Chapter 13
Analogy and Interpretation in Legal Argumentation

Damiano Canale and Giovanni Tuzet

13.1 Introduction

One of the distinguishing features of legal argumentation is the interplay between legal arguments supporting a conclusion and interpretive canons supporting a definite reading of the legal provisions that justify the conclusion argued for. On the one hand, a definite interpretation of the relevant legal materials aims to provide the normative premises of a legal argument concerning a case or a set of cases, but, on the other hand, interpretive choices are themselves in need of justification and therefore have to be supported by interpretive arguments (e.g. the argument from literal meaning of the relevant provisions, the argument from legislative intention, the argument from legislative purpose, etc.).

This kind of interplay becomes problematic in some circumstances. For instance, when different interpretive arguments justify different readings of the same provisions and therefore provide different normative premises. Or when, interestingly enough, argumentation and interpretation point to the same conclusion but the law prohibits the former and permits the latter. This is the case of criminal law when, to protect individual liberty, it puts a ban on analogical reasoning but at the same time, to protect society from crime, does not exclude the "extensive" interpretation of criminal legal provisions. The puzzling result is that the same conclusion can be accepted if argued for in interpretive terms but cannot if presented as the outcome of an argument from analogy.

The present work focuses on such tension between analogical reasoning and extensive interpretation in law. They are two techniques of judicial decision-making that permit to rule a case that is not explicitly considered by a legal provision

D. Canale (✉) · G. Tuzet
Department of Legal Studies, Bocconi University, Milano, Italy
e-mail: damiano.canale@unibocconi.it

G. Tuzet
e-mail: giovanni.tuzet@unibocconi.it

H. J. Ribeiro (ed.), *Systematic Approaches to Argument by Analogy*,
Argumentation Library 25, DOI 10.1007/978-3-319-06334-8_13,

and still is worth being regulated on the basis of it.[1] In most legal systems, as we said, reasoning by analogy is prohibited in criminal law (unless it is in favor of the accused) whereas extensive interpretation is not.[2] Hence, it is a crucial point in criminal adjudication to distinguish the two, although they seem to serve the same purpose (see e.g. Ross 1958, § 29; Silving 1967; MacCormick 1978, p. 155 ff.; Wróblewski 1992, pp. 223–227). Indeed, if a trial court justifies a criminal decision arguing by analogy, the decision will be reasonably quashed on appeal because it is contrary to the law. The same decision is justified, on the contrary, when it can be considered an extensive interpretation of a criminal provision, even when this is the same provision that the court could have used analogically. The problem is that in the legal practice one can hardly distinguish analogy from extensive interpretation. It is very unclear whether there is a real difference between the two and where it might be. On the one hand, some scholars claim that they differ from a theoretical point of view, since they do not have the same argumentative structure. On the other hand, analogical reasoning and extensive interpretation come to the same result starting from the same legal materials: they justify the extension of a regulation to a case that is not explicitly considered by the law.

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

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

[1] Although "analogical reasoning" and "extensive interpretation" are often used in judicial discourse to denote two fungible techniques of decision-making, legal theory clearly differentiates the two classes of entities they refer to. As we shall point out in § 2, "extensive interpretation" makes reference either to the interpretive process that extends the standard meaning of an interpreted legal provision, or to the outcome of this process. On the contrary, "analogical reasoning" denotes an argumentative technique inferentially articulated. In this article we shall look at these subjects from the point of view of the theory of legal argumentation: those labels will single out two arguments that are used to justify a judicial decision.

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

Book ID: 318557_1_En ChapterID: 13 Dispatch Date: 24/04/2014 ProofNo: 1

a straightforward line can be drawn between the two canons, then the legality of a criminal decision based upon them is not compromised.

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

13.2 The Traditional Standpoint

In legal argumentation and practice, "restrictive" and "extensive" interpretations are often described as techniques that are used when the literal meaning of a legal provision (hereafter *standard* meaning) does not correspond to the intended meaning of the legislature. It may be the case that the legislature, by enacting a statute, says one thing but means another.[3] In the legal jargon, it is commonly claimed in these circumstances either that *lex magis dixit quam voluit* (the law said more than it wanted to say) or that *lex minus dixit quam voluit* (the law said less than it wanted to say). Now, when the standard meaning[4] of a legal provision differs from the intended meaning, a court that decides a case according to the former will fail to enforce the law that the legislature intended to make. Restrictive and extensive interpretation serve to address this issue. These interpretive techniques give the judge the opportunity to set aside the standard meaning of the statute in order to bridge the gap between what is said and what is intended. And they do this either narrowing the set of cases that the statute would have ruled if the judge had interpreted it literally, or expanding this set. In the latter circumstance, one or more cases that do not fall under the standard meaning of the statute will be ruled according to it nevertheless.

