator, be cases which have already been qualified by the courts as falling under this rule, be grounded in the common understanding of words used in this rule, or just be those that naturally come to mind.⁵⁹

⁵⁷ As to the question of the admittance of out-of-jurisdiction statutes and judicial opinions in legal argumentation in the USA see Michael D. Murray and Christy Hallam DeSanctis, *Legal Research and Writing*, Foundation Press: 2005, pp. 79-80, Frederick Schauer, *Thinking Like a Lawyer : A New Introduction to Legal Reasoning*, Harvard University Press: Cambridge 2009, pp. 79-80, Richard A. Posner, *How Judges Think*, Harvard University Press: Cambridge 2008, pp. 348-353.

⁵⁸ Cf. Smoktunowicz, pp. 24-25.

⁵⁹ Thus, for instance, Edward H. Levi announces that: "It is only folklore which holds that a statute if clearly written can be completely unambiguous and applied as intended to a specific case. Fortunately or otherwise, ambiguity is inevitable in both statute and constitution as well as with case law. Hence reasoning by example operates with all three" (see Edward H. Levi, *An Introduction to Legal Reasoning*, The University of Chicago Press: Chicago 1949, p. 6). Murray and DeSanctis note that: "Often the legal rules used in the rule-based reasoning syllogism require explanation and illumination to demonstrate for the reader why your prediction of the outcome is legally sound and likely to occur. Analogical reasoning is used within the rule-based reasoning syllogism to further the overall discussion by showing how the rule itself or elements of the rule are supposed to work by discussing and analogizing to or from certain actual circumstances (cases) where the rule was applied to produce a certain outcome" (see Murray and DeSanctis, p. 10). Eileen Braman points out that: "In statutory construction, for instance, when the "plain language" of a disputed provision is ambiguous, judges often look to previous application of the law, seeking to draw connections and/or distinction between past and pending scenarios. Using analogy in this way helps judges make reasoned decisions about whether or not a particular rule should apply to circumstances giving rise to litigation" (see Eileen Braman, *Law Politics & Perception. How Policy References Influence Legal Reasoning*, University of Virginia Press: Charlottesville 2009, p. 84). Bankowski and MacCormick elucidate that: "Where the problem is whether or not to qualify a problematic phenomenon as instantiating some statutory term or another, analogy to less problematic instances covered by prior decisions is relevant" (see Bankowski and MacCormick, *Statutory...*, p. 369). Sunstein makes the observation that: "In hard statutory cases, the issue is sometimes resolved by something like this: We know that the statute applies to case X. We do not know if it applies to case Y. To resolve the issue, we have to decide whether case Y is relevantly like, or relevantly unlike, case X. We have to think analogically" (see Cass R. Sunstein, *Commentary on Analogical Reasoning*, Harvard Law Review no. 106 (1992-1993), footnote 147 on p. 785). And Steven J. Burton captures this issue in the following manner: "[A]nalogical reasoning may be used to help interpret and apply an enacted rule. The analysis begins with the enacted text. It may help to find base points in the context that can be used to

The paradigm example of using analogy in the aforementioned way is the ascertainment of the meaning of words occurring in a statute that are vague and value-laden or where the statutory meaning for some other reasons is dependent on judicial assessment (adjustment).⁶⁰ The occurrence of words of that kind is even comprehended in terms of the legal gap, however a specific one. Scholars call it “*intra legem*”⁶¹ (“*inter legem*”⁶²), “interpretational”⁶³ or “indeterminacy”⁶⁴ gap.⁶⁵ The recourse to analogical reasoning in order for its liquidation is also widely accepted.⁶⁶ The analogy that serves to this aim can be in turn termed: “analogy in interpretation (construing) of the law” or counted as a type of “*analogia intra legem*”, as Wróblewski and Nowacki (together with Jamróz) do respectively.⁶⁷

Evidently more far reaching, however, is the thesis that statutory law is always or nearly always applied via an analogical inference. As Weinreb argues, “[f]or both reasons – because words, as symbol with meaning, are general and phenomena, as such, are particular, and because words, however precise, do not fully distinguish phenomena in all their variety – there remains a gap between a rule and its applications that no further statement of the rule or specification of the facts will close completely.”⁶⁸ Likewise, Friedrich V. Kratochwil contends that “norm-application is never a mere subsumption, but always entails an evaluation on the basis of analogies which are held to be relevant.”⁶⁹ The prevailing stance – at least pertaining to civil law legal families – seems, however, that the place of the main method of applying statutory law is taken by legal deduction (especially in the form of the so-called legal syllogism).

reason analogically in a problem case” (see Steven J. Burton, *An Introduction to Law and Legal Reasoning*, 3rd ed., Wolters Kluwer: Austin 2007, p. 77).

