Trembling Necessity and Analogy

Juridical reason as judgment by the similar

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DPSP Annual
Volume 1 (2020)

Abstract

Some philosophers say that there is a kind of "trembling necessity", which congregates three patterns of reasoning: universal rules, general patterns of action and singular judgments in ethics. The idea of 'trembling necessity' introduces emotional arguments as relevant to moral judgment.

Keywords

analogy, interpretation, integration, method, Paul Scholten.

Cite as

Penteado, Luciano. Trembling Necessity and Analogy: Juridical reason as judgment by the similar. DPSP Annual, I: Research, Volume 1 (2020), 145-159.

Article Info

Research question · Law and Emotion
Volume 1 (2020)

The eye that you see, is not an eye because you see it; it is an eye because it sees you.(António Machado, Proverbios y cantares).

1. A brief distinction:*iuris creationis* (creating law)*vs. iuris applicatio* (applying law)

Human beings conduct juridical reason. Therefore, this aspect of practical reason is not only accomplished by reason, isolated from other human dimensions such as will and affectivity, which act all together in human acts. In this sense, to decide is a human act permeated by freedom, emotions and by instincts. Considering this complexity of factors, it is necessary to take into attention that some of them are able either to help or to impede finding law, *i.e.* a solution for concrete and specific cases, because these elements can guide or obstruct the task of judgment. Affection, if well educated, facilitates finding the solution, but can also cause terrible difficulties. Even though it is possible to do correct things not being a correct person, a correct person is inclined to act correctly and so, his acts are more frequently and more spontaneously correct.

Juridical decisions, therefore, are not judgments of necessity – necessity derives from *nec essitas* in Latin, which means a thing that cannot be realized in another way. The philological approach sheds light to the notion of mandatory understanding of essence. Legal reasoning is a judgment based on some criteria, so it has some resemblance to necessary conclusions, but it involves a remarkable difference, because those criteria must be adapted and concretized in each situation, by several human structures. Necessity cannot be presented like the reduction of a singular situation to a general rule, in the sense that the reason of law was already given by legal texts, and the case should be just fitted in it, like putting a lamp in its socket, like theorists of mere "subsumption" state. Not only the case will have to be evaluated, but also rules, previous decisions, doctrine, and all law´s sources. In this sense, the idea of juridical system's infallibility must be revised, and, as a result, some tremor in necessity is noted, caused by this adaptive task of interpreting, evaluating the similarities between rules and concrete situations and determining what rules really refer to. In this sense Scholten´s contribution is remarkable: to him, "the rule has to be found", [2] and for this he suggests the alternatives of interpretation, analogy and refinement. [3]

As some Brazilian contributions state for the analysis of the Aristotelian *corpus*, the organization among universal rules, general patterns of action, and singular judgments in ethics could neither be provided by intelligence nor by willingness or affection alone. Nevertheless, the universality, the generality, and the exceptions, have to be organized, and they have proposed, therefore, that the organization should be provided by a "hampered necessity" (Porchat). [4] The words related to this expression in Aristotle´s works are "?? ??? ?? ????", "in most cases." To Zingano, this leads to the situation in which:

> "Universality is always hindered in its core, and from this nuisance a generality results which is always open to exceptions". (trans. lcp) [5]

We use, here, therefore, *trembling necessity* as that which pertains either to the critics of the idea of "subsumption" like a logical syllogism of three propositions, in which the third one is derived from the general one, or to those that defend the idea that juridical reason does not necessarily conduces to the same point in all situations. Therefore, necessity is disturbed by a radical tremor. The reason seems to be that the necessity proposed by general rules is an illusion, inasmuch they are only guidance to solutions, not solutions themselves. In this sense, here, we propose that the study of analogy can show that there is a reverse causality in the relation between rules and cases, specifically in Scholten´s work. This can be clarified by the study of a new contractual structure, proposed some years ago by law and economics' studies: the so-called incomplete contracts, that have to be completed *ex post*.

It is interesting in this respect that some of Occident's important codes had direct influences from legal science. The French Civil Code, for instance, in some chapters, has articles derived directly from Domat and Pothier´s works [6]. In Brazil, our property law, since our first Civil Code, contains rules taken from Laffayete Rodrigues Pereira´s course [7], published in the 19th Century. The notion of contract in art. 1.321 of the Italian Civil Code is greatly influenced by Emilio Betti's general theory of legal affairs. [8] This is just a starting point to show that, even though science is not binding, observing rules and their origins, the traditional distinction between authentic and scientific interpretation does not sustain itself. Besides, rules are made from doctrine in these examples, and doctrine is not commenting about rules. So, there is a creative pattern in law not derived from rules.