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

C does not fall under N_1 obtained via I_1 of P.
But, C falls under N_2 obtained via I_2 of P.

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

[4] We shall use the expression "standard meaning" to refer to the meaning that an expression assumes most times according to the rules governing the use of this expression in a given language.

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

Given this explanation, it is clear that an interpretation is not "extensive" *per se* but with respect to some standard interpretation.[5] And it works like this: N_2 is a justified interpretive extension of N_1 when an interpretive canon permits to extend the standard interpretation of P. If I_1 is the standard (literal) interpretation, I_2 might be an extensive interpretation argued from the intention of the legislature, from the purpose of the regulation, from a legal principle, etc.[6] Therefore, strictly speaking, "extensive interpretation" and "restrictive interpretation" do not denote argumentative canons. These expressions simply qualify the upshot of interpretation: in particular, they mark the fact that the scope of the norm so stated is larger or narrower than it would have been had the provision been interpreted literally. In this sense, such interpretive techniques do not justify a judicial decision, although they are sometimes employed in legal argumentation as if they could. Extensive interpretation is in need of justification: it is not itself an argumentative tool. In fact, it simply brings into operation those argumentative canons that justify giving up literal interpretation, and thus leads the judge to defeat the principle of strict construction in criminal law. By making reference to the intended meaning of the legislature, which can be determined using different argumentative tools, the range of criminal liability may be both expanded and cut down.

What happens instead in analogical reasoning? A gap in the law is filled by arguing analogically from a source case to a target case (see Holyoak and Thagard 1995),[7] and thereby a new norm is created. To put it differently, a first norm regulates a source case which is relevantly[8] similar to a target case that lacks a legal regulation. On the basis of the relevant similarity and the lack of relevant dissimilarities, the regulation of the source is extended to the target. In this way, the gap is filled by the judge by generating a second norm that goes beyond the first, and hence can be seen as created by the judge.

[5] "Extensive interpretation (interpretation by analogy) is the term used when pragmatic considerations result in the application of the rule to situations which, regarded in the light of 'natural linguistic reading', clearly fall outside its ~~filed~~ of reference" (Ross 1958, p. 149; note that Ross does not distinguish between analogy and extensive interpretation).

[6] Ross (1958, p. 150) claims that extensive interpretation has two presuppositions: (1) that a legal evaluation is in favor of applying a rule not only to sphere (a) but also to sphere (b); (2) that there is no difference between (a) and (b) that could justify a different treatment of the two cases. See also Silving (1967, p. 313): "though words have outer limits of social meaning, beyond which their extension might appear absurd, their meaning in a statute is very often sufficiently flexible to include or to exclude certain items, depending on purpose."

[7] On analogy in the law cf. Golding (1980, part III), Sunstein (1993), Brewer (1996), Kloosterhuis (2005), Kaptein (2005). It might also happen that the inference is drawn from multiple sources: see Guarini (2010).

[8] Relevance is determined by legal purpose (*ratio legis* in civil law systems), as we tried to show in Canale and Tuzet (2009). Cf. Cardozo (1921, pp. 28–30, and 1924, pp. 79–80) on analogy and ~~*radio*~~ *decidendi* in case law.

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

In this scheme, C_1 is the source case, whose regulation is extended analogically to the target case C_2. N_2 is a new norm created by analogy from N_1. For example, to use the famous American decision *Adams v. New Jersey Steamboat Co.* (1896), the issue of the liability of steamboat companies for the loss of money or other personal effects of their passengers (target case) is treated by analogy with the liability of innkeepers for such losses of their guests (source case), considering that a steamboat is a "floating inn" in the light of such purpose as the protection of guests or passengers from "fraud or plunder" from the proprietor.[9]

13.3 Different Traits, and Common Ones

What are the distinguishing traits of extensive interpretation and analogical reasoning? According to the theoretical demarcation we just outlined, they have at least four different features (see e.g. Bobbio 1994: Chap. 1; Carcaterra 1988, pp. 16–18; Gianformaggio 1997; Peczenik 2005, pp. 20–24). First, analogical reasoning presupposes a given interpretation of the relevant provisions, which is at stake in extensive interpretation. Interpretation comes first. That is, one argues analogically after having interpreted the relevant provisions and having established that the case is not regulated, despite the interpretive method the judge could call on. On the contrary, extensive interpretation is precisely about the way in which such provisions ought to be interpreted, or have been construed as a matter of fact.

