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The A Simili Argument: An Inferentialist Setting[+*]

The A Simili Argument (ASA), or argument from analogy, draws the conclusion that a target case has a certain property since it is relevantly similar to a source case. A major issue of the argument is the notion of relevance. When a target case is relevantly similar to a source case? What criteria can we provide for such relevance? Is legal relevance different from relevance in other domains?
In legal matters, the standard answer refers to the notion of *ratio legis* or, in judicial contexts, *ratio decidendi*: it is the *ratio* which fixes what is relevant for what. But, as legal scholars know well, the determination of the *ratio* is often a difficult and controversial task.
Here we will look at such an argument from an inferentialist point of view. We will make reference to the idea of scorekeeping practice as described by Robert Brandom and will claim, firstly, that *ratio* and relevance are determined by the normative statuses reciprocally attributed by the speakers in the context of legal argumentation; secondly, that such statuses involve some ontological assumption concerning the entities, natural or social, the law deals with. In the legal field, if our remarks are correct, the ASA definitely depends on what the speakers take to be normatively relevant, and what is taken to be normatively relevant depends, in turn, on what is taken to realize a law's purpose.
Before going into the presentation and discussion of such an inferentialist setting, we shall remark how the ASA can be seen not as a single but as a complex inference, each step of which, in its turn, might be analyzed in terms of speakers' normative statuses within an exchange of reasons.

1. *The A Simili Argument as a Complex Inference*

The ASA, in one of its versions at least, can be seen as a complex inference[1]. It draws the conclusion that a target object has a property *Q* since it shares with a source object a relevant property *P*. When this is the case, source and target are relevantly similar[2]. Now the argument can be seen as a complex inference constituted by three different inferential steps:

1) an abduction of the relevant property *P*,
2) an induction of the class having that property,
3) a deduction of the target's having the property *Q*.

[+] Published in "Ratio Juris", vol. 22, 2009, pp. 499-509.
[*] A draft of this paper was presented in a workshop of the 23rd IVR World Congress, August 2007, Krakow. The authors wish to thank E. Feteris and H. Kloosterhuis for their invitation to participate in that workshop, and all the participants for their helpful suggestions.
[1] For different accounts of analogical reasoning in law, cf. e.g. Nerhot 1991, Rotolo 2001, Kloosterhuis 2002 and 2005, Kaptein 2005, Hage 2005, Marmor 2005, Weinreb 2005. In the Italian debate, see in particular Bobbio 1938 and 1994 (Chap. I), Gianformaggio 1987 and 1997, Carcaterra 1988, Velluzzi 1997 and 2006.
[2] Being the source better known than the target, Adler 2007 conceives of analogy as an asymmetrical argument but does not remark that (1) any analogical argument is *epistemically asymmetrical* since the source is better known than the target and (2) any analogical argument is *logically symmetrical* since the relevant property plays the same role in both the target and the source.

If so, it can be considered as being both a form of inferential discovery and a form of inferential justification[3].
A major problem of such an account is the characterization of the property relevance[4]. When a property *P* is relevant for another property *Q*? In causal contexts the answer is relatively easy: a property *P* is relevant when it is causally relevant for *Q*. But in legal contexts this answer is hardly satisfying: in legal matters the ASA has usually a normative dimension. For the property *Q* to be inferred is not a factual property but a normative, deontic property. If so, the relevance of property *P* for normative property *Q* cannot be a causal kind of relevance.
Consider the following example:

Gin Tonic gets me drunk (*Q*)
Gin Tonic and Vodka Tonic contain alcohol (*P*)
_____
Vodka Tonic gets me drunk (*Q*).

Suppose in fact that I know what is the effect of Gin Tonic on my organism (it gets me drunk) but I never tried what happens with Vodka Tonic. I can infer from analogy that it will produce the same effect, since it has the relevant property of containing alcohol. This can be analyzed in detail as constituted by the three inferential steps indicated above[5]. Now observe that property *P* is *causally* relevant for property *Q*. This cannot do in legal matters when the property to be inferred is normative. Consider the following, legal example:

Spouses are permitted to make medical treatment decisions for the partner who lacks capacity (*Q′*)
Spouses and lesbian girlfriends have a close personal relationship to their partner (*P′*)
_____
Lesbian girlfriends are permitted to make medical treatment decisions for the partner who lacks capacity (*Q′*).