See also: Sunstein, *Legal...*, pp. 79-90, Scott Brewer, Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy, Harvard Law Review no. 109 (1995-1996), pp. 990-1003, Lloyd L. Weinreb, *Legal Reason : The Use of Analogy in Legal Argument*, Cambridge University Press: 2005, pp. 88-94, Levi, pp. 6-8, 27-102, McCormick, *Rhetoric...*, pp. 212-213, Nowacki, *Analogia legis*, pp. 49-51, 62-67, Herbert Lionel Adolphus Hart, *The Concept of Law*, 2nd ed., Oxford University Press: Oxford 1994, p. 127, Martin P. Golding, *Legal Reasoning*, Broadview press: Peterborough 2001, pp. 104-107 and Burton, pp. 65-74.

⁶⁰ According to Alexy and Dreier, a particular term is said to be vague “when there are some subjects that indubitably fall within its scope (positive candidates), some subjects that indubitably do not fall within its scope (negative candidates) and a third class of subjects cannot be said to belong to one or the other with certainty (neutral candidates)”. Evaluative openness [being value-laden] characterizes, in turn, those terms which have “but little descriptive contents over and above their evaluative component” and in relation to which the task of the judiciary is “to fill them with descriptive meaning to match as well as possible their evaluative component, a task likely to be performed differently by different judges” – as examples of such terms one may thus invoke: “good faith”, “reprehensible” or “sensible reason” (see Alexy and Dreier, *Statutory...*, pp. 74-75).

See here also: Brewer, p. 937 footnote 35 and pp. 993-994, Bartosz Brożek, *Rationality and Discourse : Towards a Normative Model of Applying Law*, a Wolters Kluwer business: Warszawa 2007, pp. 25-28, Hart, pp. 124-154, Burton, p. 52, Tomasz Gizbert-Studnicki, *Wieloznaczność leksykalna w interpretacji prawniczej*, Drukarnia Uniwersytetu Jagiellońskiego w Krakowie, pp. 43-73, Morawski, *Wstęp...*, pp. 128-130, Maciej Zieliński, *Wykładnia prawa : Zasady, reguły, wskazówki*, 3rd ed., Wydawnictwo Prawnicze LexisNexis: Warszawa 2006, pp. 169-181 and Walton, pp. 290-293.

⁶¹ Nowacki, *Normy sprzeczne...*, p. 318, Nowacki, *Koncepcja...*, p. 322, Jamróz, p. 208, Koszowski, *O lukach...*, p. 112.

⁶² Smoktunowicz, p. 34, Morawski, *Wstęp...*, pp. 178-179, Opałek and Wróblewski, *Zagadnienia...*, pp. 108-109, Nowacki, *Koncepcja...*, p. 322, Nowacki, *Normy sprzeczne...*, p. 318

⁶³ See Nowacki, *Normy sprzeczne...*, p. 318 and Aarnio, *Statutory...*, p. 132 (he defines “interpretational gap” as the situation “where we cannot say for certain what provision would be applicable to the case at hand”).

⁶⁴ Peczenik and Berghotz, *Statutory...*, pp. 313-314.

⁶⁵ The configuration known under the concept of *intra legem* gap is qualified as a kind of a legal gap mainly in civil law legal systems. However, in common law legal systems, it can be regarded as such as well. For instance, in relation to the USA, Summers elucidates that “[a] gap in statutory scheme may be said to exist when a statute includes a general clause or other terms which grant discretion to courts or administrators.” See Summers, *Statutory...*, p. 411.

⁶⁶ Cf. however Opałek and Wróblewski, *Zagadnienia...*, pp. 108-109.

⁶⁷ Nowacki, *Analogia legis*, pp. 47-50, Jamróz, p. 208

⁶⁸ Weinreb, pp. 89-90.

⁶⁹ Friedrich V. Kratochwil, *Rules, Norms and Decisions : On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, Cambridge University Press: Cambridge 1989, p. 226.

Nonetheless, when an *intra legem* gap occurs, the interpreter appears here to be fully entitled to take advantage of analogical reasoning in order to decide whether a given statutory provision (a rule derived from it) should be applied to the case at hand: through the comparison of the facts of the case at hand with typical instances of the application of the provision (rule) which applying to this case is dubious.

7. Resolving conflicts between statutory rules

Analogical reasoning may also be of help when one is faced with two or more conflicting statutory provisions (rules one may derive from them). In general, clashes between statutory rules may be of a different sort. For instance, one statutory provision may impose an obligation or right that excludes the obligation or right envisaged by another statutory provision. One statutory provision may prescribe behavior whose performance impairs or cancels the effect which results from abiding by another statutory provision, though these provisions do not contradict each other from the logical point of view. As an example, the two following directives might be invoked: open the window while it is closed and close the window when it is open. Finally, one statutory provision, despite not being in overt conflict, pursues goals (protects values) that are at odds with the goals (values) being realized (secured) by another.⁷⁰