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

Thirdly, analogical reasoning creates a new norm to fill the gap, whereas extensive interpretation extends the content of the standard reading of the relevant provision. Let us say that N_1 regulates cases of type A and B: with extensive interpretation N_2 regulates cases A, B and C. With analogical reasoning, on the contrary, N_1 regulates cases A and B, whereas N_2 regulates cases C. The scope of N_2 with extensive interpretation is necessarily greater than that of N_1, which is not the case with analogical reasoning.[10]

[9] As scholars know, a disputed question was whether the relevant similarity of steamboats was with inns or with ~~railroads~~; in the former case companies were liable for such losses, in the latter they were not. See e.g. Weinreb (2005) and Posner (2006). For a similar problem see Sunstein (1993, p. 772): is hate speech analogous to physical assault or to political dissent?

[10] But analogical reasoning presupposes a principle or a value related to the *ratio* and covering all those cases.

Fourthly, as is the case in almost every contemporary legal system, analogical reasoning is prohibited in criminal law while, as we already pointed out, extensive interpretation is not. A basic legal principle lays behind this: it is the "rule of law" principle in common law countries and the "legality" principle in civil law ones. It is the shared idea that judges shall not create new law in criminal matters, but just decide on the basis of already established and cognizable norms. As the slogan has it, they have to apply the law. This idea is commonly represented by the maxim *nullum crimen sine lege, nulla poena sine lege.* But this is not meant to exclude all margins of judicial appreciation and discretion; flexibility is a felt need of law in general and also, with more caution, of criminal law. So both laxity of construction and vagueness of criminal statutes may sometimes be useful or even necessary.[11] As a consequence, legal scholars in general think that extensive interpretation is admissible in criminal matters, provided that judges do not create new law but confine themselves to the admissible interpretations of given provisions.[12] This view is reasonable if the two techniques at stake are different indeed. The different traits we outlined above seem to support the view that they are not the same, and rule out as a theoretical confusion the label "analogical interpretation".[13]

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

Secondly, and more importantly, extensive interpretation and analogy have the same practical outcome. For N_2 (either obtained by extensive interpretation or by analogy) extends the regulation to the case in hand. The practical outcome for the parties involved is the same, either if you argue from extensive interpretation or from analogy. Let us consider our previous examples. A skateboard might be qualified as a vehicle according to an extensive interpretation of the provision "No vehicles in the park" whose standard meaning covers motor-vehicles, to the effect that skateboards are not allowed in the park (N_2). But one might also argue in the following way: "vehicles" is to be read as referring to motor-vehicles (because of some interpretive argument to be specified, like the argument from literal meaning or from legislative intent); so the norm does not cover the case of skateboards entering the park; so there is a gap in the law; but there is also a relevant similarity between motor-vehicles and skateboards (both represent a threat to the safety of pedestrians

[11] "Overly precise *statutes* invite the criminally inclined to frustrate the intent of legislation by skirting the inflexibly precise language. As a result fairness only requires that a statute put law-abiding non-lawyers on reasonable notice that their intended conduct runs a reasonable risk of violating the statute" (Dressler 1987, p. 28).

[12] In Italy, for instance, the positive law explicitly prohibits analogy in criminal matters (art. 14 of the "Preleggi"), but is silent on extensive interpretation; scholars in general claim that the latter is admissible.

[13] But MacCormick (1995, p. 474) argues that analogy can work as an *interpretive* argument, extending the interpretation of one provision to another.

in the park); therefore the gap is to be filled by analogy extending to skateboards the regulation on motor-vehicles, to the effect that skateboards are not allowed in the park (N_2). The same outcome that was arrived at by interpreting extensively the given provision could be reached by arguing analogically after having interpreted non-extensively the same provision. Or, the other way round, one could turn an analogical argument into a form of extensive interpretation. The Court of *Adams* argued there was a gap in the law and, because of the relevant similarity between steamboats and inns (a steamboat is a "floating inn") the gap was filled by analogy. Now, assuming there is a provision about "inns", one might also argue that the word "inns" is to be interpreted extensively (because a steamboat is a "floating inn") to the effect that the regulation about inns extends to steamboats. It is perhaps for this common traits that some scholars, in the context of systemic interpretation and with reference to the issue of legal gaps, use the labels "analogy *extra legem*" (analogical reasoning) and "analogy *intra legem*" (extensive interpretation).[14]

All of this might not be a problem for thinkers who love theoretical distinctions as such. It is indeed a problem for pragmatist thinkers who are more interested in outcomes than in the ways they are arrived at. It is a pragmatist principle that, if the application of two concepts has the same practical consequences, they are the same concept under different names.[15] Now, if "extensive interpretation" and "analogical reasoning" produce the same practical consequences, one could say that they are the same argument and that it does not make any sense to permit the one and prohibit the other. Same consequences, same arguments.