Here property *P′* is not casually but pragmatically relevant, since it is claimed that it justifies the ascription of deontic property *Q′*[6]. But in what sense of *justification*? In what sense having property *P′* might serve as a justification of the ascription of property *Q′*?
A possible answer to this is the idea that the relevant property is the ground of the *ratio legis*, or *ratio decidendi* in judicial contexts[7]: namely the property in reason of which, given a certain purpose, the lawmaker qualifies in normative terms a given situation (i.e. something is permitted, or prohibited, or obligatory, because something has property *P′*). If a source has property *P′* and –

[3] This account of analogy is inspired by Charles S. Peirce's remarks on it. Such an account is elaborated, in the field of legal reasoning, by McJohn 1993 and Brewer 1996 in particular. Cf. Levi 1948, Sunstein 1993, Haack 2007. See also Holyoak and Thagard 1995, Tuzet 2006.
[4] Of course there are other problems that we cannot discuss in this paper. One of them is whether being similar can be reduced to sharing some property (see Rotolo 2001, Chap. IV).
[5] Notice the importance of guessing by abduction the correct property: in fact, as the example suggests, one not very experienced with drinks might observe that both Gin Tonic and Vodka Tonic contain Tonic and, taking this as the relevant similarity, infer that a drink containing Tonic gets one drunk. (This remarks elaborates on the so-called Scientific Drinker Fallacy).
[6] Notice that the legal character of the deontic property imposes further conditions on a valid use of the ASA: (1) the case is not regulated by the law; (2) the gap can be filled by means of analogical integration, with regard to (a) the regulated legal field, and (b) the type of source norm. On these and further conditions see Kloosterhuis 2002 and 2005.
[7] "The *ratio decidendi* is the rule or principle of decision for which a given precedent is the authoritative source, whether that rule or principle of decision is then to be treated as binding or only as persuasive in some degree for other later deciders of *similar* questions" (MacCormick 1987, p. 156; our emphasis). On the *ratio decidendi* cf. MacCormick 1978, Chap. IV. On the notion of *ratio legis* see e.g. Carcaterra 1988, Viola and Zaccaria 1999, p. 151 ff., Guastini 2004, p. 150 ff.

because of this – normative property *Q'*, a target should have *Q'* as well if it shares with the source the relevant property *P'*.
Now, legal scholars know well that the determination of the *ratio* is often a difficult and controversial task[8]. Here we shall discuss such an issue in an inferentialist setting, which might be of help to throw some light on the argumentative and practical constraints of such a determination and justification[9].

2. *Brandom's Inferentialist Framework: A Sketch*

Brandom has recently set out a theoretical framework permitting an analysis of conceptual content in a genuine pragmatic way[10]. This framework is based on an inferentialist theory of intentionality and meaning, which explains the semantic content of a sentence in terms of deontic commitments and entitlements assumed by the speakers using it. In Brandom's picture, the content of a sentence is fixed by its inferential role as a premise or conclusion within an exchange of reasons. In its turn, a pragmatic explanation of inferential roles is possible if we consider the steps of the argumentation, i.e. the speech acts it is composed of, moving from the normative attitudes of the speakers. From the inferentialist point of view, in fact, to be a participant within an argumentative practice is to be responsible of the claims one makes. And to be responsible is *to be taken* as responsible by the other participants within the practice. In the context of legal argumentation, for example, to take someone's utterance as a claim about the facts, or as a prescription drawn from a legal sentence, is to attribute inferential *commitments* and *entitlements* to the speaker: the duty to accept the consequences one is committed to, and the authority to claim the consequences one is entitled to[11].
From this theoretical approach, applied to the context of legal reasoning and argumentation, it follows that:
1) the content of a legal sentence, the existence of a gap in the law, the coherence of a legal system etc. are functions of a linguistic, inferentially articulated practice;
2) a correct use of some complex inference, such as the ASA, and the legal conclusions it justifies depend on the normative attitudes of the speakers;
3) the analysis of legal reasoning should take into account not only the formal structure of legal arguments but also the use that legal practitioners make of them in a critical discussion with a real or supposed antagonist[12].
Thus, to analyze the pragmatic structure of the ASA, and the role the *ratio* plays in it, we should also consider which normative attitudes the speakers undertake and attribute using this argumentative technique.