The collisions between statutory rules are also sometimes regarded as legal gaps. Depending on its kind and terminological convention, this can be a gap of conflict or collision⁷¹, praxeological (teleological) gap⁷², logical gap⁷³ or a gap by contradiction⁷⁴. In order to cope with such gaps, different principles are envisaged that are based mainly upon the hierarchy of legal acts, the time of enactment or the degree of vagueness (concreteness).⁷⁵ Among these principles, however, one may also find such that orders the determination of which of the conflicting statutory provisions (rules) is – in essence – more adequate for the case at hand. In turn it may follow that priority should be given to this of the rules that are in dissonance who's typical or obvious instances of application are more similar to the facts of the case at hand.⁷⁶ Moreover, a gap arising from the conflict of statutory provisions (rules) can also be resolved not by rendering an analogy to one of the provisions (rules) which collide with each other but by analogy to yet another statutory provision (rule) that regulates cases similar to the case at hand.⁷⁷

⁷⁰ On possible types of conflicts between statutory provisions (rules derived from them) see: Nowacki, *Analogia legis*, pp. 62-67, Nowacki, *Normy sprzeczne...*, pp. 311, 318-319, Nowacki, *Koncepcja...*, pp. 322-323, Morawski, *Wstęp...*, pp. 177-178, Pulka, pp. 80-82, Zeidler, p. 184; cf. also Raz, p. 201.

⁷¹ Smoktunowicz, p. 34, Nowacki, *Normy sprzeczne...*, pp. 318, Koszowski, *O lukach...*, pp. 119-120.

⁷² See Nowacki, *Normy sprzeczne...*, pp. 311, 315-316, 318-319, Nowacki, *Koncepcja...*, pp. 322-323 and Morawski..., *Wstęp...*, pp. 177-178.

⁷³ Munczewski, p. 171, Redelbach, Wronkowska and Ziemiński, *Zarys...*, p. 222, Zeidler, p. 184, Chauvin, Stawecki and Winczorek, p. 140; cf. also Nowacki, *O tzw. konstrukcyjnych...*, pp. 7-11, Nowacki, *Normy sprzeczne...*, pp. 310, 318-319, Nowacki, *Koncepcja...*, p. 322, Korybski and Grzonka, p. 134.

⁷⁴ See Nowacki, *Normy sprzeczne...*, pp. 310, 318.

In the context of two or more conflicting statutory provisions (rules) one may also encounter the notion of "alternative gap". This name presupposes, however, that one of the conflicting provisions (rules) should be selected and the case at hand is to be decided upon it (the option that these provisions/rules may cancel each other is out). See Nowacki, *Normy sprzeczne...*, pp. 311, 318-320.

As to the doubts as to the aptness of using the term gap on such occasions see Nowacki, *O tzw. konstrukcyjnych...*, pp. 8-11. On the problem of the evaluative nature of gap resulting from the conflict of statutory provisions (rules/norms derived from them) see Nowacki, *Normy...*, pp. 313-320.

⁷⁵ On specific principles by which the conflicts between statutory provisions (rules inferred from them) may be resolved see: Nowacki and Tobor, pp. 153-158, Morawski, *Wstęp...*, pp. 71-74, Mastalski, pp. 133-149, Morawski, *Zasady...*, pp. 225-239, Pulka, pp. 82-84, Opałek and Wróblewski, *Zagadnienia...*, pp. 100-104, Wronkowska and Ziemiński, *Zarys...*, pp. 174-179, Jabłońska-Bonca, pp. 164, 165, Zygmunt Ziemiński, *Problemy podstawowe prawoznawstwa*, Państwowe Wydawnictwo Naukowe: Warszawa 1980, pp. 304-309, Ziemiński, *Wstęp...*, pp. 196-198, Peczenik, *On Law...*, pp. 340-344, Jamróz, pp. 198-202; against the background of the EU law see also: Anna Kalisz, *Wykładnia i stosowanie prawa wspólnotowego*, Oficyna a Wolters Kluwer business: Warszawa 2007, pp. 91-96.

⁷⁶ Albeit respecting the collision of precedential rules, see Weinreb, p. 98, 104.

⁷⁷ See Nowacki, *O tzw. konstrukcyjnych...*, p. 8 and Nowacki, *Normy sprzeczne...*, pp. 308, 315.

A lateral question – parenthetically – is here whether the colliding rules cancel each other, one of them annuls the other one (the rest) or, despite being in conflict, they still remain in force.⁷⁸ One should note, however, that recourse to analogy in order to fill the gap stemming from the collision of statutory provisions (rules) is usually deemed possible only if other rules of settling conflicts cannot be availed of or turn out to be unsuccessful.⁷⁹

8. *Untangling the ejusdem generis canon of statutory construction*

Another place in which the employment of reasoning via analogy in statutory law can be discerned is the so-called “*ejusdem generis* canon of statutory construction [interpretation]”,⁸⁰ a canon which may be regarded as a technique of composing canonical texts or construing them.