2. The creative dimension of interpretation

As law is permeable by morality, the articulation "in most times" is central in juridical reasoning, but this necessity is quavering. Some authors refute this thesis, because they center their analysis in the incidence of rule. To them, judgment is made when a concrete situation is reduced to a general norm that regulates the former hypothetically. Pontes de Miranda, for instance, tells us about incidence as a mechanism by which the rule colorizes the fact, [9] taking the law world to be colored and the facts to be gray. He uses, in his last work, also another strong metaphor: he says the rule postmarks, stamps facts, [10] which presumes that the rule is already made, and that its framework determines *ex ante* the solution for concrete facts. Legal system would be, in this comparison, like a great rubber stamp, whose shape shall determine consequences to real life.

Scholten criticizes this kind of argument, suggesting that the singular judgment is made by a third kind of reasoning, not the one that founds abstract rules, neither the one that defines the concrete case. Therefore, it is possible to maintain that judicial reasoning is not made solely by reason, concepts, and syllogism. It is made by a human potency capable to, specifically, determine possible answers, not only analyzing the similarities between concrete situations and a general rule in order to deduce from the latest the solutions to the former, but also viewing foundations, consequences, similarities to other solved cases, and

so on.

As stated in Savigny´s work, law´s interpretation is learned not by theory but by practice, by observing previous interpretations, as a painter learns how to paint by seeing pictures. It has much more to do with craftsmanship (*techné*) than with knowledge (*episteme*). In his own words:

> Interpretation is an art, and to educate yourself it is necessary to resort to the excellent specimens of ancient and modern times, we own copiously. What until now has been exposed as a theory [referring himself to the methods of interpretation] is rather defective. This failure of the theories proposed so far may be occasional; but it is important not to create illusions about the merit of any theory of this nature, even the great ones. This is because this art – like any other - cannot, be communicated and perceived through rules. We can only, by the study of the best examples, approximate the secret of its excellence; with that, we refine our intellect to what is required for any interpretation, and begin to address our efforts to the real point. That, and how to avoid many possible mistakes is what, like in every other art, we can expect to get from theory. (trans. lcp) [11]

Juridical reason is less rational than positivisms aims for, because this kind of activity is not always the same, it is not *necessary* – it can be done in several ways. To put it in other words, it is governed by a certain contingence of "in most times"; Juridical reason is not a kind of zero or one option. It involves the judging of circumstances in which emotion not only helps to decide, and to choose, the most adequate from several given options, but also provides for some concrete patterns of choice. Aquinas, is this sense, compares emotions to the light received by an object, in accordance to its proximity to the spot. [12] The nearer it is, the more light it receives. A change such as this has nothing to do with intellectual factors, but is a change compelled by circumstances, which modify and are modified by emotions. In this sense, the use of the word *insight* to denote an idea that is well and quickly comprehended, a solution that is glanced by the subject, allows to conclude that there are ideas which do not deal with intellectual process, but with emotional ones.

In order to perceive solutions for concrete cases, therefore, jurists must guide their affection to be aware of the diversity of their senses and of the multiplicity of applicable rules. The construction of a solution is not a consequence of general rules, as a syllogistic statement provided by abstract reasoning, but depends on the intuition of the decision, provided by emotions. The task can be optimized if the person who has to decide gets accustomed to it, not in the sense of becoming indifferent to it, but in the sense that he gets the ability to decide well, a kind of inclination, which is related to emotions prepared to guide intelligence and will in the direction of the most appropriate solution. Analogy, in this task, is essential, because it consists in a relevant affinity, which is more easily detected by emotion than by reason.

This can be observed in other fields of human existence as well, such as music, literature and painting, in which the organization in styles, tendencies and schools is provided by resemblance, not by strict intellectual standards. Similarity is noticed much easier by

emotions than by intelligence and willingness, and to transpose a solution by an analogical way of acting is to decide not with the necessity of a syllogism, but with the trembling necessity of a well-formed structure of affectivity. As pointed out in Betti´s works, it is not situated in the formal reasoning and simple logical approaches of lawyers, but in

> interpretive approaches, in which there is room for their sensitivity to a vibration between legal values, their perception of the interests protected by the law, their clinical and diagnostic eye, and their experience as jurists. (trans. lcp) [13]

Therefore, judging has something to do with seeing and detecting the solution by a precise glance. It is not occasional that the word interpretation is used both to describe finding law and executing musical pieces. In order to play a musical instrument sensitive tasks are more important than intellectual ones, even though both have to come together in the end.

This does not deny the intellectual efforts, neither does it propose a sentimental juridical system. Reason interferes in this task, but not in the sense of applying general rules to concrete situations in order to come to a solution, but in the sense of allowing a case to project the rule that will command it, analyzing several factors and judging them, given their higher or lower proximity. In this sense, interpretation and analogy have a great contribution, and have to be revisited nowadays. As the Ancient stated, *sensus non est inferendus, sed efferendus,* in the precise sense that, in law, the rule comes from the case, bottom-up, some would say, and not top-down from the system, thus taking into account that cases play a role in constructing the legal system internally. As Klein tells us about psychoanalysts: they form the white board where the patients project their life and interior life. [14] This way, it is possible to state that the legal system is made from the cases, and not the opposite. Kelsen [15] and Gèny [16] for example think in the other direction: rules are projected on the board of the case, in order to regulate it in the framework provided by them. Cases do not illuminate the legal system, but are illuminated by norms. We propose the model in which cases are the central point of all legal systems.