3. *The A Simili Argument in a Legal Exchange of Reasons*

We sketch in the following a legal exchange of reasons between lawyer L and lawyer M concerning the right of Sappho, lesbian girlfriend of Atthis, to accept or refuse medical treatments on Atthis'

[8] See e.g. Stone 1985. Cf. MacCormick 1978, p. 82.
[9] We provide a similar account of the A Contrario Argument in Canale and Tuzet 2008.
[10] Cf. Brandom 1994, 2000. For a discussion of Brandom's thought in relation to judicial reasoning, see Canale 2003, Klatt 2004, Canale and Tuzet 2007.
[11] "Saying or thinking *that* things are thus-and-so is undertaking a distinctive kind of *inferentially* articulated commitment: putting it forward as a fit premise for further inferences, that is, *authorizing* its use as such a premise, and undertaking *responsibility* to entitle oneself to that commitment, to vindicate one's authority, under suitable circumstances, paradigmatically exhibiting it as the conclusion of an inference from other such commitments to which one is or can become entitled" (Brandom 2000, p. 11).
[12] In this extent, our approach is similar to the pragma-dialectic analysis of legal argumentation, although it moves from a different philosophical background. Cf. Kloosterhuis 2002, p. 78.

behalf in case the latter lacks capacity to make reasoned medical decisions. As we pointed out, the structure of an argumentative practice is described by Brandom through a deontic scorekeeping model of semantic determination. The speakers keep track of their own and each other's linguistic actions: they "keep score" of commitments and entitlements by attributing those deontic statuses to others and undertaking them themselves. In the legal domain, in particular, the final score determining the solution of a case is fixed authoritatively by the judge, on the basis of the speech acts performed by the other participants in the argumentative practice. In our imaginary example, however, we will not represent this in detail but, rather, we will point out some general conditions of a pragmatically correct use of the ASA. In other words, we will try to answer the following question: Under what conditions a move in the argumentation according to the ASA scheme leads the speaker to score a point in the exchange of reasons?
At the beginning of the legal dispute between our two lawyers, L and M, imagine that L performs the following speech act:

> (L1) Since the law states that spouses are permitted to make medical treatment decisions for the partner who lacks capacity, and they are so permitted because they have a close personal relation with the patient, then the lesbian girlfriend of a patient is permitted to make medical treatment decisions too, because she has the same relation with the patient.

(L1) is an example of ASA in which, starting from the spouses' source case, the property of having a close personal relation with the patient is taken to be relevant for the ascription, in the lesbian girlfriend's target case, of the deontic property of being permitted to make medical treatment decisions. In performing (L1), L undertakes in fact the following discursive commitments:

> (c1) spouses are permitted to make medical treatment decisions for the partner who lacks capacity (source case);
> (c2) they are so permitted since they have a close personal relation with the patient (abduction of the relevant property);
> (c3) everyone who has a close personal relation with the patient is so permitted (induction of the relevant class);
> (c4) lesbian girlfriends have a close personal relation with their partner (assumption concerning the target case);
> (c5) lesbian girlfriends are permitted to make medical treatment decisions for the partner who lacks capacity (deduction of the normative property, i.e. solution of the target case).