According to Dan Hunter, the phrase: *ejusdem generis* means: of the same kind, genus and nature, and when featured in a statute, it takes the form of: “*x, y, z* or other”.⁸¹ While the terms: *x, y* and *z* are precise and specific, the word “other” is by definition of indeterminate nature. Apart from this word, the presence of *ejusdem generis* may also be inferred from placing some other expression in the statute indicating that next to the instances enumerated also some other expressly unmentioned are at stake. For instance, such statutory expressions could have a form: “..., particularly *x, y* and *z*”. Reverting to the question of the mediation of analogical reasoning in the *ejusdem generis* canon of construction, this reasoning may be used in order to determine – upon the similarity discerned between it and the expressly mentioned instances – whether the case at hand which is not any *x, y, z* falls under “other” (belongs to the category which *x, y, z* are particular examples).

That is, one may assume that the word: “other” (category specified by enumeration of its examples) present in *ejusdem generis* include – at least *inter alia* – instances that are similar to those which have been explicitly listed.⁸² Incidentally, the same apply to another known canon of construction, “*noscitur a sociis*”, which can be translated as “a thing known by its associates”.⁸³

Though *ejusdem generis* is traditionally associated with common law legal systems, it appears in civil legal systems as well. This mainly concerns the second form invoked above, i.e.: “..., especially *x, y, z*” or even more conspicuously, “*x, y, z* or the like”.⁸⁴ Moreover, statutes, especially those enacted in private law, may be deemed here as often comprising so-called “typological notions”. Notions of this kind specify a certain set of features that give a picture of a typical object or state. To fall under them, however, a given object or state needs not correspond with all the features enumerated. It suffices that this object/state is merely relevantly similar to its typical (ideal) counterpart.

⁷⁸ See Nowacki, *Normy sprzeczne...*, p. 314 (he points out that when the collision of two norms [rules] occurs there are three possibilities: 1. the elimination of one of these norms, 2. the elimination of both of them, 3 keeping both in force and regarding them as valid despite acknowledging their being in conflict).

⁷⁹ Cf. Munczewski, p. 171, Redelbach, Wronkowska and Ziemiński, *Zarys...*, p. 222, Nowacki, *Normy sprzeczne...*, pp. 306-307.

⁸⁰ See Brewer, pp. 927-928, 937-938 and Weinreb, footnote on page 19.

⁸¹ Dan Hunter, *Teaching and Using Analogy in Law*, *Journal of the Association of Legal Writing Directors* vol. 2 (2004), <http://ssrn.com/abstract=1089669>, p. 154.

⁸² Thus Brewer argues that: ‘This interpretive norm [the *ejusdem generis* canon of construction] instructs the interpreter of a series of terms that are either relatively more specific or more precise (or both) followed by a term that is either relatively more specific or more precise (or both) followed by a term that is either more generally or more vague (or both) to read the last term in a series as being “of the same “genus” as the previous, more specific terms. Often, it is exemplary reasoning that interpreter uses to discover the “genus”, that is, the category, to which both the series of specific (or precise) terms and the general (or vague) term belong.’ See Brewer, p. 937.

Likewise, Levi states that “[t]he specification of particular instances indicates that similar but unmentioned instances are not to be included. But the specification of particular instances, when in addition a word of general category is used, may be the indication that other like instances are also intended; hence the *ejusdem generis* rule.” See Levi, p. 28.

Hunter, however, maintains that “the *ejusdem generis* rule clearly relies on inductive inference” and disagrees thus with Brewer’s stance invoked above; see Hunter, p. 154.

On *ejusdem generis* (*eiusdem generis*) see Holland and Webb, pp. 267-268, Bankowski and MacCormick, *Statutory...*, p. 380, Summers, *Statutory...*, p 418 and Hunter, p. 154.

⁸³ See Summers, *Statutory...*, p 418.

⁸⁴ As to the latter see Pulka, p. 146.

This possibility makes “typological notions” essentially different from the so-called: “classifying notions” in case of which a complete fulfillment of all the defining features is required. The “classifying notions” are thus maintained to be more adequate for tax and criminal law, while the “typical notions” are associated with the province of private law.⁸⁵

9. *The pertinent application of law*

In the domain of statutory law, analogical reasoning can also be linked with a specific technique of composing canonical texts, namely the so-called “pertinent application of law”.

In the text of a statute, in order to avoid repeating the same or very similar provisions, it is sometimes deliberately stated that the set of specific statutory provisions should also be applied to some other scope of circumstances despite these provisions literally not encompassing them. For example, it can thus be directed that the provisions that regulate the contract of the sale of goods are to be applied to the contract of the exchange of goods. As a result, the provisions primarily designated for one legal institution in fact regulate two legal institutions: one directly and one due to the statutory reference made to this aim. Such reference can be here to one or several statutory provisions, but equally it can encompass a larger group of such provisions or even concerns the whole statute. Interestingly, however, the provisions the reference is made to may be stated to have to be applied or to be applied pertinently (properly, adequately); in this second case, however, it is done without any further specification of what the pertinent/proper/adequate application stands for. As expounded in legal doctrine, such an application shall mean that all of the relevant differences and similarities that exist between the institutions to which these provisions apply directly and the institution to which these provisions apply only upon the reference should be taken into account. In consequence, in relation to the latter institution, particular provisions can then be applied without any modification, with some (they may concern a consequent as well as an antecedent),⁸⁶ or even not applied at all. These three possibilities give sense to the phrase of “pertinent application” and differentiate it from “direct (as they are) application” of the provisions referred, which technique – as already mentioned – is also used in drafting legal acts.⁸⁷