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

13.4 The Vatican Radio Case

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

Article 674 of the Italian Criminal Code sanctions the "dangerous throwing of things" (*getto pericoloso di cose*), while no article of the Code mentions electromagnetic waves. Was the emission of such waves a "dangerous throwing of things"?

[14] "The problem of the completeness of a legal system is linked with that of extra-statutory analogy ('analogy *extra legem*'), where legal consequences are ascribed to facts, which are not singled out in enacted legal rules. In interpretation, there is a problem of using analogy *intra legem*, where one does not go 'outside the valid law' but only tries so to fix the meaning of the legal rules that they constitute the most harmonious whole possible. Thus interpretation by analogy is singled out according to the reasoning it uses" (Wróblewski 1992, p. 103).

[15] It was, in particular, Peirce's pragmatic maxim. See e.g. Haack (2005, pp. 75–77).

The Court of Cassation (III Criminal Sec., decision n. 36845/2008) decided it was and claimed to argue from extensive interpretation and not from analogy.

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

Note that these questions, put in this order, imply a semantics that follows the "principle of composition": first one has to determine the meanings of single words, then one has to put them together to determine the meaning of a whole sentence or complex expression. A semantics following the "principle of context" would do the other way round: first you determine the context, that is the meaning of sentences or complex expressions, then you extract from it the meaning of single words (cf. Searle 1978; for an inferentialist picture of these issues, see Canale and Tuzet 2007). In our case the Court follows rather a compositional semantics, cutting the expression at stake into pieces and determining the meaning of its parts in order to establish the meaning of the whole.

13.4.1 On "Things"

To be sure, waves are not "things" according to the linguistic standard uses. So an argument is needed to support that interpretive conclusion. A significant argument provided by the prosecution and then used by the Court makes appeal to another norm of the system: art. 624 (c. II) of the Criminal Code, on theft, states that electric power, as any other energy with economic value, legally counts as a thing; so electromagnetic waves are "things" according to the law. Against this argument the defense contended that, according to the intention of the legislature of 1930, when the Code was enacted, "things" in art. 674 refers to material things. To that argument the Court added some scientific considerations as to the physical nature of waves.

Now, to be sure, both interpretations seem admissible. The first is supported by a form of systemic argumentation (making appeal to other norms of the same legal system); the second is supported by a psychological argument (the argument from legislative intent). The first claims that taking waves as "things" is an extensive interpretation justified by systemic considerations; the second claims that to treat electromagnetic waves as material things is to make an analogy, since a psychological argument justifies a strict interpretation of art. 674 and the interpretive conclusion that there is gap: as a matter of fact, the 1930 legislature didn't care about such waves at all.

Note that if both interpretations are admissible there seems to be space for taking the extensive interpretation thesis as correct: there is no need to argue from analogy, it is sufficient, to settle the case, to select one of the admissible interpretations of "things", namely the extensive one (on "things" in ancient and modern law see also Silving (1967), pp. 313–314). This for the object of the conduct in question. What about the conduct itself?

13.4.2 On "Throwing"

Again, the argument of the prosecution and the Court about "throwing" is that art. 674 can be interpreted extensively. An emission falls under the notion of "throwing" because there are linguistic uses of the latter referring to the former; for instance, says the Court, to describe the act of emitting a cry one can use the expression "throwing a cry". You might also think at the phrases "throwing light" on something and "throwing suspicion" on somebody, which share with "throwing a cry" the fact of extending the meaning of the expression.

The defense replies that according to standard uses "throwing" refers to the act of flinging something, for instance out of the window, with some physical effort, and that a "dangerous throwing of things" refers to the act of dangerously flinging some material things into the public space; metaphorical uses are not at stake here and no interpretive canon permits to construe the provision as referring to an emission of waves. So there is a gap in the law, which could be filled only by analogy; but analogy is prohibited in criminal law.