As a method for the task of law-finding, interpretation reveals some patterns that should be followed. Betti proposes, in this sense, *four canons of hermeneutics,* two related to the object, two related to subject (the interpreter). [17] Even though this could sound a little too simple, because of the artificial and external distinction between objective and subjective issues, his contribution can offer important guidance in some situations.

The first canon is the so-called *autonomy of the interpretative object.* According to this, there must be a kind of intellectual humility in interpreting, due to which interpreters should consider and respectfully examine the object in its own dimension and singular meaning. Meaning must come directly from the object, as a flower comes from its seeds. [18] It is necessary, first of all, to take into account that something has to be perceived, and that this is external in relation to the interpreter. Besides, that it has its own organizational

structure and meaning that have to be understood, not created. As to say, there is a preliminary activity of recognition.

The second object-related canon consists in taking its totality and coherence in account. This canon prevents fragmentation or divorce between the object and its context. A relevant context is the one that is considered to have been conducive for the existence of that object. [19] All object´s parts are related and articulated in the whole. This canon avoids a fractional interpretation, which has to be avoided, because it would be partial, and therefore would not allow to get the meaning of the objective itself.

The third canon is related to the subject and pertains to his actual knowledge. According to this canon the interpreter must recall the object that has to be interpreted from his experience, by internally reconstructing, all the phases of the process of its generation. In Betti´s example the interpreter has to vibrate in the same frequency as the object. [20]

The fourth one concerns the adequacy of the comprehension. According to it, the interpreter is obliged to refer to himself as an author and to find in this dimension the foundation and meaning of the object. [21]

This method, proposed by Betti, is certainly not generally accepted. It has been deeply criticized by Gadamer, for instance. But it brings some lights to the idea that finding meaning by interpretation is quite a difficult task and that some patterns – or guidelines - have to be established, like dikes for a river, in order to preserve legal rationality, even more so in complex societies.

3. Analogy: relevant resemblance that supplements a significant omission

As previously pointed out, we propose a certain revision of analogy as it is traditionally conceived i.e. as an integrative meta-form. In the last section of this article, we will apply this idea to the field of incomplete contracts´ doctrine. Analogy is one of the ways to supplement incomplete contracts, because it plays the role of an integrative meta-form, due to its ability to manage several ways to complement legal systems.

Traditionally, analogy is studied and used in Brazil – as well as in several other countries – as a method of supplementing positive law, in conformity to art. 4º of the *Introductive Law Ruling Norms of Brazilian Law* (Legislative Decrete n.º 4.657/1942). Analogy is mostly introduced as a way to detect rules to be applied when there is a gap in the legal systems due to the absence of a previous rule concerning a certain matter. Besides, reasoning by the similar can also bring a solution in cases, which are regulated by previous rules, through successive approximation (refinement, *e.g.*). Scholten said about this:

> However it is often the case that the law and even its interpretation […] do not give the answer. One then takes recourse to analogy. [22]

Analogy is however usually invoked to regulate a situation that hasn´t an explicit rule previously written to solve it. By similarities, the significant omission (gap) is fulfilled trough relevant resemblance shown by analogical judgment. So, when there aren´t rules, analogy is used to create law´s solution to concrete cases. When there are rules, interpretation is the main requirement, because analogy, normally is only required in the case of gaps. Here it is important to note that it is one thing to detect meaning, or to interpret, and another thing to fill gaps, when the absence of previous normative criteria gives place to a search for them.. Texts are interpreted, gaps are filled.

However, as real gaps first have to be detected, there is a kind of interpretation which precedes filling gaps. One of the most important means to complement a legal system is therefore, indeed analogy as an integrative meta-form.

It is also common to distinguish in the case of the need to fill gaps between two different forms of analogy: analogy *legis* and analogy *iuris*. This distinction pertains to the different roles of this figure: analogy may be used as a simple supplementary rule or as a way to reach integration in the legal system through a new legal institution. Thus, for example, before the trial of the ADPF n.º 132 by Brazilian Supreme Federal Court (STF) in 5.5.2011 [23], cases involving common law marriage, the ones in which people live together without formal marriage, in case of homosexuality, were solved by analogy with common law marriage between men and women, provided by art. 1723 of Brazilian Civil Code. In other words, a legal analogy was used to be made with a legally regulated institution, namely, heterosexual common law marriage. The difference of gender, male and female, in the written text of the Civil Code and the Federal Constitution was transposed to same sex by analogical integration because of similarity, not- withstanding the obvious gap, and by this homosexual common law marriage was legally recognized. However, after the constitutional claim was judged, the scene has changed substantially.