Because the results of “pertinent application” are dependent on the comparison of the nature (gist) of the involved institutions and the similarities and dissimilarities between them, analogical reasoning is said to be at work here. Moreover, the legislative decision that some institutions are to be regulated by the same or a similar set of statutory rules, one directly and one upon the reference, suggests that the Legislator considers them to be alike. In addition, it is notably that “pertinent application” does not entail the filling of a gap; this time the resort to similar statutory provision(s) is ordered by the statutory law itself.⁸⁸ It must, however, be intimated that not everyone sees in the “pertinent application of law” room for an analogical argument to be employed.⁸⁹

10. *Argumentum a fortiori*

As one more example of the employment of analogical reasoning in statutory law one may consider the so-called “*argumentum a fortiori*”.⁹⁰

⁸⁵ See Morawski, *Wstęp...*, pp. 131-132; cf. also Kratochwil, p. 225.

⁸⁶ Frequently such modifications are pretty obvious and slight (as, for instance, changing the names of the parties or institutions mentioned in provisions being referred to), but sometimes they can also be of a fairly complex and sophisticated nature; see Józef Nowacki, „Odpowiednie” stosowanie przepisów prawa, *Państwo i Prawo* no. 3 (1964), pp. 370-371, 372-375, Nowacki, *Analogia legis*, pp. 142-143, 144, 147-150.

⁸⁷ See: Morawski, *Zasady...*, p. 215, Morawski, *Wykładnia...*, pp. 294, 299-302, Nowacki, *Analogia legis*, pp. 135-162, Nowacki, „Odpowiednie”..., pp. 367-376, Smoktunowicz, pp. 78-85, Opałek and Wróblewski, *Zagadnienia...*, pp. 320-321.

⁸⁸ Nowacki, „Odpowiednie”..., pp. 369-370, Nowacki, *Analogia legis*, p. 140 and Korybski and Grzonka, pp. 134-135 (they even comprehend it in terms of *analogia legis*).

⁸⁹ See Opałek and Wróblewski, *Zagadnienia...*, p. 320; cf. also Nowacki, *Analogia legis*, pp. 153-162.

⁹⁰ In general argument *a fortiori* is regarded as having two forms. The first is the so-called “*argumentum a maiori ad minus*” (from the greater to the smaller). It works then in the way: “who may more, all the more so may less” and concerns those statutory provisions that permit to do something. Alternatively it works in the way: “who is ordered more, all the more so, is ordered less”, and then it relates to the provisions that order something. The second, “*argumentum a minori ad maius*” (from the smaller to the greater), runs as follows: “who is forbidden less is all the more so forbidden the more”, and it pertains to those statutory provisions which prohibit to do something. See Morawski, *Zasady...*, pp. 219, 220, Pulka, pp. 154-155, Nawrot and Przybylski-Lewandowski, p. 348, Chauvin, Stawecki and Winczorek, pp. 246-247, Korybski and

Namely, this argument/mode of inference is occasionally perceived as a version of reasoning by analogy⁹¹ or even as “an amplified reasoning by analogy.”⁹² Indeed, argument *a fortiori* and analogical reasoning have much in common. First, both are applied in configurations in which a legal gap (unprovided case) occurs. Second, the outcome of *argumentum a fortiori* – as with analogical conclusions – is dependent on evaluation (assessment). Third, both the *fortiori* and analogy used in statutory law usually back themselves by reference to some valid statutory rule or rules.⁹³ Additionally, as their point of departure, each of them may have examples/instances whose legal consequences are uncontested.⁹⁴ The difference between these two argumentative forms lies, however, in the sort of the similarity that has to obtain between cases being compared. That is, while reasoning *a fortiori*, one argues that the regulated and unregulated cases should be treated alike not because they merely sufficiently resemble each other, but because the unregulated case deserves the certain kind of treatment in a higher degree than the regulated case. In other words, it might be said that in a sense the unregulated case presents itself here as more similar to the regulated case than this case is similar to itself.⁹⁵ In *a fortiori*, the facts of an unprovided case thus constitute not an equal but stronger support for ascribing to this case the legal consequence envisaged for the case which is provided for.⁹⁶ As a corollary, the need for maintaining the coherence within the legal system also calls louder here for assigning this legal consequence to an unprovided case if compared with ordinary analogical legal reasoning.⁹⁷