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

Finally, note that if both interpretations are admissible there is room for thinking also here that extensive interpretation is a right solution. But one may have legitimate doubts about the admissibility of such an extensive interpretation of "throwing". The Court says there are linguistic uses of "throwing" that refer to the act of emitting something, for instance a cry. Dante's poetic language is taken by the Court as an example of this. Now you may wonder if a line of a poet who lived eight centuries ago is among the uses that determine the admissible interpretations of a provision in a legal controversy nowadays.

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

13.5 Legal Interpretation, Vagueness, and Semantic Tolerance

On the basis of the arguments provided by the Court of Cassation, it is actually far from being clear that its decision was the result of an interpretive extension and not instead of an undeclared extension by analogy. Actually, it is the standard account of the distinction between the two that seems to be unsatisfying or even lacking. In particular, the distinctive features of extensive interpretation in the standard picture

seem to provide little or no guidance at all to legal interpreters, thereby giving rise to misuses of this interpretive technique.

In this section we shall put forward a different explanation of the interpretive practices we are focusing on in order to throw some light, as it were, on the issues considered in the outset.

As the Vatican Radio Case clearly shows, the question whether a legal provision is to be interpreted extensively presupposes that the content of such a provision is vague.[16] This is actually true by definition. Extensive interpretation is possible if, and only if, the interpreted legal provision admits some changes in the cases to which it can be meaningfully applied. In other words, to be interpreted extensively a legal provision shall yield borderline cases. The words "things" and "throwing" are a good example of this phenomenon, at least according to the Italian Court of Cassation. On the Court's view, it is not immediately clear whether the term "things" applies to electromagnetic waves, nor whether the word "throwing" applies to their emission. Consequently, art. 674 of the Italian Criminal Code is vague: it is not definitely true that electromagnetic waves are things nor that they are not; similarly, it is not definitely true that waves emission is a kind of throwing nor that it is not.

Now, it is well known that the notions of "borderline case" and "definiteness" are strongly controversial in the philosophical literature on vagueness (see Shapiro 2006, p. 2).[17] Regardless of this, one may outline the linguistic problem faced by the Italian Court by means of the following uncontroversial scheme (Fig. 13.1):

This scheme represents the extension and antiextension of a legal provision such as art. 674 of the Italian Criminal Code.[18] Let A be the set of cases that clearly fall under the legal provision according to its standard meaning and which thus belong to its extension. Similarly, let C be the set of cases that clearly do not fall under the standard meaning of the same provision, i.e., that belong to its antiextension. Finally, B is the set of the borderline cases that come between clear "positive" and "negative" ones (see Endicott 2000, p. 55; cf. Hart 1961, Chap. 7). When *x* is a borderline case, the task for legal interpretation is determining whether *x* ought to be treated as a "positive" or "negative" case from the legal point of view. In the first

[16] Some authors claim that vagueness is a property of (some) words, others claim it is a property of (some) contents. See below for some references.

[17] As a matter of fact, most theorists claim that vagueness involves a form of ignorance, so that the different accounts of this phenomenon depend on what such an ignorance amounts to. For instance, epistemicists claim that with borderline cases we are ignorant of facts that actually we cannot know (Williamson 1994); a supervaluationist holds that we are ignorant because a vague sentence is neither true nor false (Fine 1975); an incoherentist claims that we do not know whether a vague term ~~apply~~ to a case because our language sometimes is incoherent (Dummett 1975); a contextualist assumes that we are (apparently) ignorant of the conditions of application of vague terms because these conditions shift with context (see Raffman 1994, and Soames 1999). For a discussion of these accounts of vagueness as to legal language see Endicott (2000), Jónsson (2009) and Poscher (2012).

[18] The extension and antiextension of a sentence S shall not be confused here with the extensive interpretation of S. The extension of a sentence is the set of objects, events or states of affairs S refers to, whereas the antiextension is the complementary set thereof. An extensive interpretation of S actually modifies the standard extension and antiextension of it.

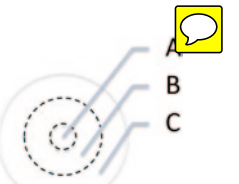

Fig. 13.1 Vagueness Scheme

circumstance, the content of the provision shall be extended so that to include *x*: the boundary between A and B moves to include *x* within the meaning of the provision. In the second circumstance, the content of the provision will be restricted: the boundary between C and B is shaped so that to include *x* in C. Obviously, all this requires that the boundaries between A, B and C are flexible in the sense that they lack sharp cutoff-points.[19] By interpreting the legal provision for decisional purposes, however, the judge is called upon to set up these boundaries and to determine where the case at hand is located. As a result, *after* legal interpretation *x* shall be qualified as belonging to A or C as a matter of fact.