It is important to remark that in Brazil, differently from several other countries, the social clamor about this issue was not attended by a new act of Legislative Power to integrate the homosexual marriage in the legal system. By the judgment of the specific petition, the Supreme Court created the homosexual union, assuming it as another kind of familiar entity, besides the ones generated by marriage, common law marriage of opposite sex person, and the single parent family (foreseen in art. 226 of our Federal Constitution). The homosexual common law marriage is now not anymore a result of transposing the rules of the heterosexual institution, but of a constitutional judgment that decided that the Civil Code, read according to the Constitution, must be integrated by this new form. Juridical analogy was invoked to compare all familiar figures in order to extract their juridical grounds and see that it could provide a rule to a factual situation not previously contemplated by our juridical system.

Therefore, since the final judgment of this constitutional claim, when it became *res iudicata* , our law was integrated, by juridical analogy, in order to fulfill gaps. As stated in one of

the votes of the judges, the one written by Minister Ricardo Lewandowski,

> it is necessary to clarify that we are not recognizing a ´homoaffective stable union´, as a result of extensive interpretation of art. 226, § 3º [from the Constitution], but a ´stable homoaffective union´, because of an analogical integration process. To put this in other words: by this method, another specimen of familiar entity is unveiled, to be put besides those formed by marriage, stable union either between man and woman or between the parents and their descendants, made explicit in the constitutional text. (trans. lcp)

In this sense, the decision, comparing several kinds of families, created a new juridical model for the factual situation, in *analogia iuris*. We used to have three family patterns, and the fourth was then created by the decision. And it is not guaranteed that in the future more patterns will not appear in law. So, the idea of a complete legal written system is hampered in its necessity, and this tremor unveils that rules provide guidance to solutions only “in most times”.

The difference between analogy *legis* and analogy *iuris* is not merely quantitative, as if in the first case just one legal provision was used for supplementation and in the latter one, two or more, because a legal institution formed by several rules was used. It is not a question of the amount of norms involved. The difference is qualitative, because in the method of analogy *legis* a situation with no previous rule is seen as similar to one with a rule. This resemblance supports then the transposition of the **rule** to the similar situation. In the analogy *iuris* however, cases, norms and decisions are compared in order to establish, from them, the juridical **ground**, the *ratio iuris*. Then, by induction, a new unwritten rule is derived from these elements, which was not given *ex ante* in the legal system. Analogy *legis* and *iuris* are thus two different ways to deal with filling gaps. The new unwritten norm can be used in future situations also. So it is possible to say that there are, in fact, two kinds of analogy, and not only two different ways how to use analogy.

More in general it can be said that analogical reasoning, guided by resemblance (*ad similia procedere*), is a *way of thinking* in the field of law, which has significant and unique characteristics. The analogical reasoning used in the analogy *legis* is very similar to an inference from comparative terms. Given a fact (1), the norm that regulates it in general (2), and another fact, no standard regulating it (3), the first norm should be applied to the second also, on behalf of the analogy between the facts. This is often seen as a deduction directed to the case without a rule, from three already known elements.

However, prior to this deduction, there was the inference of similarity between the cases, which was not present in the existing norm. Disregarding this analysis of resemblance, the reasoning is quite approximate to the method of the rule of three. The method could be so expressed as, "if no rule to one case", “if there is a similar case regulated” and “the rule edited to it”, it is possible to transport this rule to the former. Nevertheless, this is not a good description, as already indicated by Aristotle, [24] because the *ratio* of similitude is the fourth element in the transposition, although mostly not explicit.. Therefore, even *analogia legis*

requires an evaluation of resemblance, which is not guided by formal logic, but by an argumentative pattern, that requires affection and emotion. Therefore – seen from the perspective of the integrative meta-form - an authentic new rule, extracted from known facts and rules, is generated in analogy and this makes it different from an application of general principles of law.

What happens in analogy *iuris* is, primarily, a normative induction. From several cases with their own rules, the interpreter extracts not only the common normativity among them, without expressly valuing its positive sense (this would suffice for analogy legis), but he focuses on the level of the fundamentals of that particular regulation, the *legis causæ*. Therefore – seen from the perspective of the integrative meta-form of analogy - , there is an authentically creative legal task in the induction, which is indicated by the adjective ' *amplifying*' [25], because it is not merely an abstraction of the common similarity, but a formulation of the common *ratio iuris*.

Not only legal regulation has gaps, but also some legal transactions, contracts, marriages or testaments. It is not possible to define, *ex ante*, provisions for every situation that might occur during private affairs. In contracts, sometimes, the text is not enough to regulate all that can occur between contractors, and legislation does not have all the solutions for all these situations. There are two levels of the task of filling gaps here, because there are two levels of gaps: the normative and the bargaining ones. The bargaining gap, when detected, conduces to the question concerning how to determine the form of integrating incomplete contracts with analogy: analogy to what?

This can occur in several ways: contractual arrangement previously may have adopted the duty to renegotiate, may have elaborated arbitration or may be silent. When the gap is twofold: concerning legal transaction and the law, several methods can be used for completion. Some examples are references to usages, the market, good-faith, and so on. However, we believe that it is necessary to organize them, and in this task, analogy is central.