Because of the need to compare “the relative strength of two sets of facts” or because of the ascertaining of a degree in which both cases, regulated and unregulated one, deserve such-and such treatment, an *a fortiori* inference is considered as a form of analogical thinking.⁹⁸ Parenthetically, it may be also noted that *argumentum a fortiori* inference is not exclusive to the province of statutory law, being employed in precedential law as well.⁹⁹

11. Analogia iuris

More mysterious and puzzling than *analogia legis* is its relative called: “*analogia iuris*” (“*analogia juris*”). Other names one may encounter to denote it are: law-analogy, legal-system analogy and – however this one is less

Grzonka, p. 134, Peczenik, *On Law...*, p. 328, Stelmach, pp. 74-76, Jamróz, p. 206; as for examples which are illusive in the sense that they only seemingly lead to the *a fortiori* conclusions see Perelman, *Imperium...*, p. 88 and Stelmach, pp. 75-76.

⁹¹ Alexandner and Sherwin, p. 76.

⁹² Peczenik and Bergholtz, *Statutory...*, p. 320, Peczenik, *On Law...*, p. 328.

⁹³ See Nowacki, *Prawotwórczość...*, pp. 36-37, Wróblewski, *Judicial...*, p. 227.

Perelman maintains even that *argumentum a fortiori* – as analogy – bases upon the spirit of a statute; see Perelman, *Logika...*, pp. 37-38. Lechniak points out that the arguments: *a fortiori* and a *simile* overlap in that both require referring to the intention of Legislator; see Lechniak, p. 97. La Torre, Pattaro and Taruffo, in turn, intimate that *a fortiori* as well as analogy could be defined as “incomplete”, i.e. since both of them have to be accompanied by others arguments in order for a legal decision can be made (each of these argument needs some “substantive criteria of evaluation” that are not provided by this argument itself); see La Torre, Pattaro and Taruffo, *Statutory...*, p. 232-233.

⁹⁴ As for an argument by example enhanced by (combined with) argument *a fortiori* see Perelman, *Imperium...*, p. 123.

⁹⁵ See Peczenik and Bergholtz, *Statutory...*, p. 320, Peczenik, *On Law...*, p. 328, Nowacki and Tobor, p. 185, Morawski, *Wstęp...*, pp. 195-196, Morawski, *Zasady...*, pp. 219-222, Mastalski, pp. 127-132, Leszczyński, pp. 247-248, Wronkowska and Ziemiński, *Zarys...*, p. 174, Perelman, *Logika...*, pp. 38, 91-92, Lechniak, pp. 96-97, Pulka, pp. 153-156, Stelmach, pp. 74-75, Nawrot and Przybylski-Lewandowski, pp. 347-348, Jabłońska-Bonca, pp. 168, 169, Korybski, Leszczyński and Pieniążek, p. 176, Morawski, *Wykładnia...*, pp. 334-344, Ziemiński, *Problemy...*, pp. 303-304, Ziemiński, *Wstęp...*, pp. 192-194, Redelbach, Wronkowska, and Ziemiński, *Zarys...*, p. 213.

⁹⁶ Cf. Larry Alexander and Emily Sherwin, *Demystifying Legal Reasoning*, Cambridge University Press: Cambridge 2008, p. 76.

⁹⁷ See Peczenik, *On Law...*, p. 329.

⁹⁸ See Peczenik and Bergholtz, *Statutory...*, p. 320, Peczenik, *On Law...*, p. 329, Alexander and Sherwin, p. 76.

⁹⁹ “If the old case was a suitable case for the decision that was actually taken in it, and the new case is just as suitable or even more suitable for such a decision, there is reason to take this decision in the new case too” (Jaap Hage, *Studies in Legal Logic*, Springer: Dordrecht 2005, p. 114). “If the facts of a new case provide support for the outcome reached in the precedent case that is stronger than the support provided by the facts of precedent case itself, then it follows, a fortiori, that the new court should reach a parallel result” (Alexander and Sherwin, p. 76). See also Grant Lamond, *Precedent and Analogy in Legal Reasoning*, in: *The Stanford Encyclopedia of Philosophy*, first published 2006, <http://www.science.uva.nl/~seop/entries/legal-reas-prec/>, pp. 12-14.