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

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

To answer this question, let us return to the features of vague terms or contents. We have seen that a vague term admits of some content changes in the cases to which it can be meaningfully applied, i.e., the term is "tolerant" as to its application conditions.[20] Now, semantic tolerance is a matter of degree and depends on context: turning back to our example, when a case is slightly different from the standard one in the light of the contextual constraints put on the use of "things" and "throwing", these terms apply to it nevertheless. On the contrary, if the difference is contextually

[19] This claim is countered, however, by the epistemic theory of vagueness and by supervaluation theory as well. Cf. Williamson (1994). On supervaluationism and its logics cf. Varzi (2007).

[20] The tolerance metaphor is used here to point out that certain terms or expressions are less precise than others in a given context, so that they can be meaningfully used to denote cases that do not fall under their standard meaning. See Dummett (1975) and Wright (1975).

relevant, these terms do not apply. Given this, we might state the following principle (*Tolerance Principle*): being AC the application conditions of term T in context C, when two cases differ only marginally in the respects on which T is tolerant, so that they both satisfy AP in C, if a competent speaker judges the first case to be covered by T, then she cannot competently judge the other case in any other manner (cf. Shapiro 2006, Chap. 1). The Tolerance Principle sets out the conditions under which the extension of a regulation to a borderline case is justified. These conditions depend on the characteristics of the subject of regulation that are taken to be relevant, within a given context, as to the application conditions of a given legal term.

One might ask here: Why are those characteristics relevant? Now, the relevance criterion cannot be determined by the standard meaning of the vague term. Relevance is rather a function of context: contextual constraints put on language uses determine what characteristics of a given case are relevant in adjudication. These constraints are typically made explicit by means of legal arguments: the argument from intention, the argument from purpose, the argument from legal history, and the various sorts of systemic argument used in legal practice highlight different contextual constraints that the judge can take into account in interpreting a statute, which in turn make some characteristics of the case relevant according to the law. When interpreting the term "things" so that to include in its extension the case of electromagnetic waves, for instance, the judge is committed to give a reason for content extension, which sorts out the characteristics of the case: some of them will turn out to be relevant according to the argument that the judge resorts to, others will not. If this commitment is satisfied from the point of view of the participants in the argumentative practice according to the accepted argumentative standards, then the word "things" correctly applies to electromagnetic waves, since the latter are taken to have the same relevant characteristics of the standard instances of things. In this sense, the sort of tolerance we are focusing on can be called "semantic tolerance". The argumentative process aims at determining the semantic content of a vague term in a borderline case on the basis of the contextual constraints that are made explicit by legal arguments.[21]

As to analogical extension, on the contrary, the starting point of judicial reasoning is that the case is not within the meaning of the legal provision and thus no interpretation can include it in the extension of the provision. The ~~toleration~~ principle does not hold as to the case at hand, which in fact is not a borderline case. In this sense, the argument from analogy takes for granted that extensive interpretation has failed: analogy is a remedy to the lack of success of interpretive effort. Despite this, there might be further reasons justifying the extension of the regulation. In this respect, the argumentative process does not seek to determine the semantic content of an interpreted term or expression: the content is taken for granted and the case falls under the antiextension of the interpreted term or expression. Argumentation aims to flesh out whether the purpose of the interpreted legal provision justifies the analogical extension of the regulation beyond the semantic boundaries of language.

[21] In the light of this, the semantic content of a legal provision can be conceived of as the set of inferences the provision is involved in legal argumentation. We have discussed this idea in Canale and Tuzet (2007).

Book ID: 318557_1_En ChapterID: 13 Dispatch Date: 24/04/2014 ProofNo: 1

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

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

To sum up our analysis, the two argumentative games considered in this paper are similar (on interpretive games cf. Chiassoni 1999). First of all, they pursue the same goal: extending a regulation to a case that is not explicitly considered by the law. Moreover, some argumentative constraints are pretty alike. For instance, relevance is a necessary condition for getting the regulation extended in both games. Notwithstanding this, they are not the same game: they display a quite different argumentative path in theory and practice. In order to justify a judicial decision, it is up to the judge to decide what game to engage in, assuming that extensive interpretation comes first and analogical extension is (normally) not allowed in criminal law.[22]