To outline a possible method of analogical integration in case of incomplete contracts, therefore, it is necessary to use the abstract notion of analogy as a way of integrating legal system and to see it as an appropriate and reasonable method to harmonize private acts and legislation. For this, it is important to understand analogy as a specific kind of thinking, a way of reasoning in the field of law. [26] It is a science of proportion, whereas among the four terms of analogical reasoning (*inter quatuor*) there is a unity of two by two: the regulated situation and its rule, the non-regulated one and the evaluation of resemblance. Altogether, these four elements realize a process in which law is really created.

Thus, there is a peculiar *via rationalis inquirendi* regarding analogy, as well as a *via rationalis operandi* at the time of application of analogical reasoning. Indeed, the process of law realization is always made feasible by approximations, even when the fact is clearly described in a rule. It presumes the previous determination of all possible circumstances

that could lead to possible deviations from the rule, and this all means a continuous judging by similarity. As Pinto Bronze states:

> all judgmental-operative realization of law postulate, in essence a ... properly understood analogy iuris.(trans. lcp) [27]

When one says *in claris cessat interpretatio* – interpretation stops in clarity – , in the sense that there could be immediate subsumption, because of the literalness of the sentence, in fact one is not attentive to the fact that this conclusion is clearly reached by interpreting the object, which is done by analogical approaches. The clarity, even in the field of law, is not a starting point; it is not given by the rule, but is a point of arrival that succeeds interpretation. It is necessary to read and complete, by interpretation, the axiological-normative sense of the precept itself in all situations, even in the most obvious one. It is known today, however, that despite the possibility and necessity of objective standards of interpretation, interpretative thinking develops as a circular in a spiral, between object and subject: the plain meaning has to be conquered, it is not given *ex ante*.

In this sense, analogy plays a fundamental role in the method of capturing the sense of rules, suggested by Pinto Bronze and termed by him as methodonomology (a word composed from the radicals method and norm),. Savigny, considered one of the great founders of the modern science of interpretation in law, emphasizes the fundamental role of paradigms, as stated in his first quotation at this text:

> Interpretation is an art, and to educate yourself it is necessary to resort to the excellent specimens of ancient and modern times, we own copiously. (trans. lcp) [28]

Pinto Bronze reputes analogy as the "decisive methodonomological operator" [29], as to say, the most important tool in interpreting and applying law.

Not only the rule of subsumption, but also the application of legal system itself, involves an analogical form of reasoning. In the cases of the interpretation of contracts, the reasoning walks alternately along the concrete terms of the contracts and the abstract dimension of law, and searches for similarities and dissimilarities. As Pinto Bronze further states, in the same work:

> all [methods of applying and integrating law] are re(con)ductible, irreducibly, to analogy, because all of them (from a normative-legal principle to a legal norm) postulate the determination of their legal and problematic intentionality, which should be judged by comparing it to the juridical and problematical merit of the case, thus detecting a similarity or difference that comprises (more or less immediately) the approximation between the problem to solve and the juridical operator to be used in this task. (trans. lcp) [30]

The author reaches to the extreme of asserting that:

> every analogy is, after all, authentic ... juridical analogy. (trans. lcp) [31]

However, this broad sense of analogy is not the analogy used as a method of fulfilling gaps, but as a kind of legal reasoning. Analogy as integrative method for incomplete contractual gaps presupposes analogy in the sense of the integrative meta-form, which makes it possible to select the couple that can serve for the comparison needed to find the rules applicable in the concrete situation, given the incompleteness. Once such a pair is found (concrete fact and rule), and is added to the fact that has no rule, one can find the precept for the situation that required legal solution.

The basis for the traditional conception of analogy is the universality and unity of the law, especially positive law. It is the presumption that supposes that the law is coherent and that analogy works to reach this goal. In the field of the theory of incomplete contracts, however,, there seems to be no reason to invoke the same argument as in legal system theory, because at negotiation level, universality is not a necessity. Empirical observation proofs that incomplete contracts exists and are implemented, even though not being a universally regulating structure and a unitary text. So, if analogy is taken in conformance to the former use of analogy (the one that fullfils gaps in a coherent whole), it would certainly sound peculiar here. Analogy in the field of incomplete contracts is founded on the need for harmony and balance as conceived in practical rationality, and not on the totality or consistency of the legal system.