accurate – legal induction.¹⁰⁰ In general, *analogia iuris* is said to be based upon general principle(s) or idea(s)/value(s)¹⁰¹, “fundamental thought of legislator”,¹⁰² or even the very spirit [soul] of the law¹⁰³ *alias* the legal order (system) comprehended as such.¹⁰⁴ As its basis, a pack/set of statutory rules,¹⁰⁵ a larger part of a statute or the whole one can also be used.¹⁰⁶ Whether such a reasoning (argument/inference) as *analogia iuris* involves an analogical mode of thinking seems, however, to be an open question. It is sometimes even claimed that the very name: “*analogia iuris*” is in essence misleading and erroneous.¹⁰⁷ Hence a better term would be here: “free gap-filing”, i.e. the filling of the gap with “due consideration to all the circumstances of the case [at hand]”¹⁰⁸, or “free creation of law.”¹⁰⁹ Be it a form of analogy or not – *analogia iuris* is commonly associated with axiology and the need for keeping coherence within the legal system. Notably, the general justification of using it and the main reason for employing it in a given case are deemed to stem from the axiological consistence which as such is supposed on the part of the rational Legislator.¹¹⁰ Values or goals that are present/pursued in the legal system speak here for treating the unprovided case in the same or similar manner as the regulated case or cases.¹¹¹ Regardless of the above-mentioned terminological reservations, taking advantage of *analogia iuris* is allowed in civil law legal systems to an extent identical to *analogia legis* (statutory analogy), i.e. to liquidate a legal gap [especially *extra* or *contra legem*].

¹⁰⁰ See Peczenik, *On Law...*, p. 321-322, Pulka, p. 149, 151, Jamróz, p. 204, Chauvin, Stawecki and Winczorek, p. 248.

In German legal theory, *analogia iuris* is called “*Rechtsanalogie*”; see Alexy and Dreier, *Statutory...*, p. 89 and Holland and Webb, p. 382.

¹⁰¹ See Zuleta-Puceiro, *Statutory...*, p. 62, Alexy and Dreier, *Statutory...*, p. 89; La Torre, Pattaro and Taruffo, *Statutory...*, p. 218, 219, 225, Holland and Webb, p. 382, Smoktunowicz, pp. 28-29, Nowacki, *Analogia legis*, pp. 124-126, Nowacki and Tobor, p. 184, Morawski, *Zasady...*, p. 211, Morawski, *Wykładnia...*, p. 295, Jabłońska-Bonca, p. 166, 167, Korybski, Leszczyński and Pieniążek, p. 178, Maris, p. 76, 78, Peczenik, *On Law...*, p. 322, Opałek and Wróblewski, p. 110, Pulka, p. 149, 151, Jamróz, p. 205, Chauvin, Stawecki and Winczorek, p. 248.

On the notion of legal principle see Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press: Cambridge 1977, pp. 22-28, 71-80, 90-100, Brożek, pp. 21-24, MacCormick, *Legal...*, pp. 152-161, 166-167, 178-180, Smoktunowicz, pp. 154-164, Opałek and Wróblewski, *Zagadnienia...*, pp. 92-96, Morawski, *Zasady...*, pp. 71-81, 115-121, Alexander and Sherwin, pp. 88-103, Tomasz Gizbert-Studnicki, *Zasady i reguły prawne, Państwo i Prawo* no. 3/1988, pp. 16-26, Lamond, pp. 21-22, Aarnio, *Statutory...*, pp. 142-143, Leszczyński, pp. 249-252.

¹⁰² Wolter and Lipczyńska, p. 237.

¹⁰³ Troper, Grzegorzczak and Gardies, *Statutory...*, p. 201, Nowacki and Tobor, p. 184, Korybski, Leszczyński and Pieniążek, p. 178.

¹⁰⁴ Stelmach, p. 72 and Jamróz, p. 205.

¹⁰⁵ Alexy and Dreier, *Statutory...*, p. 89; see also Nowacki, *Analogia legis*, pp. 68-71, 122-124 and Pulka, p. 151.

¹⁰⁶ Nowacki, *Analogia legis*, pp. 123-126, Nowacki and Tobor, p. 184, Mastalski, pp. 118-119, Morawski, *Zasady...*, p. 211, Morawski, *Wykładnia...*, p. 295.

As for *analogia iuris* (juris), including the difficulties in distinguishing it from *analogia legis*, see: Holland and Webb, pp. 381-382, Nowacki, *Analogia legis*, pp. 121-134, Smoktunowicz, pp. 27-29, Morawski, *Zasady...*, pp. 211-214, Morawski, *Wykładnia...*, p. 295, Leszczyński, pp. 249-255, Munczewski, pp. 203-205, Maris, pp. 75-77, 102, Peczenik, *On Law...*, pp. 321-322, Wronkowska, pp. 95-96, Nawrot and Przybylski-Lewandowski, pp. 346-347, Chauvin, Stawecki and Winczorek, p. 248, Pulka, pp. 149-151, Jamróz, p. 205, Korybski and Grzonka, pp. 134-135.

¹⁰⁷ See Smoktunowicz, p. 29, Opałek and Wróblewski, *Zagadnienia...*, p. 110; cf. also Nowacki, *Analogia legis*, pp. 132-133.

¹⁰⁸ Aarnio, *Statutory...*, p. 132.

¹⁰⁹ Aarnio, *Statutory...*, p. 161.