Now, from an inferentialist point of view, on what conditions these discursive commitments will be fulfilled, leading L to score one or more points in the legal dispute with M? To put it simply, on what pragmatic conditions is the present a correct use of the argument from analogy? It is a correct use of it if L will be entitled by the judge to the following claims: (*a*) there is a gap in the law and the source case is a valid and suitable basis for analogical reasoning in this legal field; (*b*) having a close personal relation is the relevant property the ASA relies on, the ground of the *ratio legis* or *ratio decidendi*; (*c*) everyone who has such a personal relation is so permitted, that is, there are no exceptions nor limitations to such ruling in the legal system; (*d*) in the case in hand, Sappho has such a personal relation with Atthis.
If these conditions are met, L is entitled to the claim that, in the target case, Sappho is permitted to make medical decisions on behalf of Atthis.
Now, M might challenge his rival's claims and perform the following speech act:

(M1) The law states that spouses are permitted to make medical treatment decisions for the partner who lacks capacity, but they are so permitted since they have a close *legal* relation with the patient, a relation that a lesbian girlfriend does not have[13].

In so doing, M opposes to L's claims through the abduction of a different relevant property, the induction of a different class, and the deduction of an opposite normative property, leading to an opposite solution of the case[14]. Again, the question is: On what conditions this refusal of the ASA, from the spouses' case to the lesbian girlfriend's case, is justified? If one assumes an inferentialist point of view, the answer seems to be obvious: the refusal is justified if, in the exchange of reasons, M is entitled to such claims in the light of the speech acts performed by L, M and the judge or court deciding the case. But this answer, though being correct, might be misleading. It may convey the wrong idea that the rules governing the argument from analogy are simply a matter of agreement or judicial discretion. In order to avoid these wrong conclusions, we will try to analyze more in detail the underlying assumptions of the ASA.

4. *Underlying Assumptions of the A Simili Argument*

It is worth noting that the core of the exchange of reasons analyzed above is the move from (c1) to (c2) and the move from (c2) to (c3). If the abduction of the (supposedly) relevant property and the induction of the class having such property is taken to be justified, the normative conclusion is no more disputable, following deductively from the premises. In order to go deeper into the pragmatic structure of the ASA, therefore, one is required to make explicit on what subconditions such inferential moves are justified. What pragmatic rules are disclosed by the abduction of the relevant property and the induction of the relevant class? Focusing on the first step in particular[15], the inference of the relevant property grounding the *ratio* is a matter of judicial discretion, of legal provisions, or of underlying moral principles?
It is possible to analyze this issue coming back to the Sappho and Atthis' case. In order to defend his standpoint against M and to supplement his use of the ASA, L might perform a further speech act:

(L2) Since the law aims to assure that the decision made by the surrogate reflects what the patient most likely would have wanted, and given that the person who has a close personal relation with the patient most likely knows the preferences and values of the latter, what is relevant here is a close personal relation between surrogate and patient, whereas a legal close relation is not necessarily so.

By uttering (L2), lawyer L makes explicit the *ratio* of the permission which he pretends to be extended to the Sappho and Atthis' case. Notice, however, that the determination of the *ratio* is not a *result* of the ASA: it is an implicit premise of it, which serves to justify the claims concerning the shared relevant property of source and target. The justification of this core-premise depends on some other argument, i.e. on some psychological, teleological, or systematic argument (legislature's intention, law's purposes or law's coherence) – or it depends in some cases on argument by

[13] Of course specifications would be needed about what such a "close legal relation" amounts to; but here we can make abstraction from this aspect of the argumentation.
[14] In our example, M's utterance entitles L only to (c1); that is, the sentence "spouses are permitted to make medical treatment decisions for the partner who lacks capacity" is taken to be a valid legal sentence by both the discursive opponents.
[15] Of course also the second, inductive step presents serious difficulties (that we cannot discuss here). For instance: What is to be done when we have just one precedent or norm? What about defeasibility? On the problem of the inductive basis cf. Rotolo 2001, pp. 118, 158-167.