4. Analogy as transposition in legal systems and in incomplete contracts

Analogy has gained importance by the use of precedents of predominant case law in several countries, mainly in Brazil, due to the amount of complaints to be decided and the necessity to reach to a final point in reasonable time. Innumerable are the judgments of superior courts in Brazil with analogical applications of precedent case law in situations not expressly formulated in the summarized jurisprudential propositions, already stated as precedents. In Brazil, superior courts can formulate briefs that condense orientations to future cases in how to decide. This briefs are not legal norms, neither the precedents itself, because they lack the necessary degree of abstraction. But the interesting point is that they are being transposed analogically to situations, which are obviously different in kind and for which they were not conceived. In tax matters, for example, Superior Federal Court extended the application of Brief of Prevalent Decisions n.º 411 by analogy to situations not expressly set forth in its decision. This brief states: “Monetary restatement to the crediting of the Tax on Industrialized Products is due when there is opposition to its recovery caused by an illegitimate resistance of the Treasury”. Sometimes, this brief was analogically used to other tax species. [32]

The point here is that analogy implies transposition of factors, which means a movement of normative orientation, from one case to other. At another occasion, our Superior Court decided an important topic concerning Labor Law [33]. Our Brazilian system has a has a Guarantee Fund for Time of Service, the so called FGTS, composed by contributions that employers have to consign to each employee and that can be used by the latter for one of the reasons which are listed in art. 20 of Law n.º 8,036/1990, such as purchasing the housing property. The court has understood that this list is exemplary solely, and not exhaustive. This means that the court integrated the legal system by the use of analogy.

As a consequence of this decision, the chances of withdrawing the fund by the employee were extended to other situations of need, besides the ones provided in legal text. The Court has also integrated law by amplifying the right of the use of the fund for situations not comprised in the norm. Such is the example of the judgment which authorizes fund raising for the reform of a property not funded by the Housing Finance System, a situation not described in the mentioned norm. In a rapporteur´s vote, one can read about the new role of the dynamic interaction between interpretation and integration:

> For a long time, the maxim in claris cessat interpretatio has been losing ground in legal hermeneutics, and has been yielding to the need to interpret any right from the viewpoint of an effective protection of legal interests, even though no factual situation has been provided specifically by the legislature. (trans. lcp)

According to this decision, reforms were made in a house belonging to the plaintiffs. The essential nature of maintaining a dignified and livable housing, even though not provided by law as a possibility, *ex ante* , was understood by Court as part of the law by invoking principles such as the right to housing and human dignity. Legal reasoning in this judgment was made by analogy, because it concluded from a similarity between the legislated conditions (unemployment, purchasing of a first housing property and other ones provided by the mentioned text), which were geared to provide a sort of safety and minimum stability to the worker, and this unregulated event, not listed in the norm, because it was assumed to be oriented at the same juridical goals.

Although the case of the FGTS can be conceived as a consequence of the incompleteness of legal planning, it can also be studied as an integration by analogy of the employment contract, that is a typical incomplete one. It is part of the factual background of such a contract to support employees with the help of the fund in several situations, that, before this decisions and similar ones, seemed to be regulated. The effects of labor relationships, although strongly regulated by the legal system, are not – and cannot be - exhaustively regulated. They can be extended when the interpreter and applier integrates this incomplete contract, and by this extends the possibilities of using the fund generated by it. To reach this aim, different techniques can be used, and one of them is analogy.

It should be noted that, by using analogical reasoning in contracts, the applier creates a

rule for the case, which before this act was not present in the system. Creation, in its strict sense, presupposes an act *ex nihilo* (out of nothing) and, therefore, a non-being stated before the legal act of analogical interpretation. As Scholten says, at this point:

> analogical application is application, but at the same time it is creation of something new. [34]

Savigny, who distinguished the interpretation by analogy in cases of the absence of a particular institution from the ones made to complete particular gaps in institutions already ruled, said, that in the first case, it is necessary for the interpreter:

to create an institution in harmony with the existing law. (trans. lcp)[35]

Analogy, this transposition of rules to areas for which they have not been formulated, is founded, in itself and ultimately, in the legal principle of isonomy (likeness) [36], although this ground is clearly remote. The classic adage of hermeneutics, which authorizes the *a pari* argument (argument according to sameness), says: *ubi eadem ratio, ibi eadem dispositio* (whereever there is sameness of relationship, there will be the same settlement). This is the reason that supports the use of analogy. But analogy, when invoked, creates new law for situations not previously regulated by the legal system or by contractual terms (this is the field in which the instrument can be used according to the incomplete contracts theory).

Analogy involves a higher or lower approximation, and, therefore, it is a judgment of probability. Thus, it is "essentially contingent" [37]. Philosophically, it consists in a similarity between relations. Some authors consider it as an imperfect induction, other as an amplifying induction. Precisely because of its elastic and flexible nature, analogy requires very serious activity in order to be properly employed. It can be used not only to complement laws or legal transactions, but also in the opposite direction, as a method of removing the effect of a rule, differentiating figures and institutes taken by some as similar.

In the latter sense, Brazil´s Superior Federal Court dismissed the analogue transposition of the periods from statute of limitations from regulated situations to not regulated ones, based on the existence of significant dissimilarity. The deadlines for the revocation of a bankruptcy or of a litigation started by the creditors of a defraude were not to be used in situations involving requests to disregard the status of legal entity because of insolvency, in order to make the members of a society liable. [38] As the aim of a revocation, in both cases, is to protect credits from being violated by fraudulent acts, while disregard of legal entity is based on objective factors that do not allow to maintain patrimonial separation carried out by a corporation, the transposition should not be made. The judge of this suit decided that the transposition is not allowed and concluded that because the law provided no period for revocation, the claim for lifting the corporate veil can always be invoked, which is equivalent to saying that this request is everlasting.