¹¹⁰ Wronkowska and Ziemiński, *Zarys...*, pp. 173-174, Redelbach, Wronkowska and Ziemiński, pp. 212-213, Munczewski, p. 168, Leszczyński, pp. 250, 252-253. On the concept of the assumption that the Legislator is rational see Ziemiński, *Wstęp...*, pp. 162-170 and Leszek Nowak, *Interpretacja prawnicza : Studium z metodologii prawnoznawstwa*, Państwowe Wydawnictwo Naukowe: Warszawa 1973, pp. 35-46, Chauvin, Stawecki and Winczorek, p. 248, Nawrot and Przybylski-Lewandowski, p. 347, Pulka, p. 149.

Incidentally, *analogia iuris* resting on the preferences of particular values on the part of the Legislator may also be linked with an *argumentum a fortiori* whose basis is the extent to which a given value is protected; see Morawski, *Wykładnia...*, p. 335, Ziemiński, *Problemy...*, pp. 303-304, Ziemiński, *Wstęp...*, pp. 192-194, Wronkowska, pp. 96-97.

¹¹¹ See Korybski, Leszczyński and Pieniążek, p. 178, Ziemiński, *Problemy...*, p. 303, Ziemiński, *Wstęp...*, pp. 194-196, Munczewski, p. 171, Wronkowska, pp. 95-96, Wronkowska and Ziemiński, *Zarys...*, p. 173, Redelbach, Wronkowska and Ziemiński, *Zarys...*, p. 213, Leszczyński, pp. 249-250, 252-253, Pulka, p. 149.

However, there seems to be an order of preference established in the sense that *analogia iuris* can be used only when *analogia legis* has proved insufficient for making a legal decision in the case at hand.¹¹² Incidentally, as a bow towards *analogia iuris*, one may also treat Dworkin's theory of the judge Hercules, a theory which assumes that legal decisions are to be delivered upon a coherent set of abstract general legal principles which justify all common law precedents (excluding those that are considered as mistakes) and statutory and constitutional provisions.¹¹³ This theory is regarded as being founded upon analogical reasoning, for instance, by Raz and Maris. The former overtly states that "Dworkin's theory of adjudication is the most extreme case of total faith in analogical arguments" (i.e. in the sense that Dworkin "propounded a view according to which judges are obliged to solve all legal cases on the basis of a total analogy – to all the existing statutory and common law rules").¹¹⁴ The latter, in turn, discerns in the Dworkinian proposition something which "can be labeled as reasoning by 'super analogia iuris'".¹¹⁵

12. Analogy in legal proof and legal fictions

Undoubtedly, analogical reasoning can also be of use in the process of proving the facts of a case. As a good example, one may invoke the determination whether an alleged infringement of copyright took place through a comparison of the original item with the materials that are supposed to be its illegal copies. Contingent on the ascertained degree of the similarity between them, the question of infringement may be resolved: the greater the similarity, the more probable the illegal character of a copy would be.¹¹⁶ Also fictions, i.e. legal concepts that are – at face value – unrealistic (false), are sometimes deemed to be a manifestation of analogy. Thus, for instance, an institution of adoption assumes a similarity between an adoptee and the siblings, mandating their equal treatment.¹¹⁷

13. Conclusions

Analogical reasoning evidently has enormous scope for plausible applications in the domain of statutory law. This scope can be even likened – if not equated – to the ambit of the employment of analogy in the field of precedential law.¹¹⁸ Not only is analogy used in statutory law in order to fill divergent kinds of gaps, but it can be also useful in resolving conflicts between statutory rules and clarifying the meaning of their wordings. It can also serve as a universal means by which one may apply particular statutory provisions in concrete cases. Such an omnipresence of analogical reasoning remains in statutory law, however, quite opaque and hidden – at least when referring to civil law countries.

Due to the complex conceptual apparatus and premium that is traditionally placed on legal deduction and other kinds of quasi-logical mental operations on general rules in these countries, an analogical pattern of inference must often be extracted from argumentative forms and notions that not necessary at first glance suggest its involvement. As it appears, its presence there may also remain sometimes more a psychological fact than something which is openly admitted in the theory and practice of law.

¹¹² See La Torre, Pattaro and Taruffo, *Statutory...*, p. 225, Morawski, *Zasady...*, p. 213, Morawski, *Wykładnia...*, pp. 295, 302, Pulka, p. 151, Jamróz, p. 205.

¹¹³ See Dworkin, pp. 110-123.

¹¹⁴ Raz, pp. 205-206 footnote 19.

¹¹⁵ See Maris, pp. 81-84.

Lamond also hints – not without critical remarks – at an analogy that is based upon principles that underlie existing cases in the sense of justifying and explaining their legal outcomes; see Lamond, pp. 21-22.

As to the critical assessment of the reasoning from principle with focus mainly on the Dworkinian theory see Alexander and Sherwin, pp. 88-103.

¹¹⁶ See Walton, p. 312.

¹¹⁷ See Kratochwil, p. 224.

¹¹⁸ See Maciej Koszowski, The Scope of Application of Analogical Reasoning in Precedential Law, *Liverpool Law Review* no. 1/2016 (v. 37), pp. 9-32.

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