principles[16]. Once the *ratio* is assumed within the legal dispute, however, the determination of the relevant property is not an arbitrary one. On the one hand, it is taken to be relevant *within a legal exchange of reasons*. On the other, it is relevant because it is taken to be (*prima facie*) necessary *for the realization of a law's purpose*. In our example, according to L, the purpose of the law is to assure that the decision made by the surrogate reflects what the patient most likely would have wanted, and having a close personal relation with the patient is a relevant property for realizing this.
Thus, a property is relevant within a legal exchange of reasons if it is taken to be (*prima facie*) necessary for the realization of some fact or state of affairs: the fact or state of affairs that the law aims at establishing in the world[17]. In cases like Sappho and Atthis', without having a close personal relation with the patient, a surrogate is unlikely to know the patient's preferences and values, therefore the state of affairs that the law pretends to establish in the world – that is, a medical decision reflecting what the patient would have wanted – could hardly take place.
To sum up, it is true that the determination of the relevant property depends on the speakers' interaction, that is on the deontic statuses they assume within a legal exchange of reasons. However, these statuses involve some ontological assumption concerning natural and social reality, i.e. on what is taken to be (*prima facie*) necessary for the realization of certain purposes, of certain facts, states of affairs and relations within a human community.

5. *Conclusions*

An inferentialist analysis of the ASA shows some important features, often neglected in the literature, of this argumentative technique.
First, the ASA is a complex argument, constituted by different inferential steps, i.e. an abduction of the relevant property, an induction of the class having that property, a deduction of the normative conclusion.
Secondly, the ASA is not a complete argument: it needs some complementary argument to justify its conclusion within an exchange of reasons. It may be requested to be supplemented at least by: 1) an argument justifying the claim that there is a gap in the law which can be filled by means of analogy; 2) one or more arguments justifying the claims about the *ratio*. Now it is true that the *ratio* can be determined at different levels of generality. Moreover, Herbert Hart correctly saw that "in any hard case different principles supporting competing analogies may present themselves and a judge will often have to choose between them, relying, like a conscientious legislator, on his sense of what is best and not on any already established order of priorities prescribed for him by law"[18]. But these problems, surely important, do not touch on our point: the epistemic objectivity of what is relevant once the *ratio* is assumed. Of course, this does not mean that what is relevant according to the *ratio* is not disputable within the exchange of reasons. It does mean that the epistemic process leading to relevance attribution is quite different from the pragmatic process governing the assessment of the *ratio*.

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[16] Kaptein seems to radicalize this aspect. He points out that "the whole weight of so-called argument from analogy is on underlying principle(s) [expressing the *ratio* of normative properties at stake] and not on the original analogon at all". Moving from this assumption, he argues that "the sense of analogy […] is immediately apparent. This serves to show again that the analogon cannot furnish any ground for the argument by analogy apart from being a 'source' in a purely heuristic sense" (Kaptein 2005, pp. 502-503). Here Kaptein seems to confuse, however, the argument by analogy with the argument by principles used to justify the relevance attributed to the property grounding the *ratio*. First, not only the argument by principles justifies the relevance of a property: it can be done by means of psychological, teleological, or systematic arguments. Second, from the fact that the ASA needs to be supported by some other argumentative technique it does not follow that it is an empty argument. The ASA inferentially articulates the reasons on the basis of which a property is taken to be shared by a source and a target.

[17] Notice that some causal relation might enter the picture here, even though it remains true that legal relevance is not causal relevance.

[18] Hart 1994, p. 275. One might think, however, that some systematic argument, or argument from coherence, can guide the *ratio* determination in such cases.

Thirdly, and finally, once the *ratio* is assumed and justified, a correct use of the ASA does not imply a discretionary evaluation of the case by the judge or the court. A correct use of it rests on some underlying assumption concerning what is taken to be (*prima facie*) necessary for the realization of a law's purpose. In this respect, the ASA depends on how the world is taken to be by a community, not on the discretion or political preferences or moral values of the legislature, nor on the discretion or preferences of the judge. Once a *ratio* is assumed, one is committed to the consequences of it in terms of relevance.

Therefore, Hart's remark that "the relevant resemblances and differences between individuals, to which the person who administers the law must attend, are determined by the law itself"[19] is correct if referred to the purpose of the law or legislature, but wrong if referred to what is necessary for the realization of such purpose. Simply put, it is correct if referred to the *ratio*, but wrong if referred to what is relevant in the light of the *ratio.*

[19] Hart 1994, p. 160.

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