The Supreme Court has followed this conclusion, stating:

> analogy means to give a provision for a case by bringing an unforseen event into the law that is similar according to the Court in view of the existence of an essential element of identity. This forms the very reason for deciding. It is the teleological element which the legislator had in mind when he established the rule. (trans. lcp) [39]

By this the reason has been explicated which supports and justifies analogical implementation, in order to reach a more general level of legal reasoning. It is similarity, which is not the same as equality, because it depends on judgments that are more complex. This complexity is also noticed in other techniques, such as the use of *topoi*, standards, general clauses, principles and so on. Despite the specificity of each technique, in some cases analogy has a strong and deep relationship with general clauses. Analogy, as integration technique, is guided by the pursuit of the similar, maybe this is its differential feature. General clauses are norms writen in a vague way, usually describing values, which also allow for a more flexible reasoning in law.

In the field of incomplete contracts, both are applicable, since integration of these affairs isn´t the same as the integration of legal systems, but pertains to particular business transactions. Therefore, criteria are less stringent than the ones used in integrating norms [40]. In legal transactions, mainly in contracts, the freedom of contract allows that incompleteness can be fulfilled according to a more flexible pattern.

It is clearer, at his point, that analogy has to do with the vision of law one has. It is not by accident that Scholten often uses the term *finding law*, in the sense that previously *it was hidden*, and then, the interpreter discovered it. It is necessary to watch and to see law in order to apply it. Frequently, students are taught that learning law is learning normative texts, and their vision, therefore, becomes vitiated in some way. To face law´s challenge, it is necessary to educate sight in order to find solutions to the cases. Writing about incomplete contracts, and dealing with the necessity of a pattern of rationality to understand this structure, Jean Tirole, Nobel Prize of Economy in 2014, uses the expression “eye-opener” to describe situations in which an information can be undetected by one of the parties and can become revealed to him later on by the other party. [41] After the revealing is done, some point that made the relationship difficult is facilitated, because now it is possible to see something that was hidden.

5. Conclusion

When there is a gap, the solution provided by law is hidden, and analogy has to create it. After that, the solution can be seen in order to be applied correctly. It is possible to state that analogy is an “eye-opener” shedding light to legal systems, after creation. It is not only a matter of finding, but also of creating instruments of interpretation and integration. Invoked, analogy opens the eyes of the interpreter to the exact sense of the law to be

applied, which wasn´t detectable previously, by using only the legal system. Concrete cases require discovering the finalities of a certain regulation by law. Analogy is the way to reach them, since it leads to the grounds in which law is founded. Therefore, the so-called idea of a syllogism in which the legal solutions are derived from general rules and then applied to specific situations. must be revised. Once this is clear, the situation is one of a reverse causality. The concrete situations are the factor that support rules, not the opposite.

Scholten adverts that the ideal judge is not the one that is a kind of scholar, neither an enlightened person. He points out that his task has more to do with *wisdom*, and, therefore, other virtues instead of great intelligence, or even of a sense of justice. As he says:

> Wise is the judge who has both understanding and is empowered to act, who knows and can, who subordinates his knowledge to his acts. [42]

This articulation requires the ability to decide not always the same, but always in the correct sense; it means an open system of sources, that can be used “in most times”. This provides a necessity that is hampered by gaps, besides other factors. Trembling necessity isn´t unsafe, once it organizes flexible solutions that open the eyes to similarities that are not previously given, but can be reached by practical reason.

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[1] Luciano de Camargo Penteado died unexpectantly in hospital from an infection in September 2015. There were only a few very small editing decisions left. This is the reason that the paper is not reviewed.

[2] *General Method of Private Law*, block 29.

[3] Ibid.

[4] Zingano, "Lei moral e escolha singular na ética aristotélica." Footnote 2.

[5] Ibid., 327.

[6] Domat and Pothier influenced particularly the French doctrine of cause, used several times in French Civil Code until nowadays, such as in article 1.108, which requires, to

validity of conventions, a lawful cause of obligation. In their works. Consult either Domat, *Les loix civiles dans leur ordre naturel: le droit public, et legum deletus.*, T. 1.:27–28. or Pothier, "Traité des obligations", 107.

[7] First published in 1877, Lafayettes´s course on property law influenced our first Civil Code, published in 1916 (Law n.º 3.071/1916). One of its influences in the way of disposing property can be noticed in art. 527, about the presumption of unlimitedness and exclusivity explained by Pereira, *Direito das coisas*, 99. It is important to stress that the rule can still be found in the Brazilian Civil Code from 2002, art. 1.231.

[8] Betti, *Teoria generale della interpretazione.*, t. I.:92.

[9] Pontes de Miranda, *Tratado de direito privado*, t. I, 65.