On the basis of these findings, one may claim that analogical reasoning and interpretive extension actually do not have the same upshot. Their outcome is the same in the sense that they justify the extension of a regulation to a case that is not explicitly considered by it. But this is only one part of the story. With extensive interpretation one claims that the case is within the meaning of a legal provision: there is no gap in the law as to the case at hand, and it is so on the basis of a certain reconstruction of legislative intent, the considered legal system, or the goal pursued by the interpreted legal provision. Engaging in this argumentative game commits the interpreter to a systemic picture of the regulation. On the contrary, analogical reasoning assumes that the case is beyond the meaning of the interpreted legal provision: the court faces a gap that has to be filled. And this follows from an alternative systemic picture of the same regulation, a picture where purposes or principles certainly play a significant but different role.[23]

[22] "'Extensive interpretation' may not be distinguishable from 'analogy' in the sphere where the inclusiveness or exclusiveness of a word is uncertain. But where the outer limits of word meaning are exceeded, only 'analogy' can be said to be applicable if the statute is to be extended to conform to its apparent purpose" (Silving 1967, p. 315).

[23] "The decision whether to interpret a statute restrictively or extensively, or the decision whether to explain and distinguish or follow by extending a case-law rule is, as a matter of observation, in

13.6 Conclusions

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

In this case the Court did not provide sufficient elements to justify its decision according to our analysis. The Court claimed that the emission of electromagnetic waves falls within the extended meaning of the expression "dangerous throwing of things". As far as the word "things" is concerned, the Court satisfied its argumentative commitment to extensive interpretation providing suitable reasons. The Court argued that the case of electromagnetic waves falls under the extension of the predicate "things" according to a systemic argument that relies, in turn, on scientific considerations as to the physical nature of waves. The counter argument provided by the defense, according to which the legislature intended the term to be referred only to material things, was not complete, since the defense provided no evidence of this fact. The argument from legislative intention was not properly used, since its premises were lacking: the defense just expressed its own intuition, not unwarranted in itself, about what the 1930 legislature intended to say. As a consequence, the Court was entitled to claim that "things" applies to the electromagnetic waves released by Vatican Radio according to the interpretive standards accepted in the Italian judicial community. These standards, in particular, single out the relevant characteristics of the subject of regulation and thus the conditions of application of the term "things" as to the case at hand.

Conversely, the qualification of waves emission as an act of "throwing" was highly questionable. The Court merely claimed that the standard uses of the term "throwing" cover a number of different actions, so that the content of this term is not vague but general: it does not yield borderline cases being its extension highly inclusive. As a consequence, the emission of electromagnetic waves would clearly fall under the meaning of "throwing", according to the Court, as supported by the poetic use of the term in the thirteenth century.

It has to be noticed, however, that the term "throwing" is not highly general as assumed by the Court. The judges simply mentioned an idiomatic and metaphorical use of the term ("throwing a cry") that is not sufficient to assess its extension in ordinary language. Moreover, the poetic use of the term in the thirteenth century is not an accepted canon of argumentation and statutory construction in Italian adjudication, since it does not single out a semantic standard neither at the time in which the law was enacted (original meaning), nor at the time in which the law is applied (current meaning). Notwithstanding Dante's greatness and his majestic use of the thirteenth century Italian, if even poetic and marginal uses fall within the framework of admissibility (together with ordinary and legally technical uses), one can suspect serious violations of the rule of law or of the principle of legality in criminal law.

part at least based on arguments from legal principles, as that we can't tell whether the case we are faced with is easy or hard until we have reflected on the principles as well as on the prima facie applicable rule or rules" (MacCormick 1978, p. 231).

References

Bobbio, N. 1994. *Contributi ad un dizionario giuridico*. Turin: Giappichelli.

Brewer, S. 1996. Exemplary reasoning: Semantics, pragmatics, and the rational force of legal argument by analogy. *Harvard Law Review* 109:923–1028.

Caiani, L. 1958. Analogia. b) Teoria generale. In *Enciclopedia del diritto,* vol. 2, 348–378. Milan: Giuffrè.

Carcaterra, G. 1988. Analogia. I) Teoria generale. In *Enciclopedia giuridica,* vol. 2, 1–25. Rome: Treccani.

Cardozo, B. N. 1921. *The nature of judicial process*. New Haven: Yale University Press.

Cardozo, B. N. 1924. *The growth of the law*. New Haven: Yale University Press.

Canale, D., and G. Tuzet. 2007. On legal inferentialism. Toward a pragmatics of semantic content in legal interpretation? *Ratio Juris* 20:32–44.

Canale, D., and G. Tuzet. 2009. The a simili argument: An inferentialist setting. *Ratio Juris* 22:499–509.

Chiassoni, P. 1999. Interpretive games: Statutory construction through gricean eyes. In *Analisi e diritto 1999,* eds. P. Comanducci and R. Guastini, 79–99. Turin: Giappichelli.

Dressler, J. 1987. *Understanding criminal law*. New York: Matthew Bender.

Dummett, M. 1975. Wang's paradox. *Synthese* 30:301–324.

Endicott, T. 2000. *Vagueness in law*. Oxford: Oxford University Press.

Fine, K. 1975. Vagueness. Truth and logic. *Synthese* 30:265–300.

Gianformaggio, L. 1997. "Like"—"Equal"—"Similar": Are they to be treated alike? In *Normative systems in legal and moral theory,* eds. E. Garzón Valdés, W. Krawietz, G. H. von Wright, and R. Zimmerling, 251–277. Berlin: Duncker & Humblot.

Golding, M. P. 1980. *Legal reasoning*. New York: Random House.

Grice, P. H. 1989. *Studies in the way of words*. Cambridge: Harvard University Press.

Guarini, M. 2010. Understanding blended multi-source arguments as arguments from partial analogies. *Ratio Juris* 23:65–100.

Haack, S. 2005. On legal pragmatism. *The American Journal of Jurisprudence* 50:71–105.

Hart, H. L. A. 1961. *The concept of law*. 2nd ed. Oxford: Oxford University Press.

Hassemer, W. 1992. Richtiges Recht durch richtiges Sprechen? Zum Analogieverbot im Strafrecht. In *Rechtkultur als Sprachkultur. Zur Forensischen Funktion der Sprachanalyse,* ed. G. Grewendorf, 71–92. Frankfurt a. M.: Suhrkamp.

Holyoak, K. J., and P. Thagard. 1995. *Mental leaps: Analogy in creative thought*. Cambridge: MIT.

Jónsson, O. P. 2009. Vagueness, interpretation and the law. *Legal Theory* 15:193–214.

Kaptein, H. 2005. Legal progress through pragma-dialectics? Prospects beyond analogy and e contrario. *Argumentation* 19:497–507.

Kloosterhuis, H. 2005. Reconstructing complex analogy argumentation in judicial decisions: A pragma-dialectical perspective. *Argumentation* 19:471–483.

MacCormick, N. 1978. *Legal reasoning and legal theory*. Oxford: Clarendon.

MacCormick, N. 1995. Argumentation and interpretation in law. *Argumentation* 9:467–480.

Olivares, G. Q. 1989. *Derecho penal. Parte general*. Madrid: Marcial Pons.

Peczenik, A. 2005. *Scientia Juris. Legal doctrine as knowledge of law and as a source of law*. Dordrecht: Springer.

Poscher, R. 2012. Ambiguity and vagueness in legal interpretation. In *Oxford handbook on language and law,* eds. L. Solan and P. Tiersma, 128–144. Oxford: Oxford University Press.

Posner, R. 2006. Reasoning by analogy. *Cornell Law Review* 91:761–774.

Raffman, D. 1994. Vagueness without paradox. *Philosophical Review* 103:41–74.

Robert, J.-H. 2001. *Droit pénal général*. Paris: Presses Universitaires de France.

Ross, A. 1958. *On law and justice*. London:Stevens & Sons.

Searle, J. R. 1978. Literal meaning. *Erkenntnis* 13:207–224.

Shapiro, S. 2006. *Vagueness in context*. Oxford: Oxford University Press.

Silving, H. 1967. Analogy and extensive interpretation. *Revista Jurídica de la Universidad de Puerto Rico* 36:311–316.

Soames, S. 1999. *Understanding truth*. Oxford: Oxford University Press.
Sunstein, C. 1993. On analogical reasoning. *Harvard Law Review* 106:741–791.
Varzi, A. 2007. Supervaluationism and its logics. *Mind* 116:633–675.
Weinreb, L. L. 2005. *Legal reason. The use of analogy in legal argument*. Cambridge: Cambridge University Press.
Williamson, T. 1994. *Vagueness*. London: Routledge.
Wright, C. 1975. On the coherence of vague predicates. *Synthese* 30:325–364.
Wróblewski, J. 1992. *The judicial application of law,* eds. Z. Bankowski and N. MacCormick. Dordrecht: Kluwer Academic Publishers.

AQ1