[10] Pontes de Miranda, *Tratado das Ações*, t. I, 4.

[11] Savigny, *Sistema del diritto romano attuale.* 219.

[12] "In things relating to perfection the case is the opposite, in comparison to things that pertain to defect. Because in things relating to perfection, intensity is in proportion to the approach to one first principle; to which the nearer a thing approaches, the more intense it is. Thus the intensity of a thing possessed of light depends on its approach to something endowed with light in a supreme degree, to which the nearer a thing approaches the more light it possesses. But in things that relate to defect, intensity depends, not on approach to something supreme, but in receding from that which is perfect; because therein consists the very notion of privation and defect." Aquinas, *Somme théologique [Summa Theologiae]*, T.3.:I–II, q. 22, a.2, sed contra 1.

[13] Betti, *Interpretazione della legge e degli atti giuridici. Teoria generale e dogmatica.*, 134.

[14] Petri, "Leitura Psicanalítica do Desenvolvimento e suas Implicações para o Tratamento de Crianças", 26. The author states the distinction between Klein and Anne Freud in dealing with children using this term, used by the former and criticized by the latest.

[15] Kelsen, *Teoria pura do direito*, 388.

[16] Gény, *Science et technique en droit privé positif?: nouvelle contribution à la critique de la méthode juridique.*, passim.

[17] Betti, *Teoria generale della interpretazione.*, t. I.:304 ff.

[18] Ibid., t. I.:305.

[19] Ibid., t. I.:305–306.

[20] Ibid., t. I.:314–317.

[21] Ibid., t. I.:317–321.

[22] *General Method of Private Law*, block 21.

[23] ADPF is the abbreviation of a Brazilian expression used to nominate a constitutional claim used when a normative act or a law made before the Constitution (1988), violate its precepts. It is named "Petition for Fundamental Precept" and has the sense of concentrated constitutional control.

[24] "See the example used by Aristotle in the Nicomachean Ethics, to explain how money is used to equate the value of two different goods that will be exchanged. This kind of proportion is termed geometrical by him; for a geometrical proportion is one in which the sum of the first and third terms will bear the same ratio to the sum of the second and fourth as one term of either pair bears to the other term" Aristotle, "EN", 1131b13–1133b19.

[25] Ferraz Júnior, *Introdução ao estudo do direito técnica, decisão, dominação*, 278.

[26] Pinto Bronze, "O problema da analogia iuris (algumas notas)", 149.

[27] Ibid., 159.

[28] Savigny, *Sistema del diritto romano attuale.*, 219.

[29] Pinto Bronze, "O problema da analogia iuris (algumas notas)", 160. In similar sense, Bobbio says that analogy is the most important legal interpretative proceeding, which is historically verified, either in Roman law or at Middle Age. Bobbio, *La Teoria generale del diritto*, 266.

[30] Pinto Bronze, "O problema da analogia iuris (algumas notas)", 161.

[31] Ibid., 162.

[32] *V.* STJ, REsp. nº 1.307.515-SC, rel. Min. Mauro Campbell Marques, j. 2.10.2012, v.u..

[33] Cfr. REsp. nº 1.251.566-SC, rel. Min. Mauro Campbell Marques, j. 7.6.2011, v.u., referring to all precedents in this subject.

[34] *General Method of Private Law*, block 298.

[35] Savigny, *Sistema del diritto romano attuale.*, 130.. On the other hand, v. Maximiliano, *Hermenêutica e aplicação do direito*, 174., which refutes the creation of new law, defending only the act of finding preexisting law. In the sense of the text, at least because it admits that analogy involves creation of law, v. Bobbio, *La Teoria generale del diritto*, 269.Bobbio, *Teoria generale del diritto*, 269.

[36] Exactly in this sense, Maximiliano, *Hermenêutica e aplicação do direito*, 171.

[37] In the same sense cfr. Ibid., 169.

[38] STJ, Resp. nº 1.180.191-RJ, rel. Min. Luis Felipe Salomão, j. 5.4.2011, v.u.. See also

REsp. nº 1.180.714-RJ, rel. Min. Luis Felipe Salomão, j. 5.4.2011, v.u..

[39] STJ, Resp. nº 535.438-SP, Rel. Min. Nancy Andrighi, j. 20.5.2004, v.u.. Quotation taken from the vote of Min. Castro Filho.

[40] Bobbio also states the requirement of a relevant resemblance in order to allow analogy to be used, associated to the notion of enough reason Bobbio, *La Teoria generale del diritto* , 267.(See the work of Pinto Bronze for recognition of the fact that analogy involves similarity, and, therefore, also difference (otherwise there should be identity) Pinto Bronze, "A metodonomologia entre a semelhança e a diferença?: reflexão problematizante dos pólos da radical matriz analógica do discurso jurídico", 593.

[41] Tirole, "Cognition and Incomplete Contracts", 266.

[42] *General Method of Private Law*, block 528.

Acknowledgements

This article is presented at the second Symposium in honor of Paul Scholten