What Should Be Created When the New Factual Combination Comes Out?

--Analogy or Distinction based on math-logic, wild-politics, or tearing morality?--

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1 Traditional Notion of "Analogy" and "Distinction"

When lawyers of common law countries[2] refer to the legal techniques of analogy and distinction, they come to think of fairly popular idea about the legal method primarily educated at their first year law school curricula, namely, legal research and writing course, thereby they acquire basic technique called analogy and distinction as to comparison of different sets of facts in each cases. Therefore, author of this paper treats, as there is no reason to disobey traditional notion or thinking inertia the Anglo-American lawyers have accustomed to live upon, analogy and distinction as method of comparing facts.

Suppose that we face one new case to resolve, and then further suppose that we have had Case 1 below as past precedent that might be "relevant"[3] because almost all legal systems

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[2] Lawyers from Civil Law countries such as Germany and Japan are observed by the author of this paper that they have lighter stress on facts than rules themselves. They are more skillful in "manipulating rules" than "making-up (reorganizing) facts".

[3] The Author of this abstract paper agrees that how to find out relevant cases or even how to define relevancy are fundamental question to say before going into analysis of analogy and distinction. However, the author wants to show abstract structure of the paper as short as possible, the questions were not answered here.

usually allow lawyers to seek some reference even out of their intuition to the cases in the past. Relevancy of the Case 1 with our New Case is usually made, in the understanding of the author of this paper, out of intuitive legal sense or some other humane process of recognizing the world such as politics, economics and morality.

Suppose Case 1 has within itself a combination of Fact 1, Issue 1, Rule 1, Application 1(Analysis) and Conclusion1.

Case 1 (precedent)

Fact 1

Issue 1

Rule 1

Application 1(Analysis1)

Conclusion 1

Then assume our New Case carries within itself a combination of Fact N that is "not exactly the same " as with Case 1, but brings onto the slots of Issue, Rule, Application, and Conclusion the same others as Issue 1, Rule 1, Application 1(Analysis) and Conclusion 1 as in Case 1.

New Case (to be resolved)

Fact N

Issue 1

Rule 1

Application 1 (Analysis)

Conclusion 1

When the lawyer is asked to resolve the New Case, she would go first to Case 1, then compare the Fact N with Fact 1, then decides in two ways.

1) Fact N is "different"; therefore, no way of going to Conclusion1.
   This is usually called "distinction".
2) Fact N is "similar or same", therefore, analogy is possible and we can go to Conclusion1.
   This is usually called "analogy".

2 New Factual Combination

Suppose Fact1 is composed of factors of f-1, f-2, f-3…f-10.

Fact1 = Σf-n (n starts at 1 to 10)

Then, suppose Fact N is composed of factors of f-1, f-2, f-3…f-11

Fact N = Σf-n (n starts at 1 to 11)

Problem we are facing now is whether Fact N is the same or different from Fact 1.

If we think out of any kind of thinking power that because f-11 is neglectable in order to go to

the Conclusion[4] 1 we are aiming at, then we would make "analogy" as legal reasoning and treat Fact N as if Fact 1 then go through almost the same Analysis 1 where the reason why f-11 is neglectable is added, then finally reach to the Conclusion 1.

On the contrary, there is a possibility that we think out upon some other reasons – for example, because we did not eat egg at breakfast - that f-11 is not neglectable in order to go to the Conclusion 1 we are aiming at. Here we are making "distinction" as a way of legal reasoning and treat Fact N as totally different with Fact 1, then giving up process as with Analysis 1 but only saying the reason why f-11 makes whole analysis totally different. We say then Fact N does not reach to the Conclusion 1.

3 Facts as Absolute Substance or Mere Linguistic Recognition

Under above analysis of Fact1 and Fact N, the author of this paper assumes without explanation that factual situation could be cut into the same small pieces with the same meaning then could be constructed into one story with the same meaning. This is a reflection of one specific way of observing the world most of the lawyers believe. "We lawyers go back to grasp "truth" rather than "make-up of the facts" Hearsay rule in evidence law, for example, obviously is thought that the rules exist because there are always possible for witness on stand to twist the original sayings of the person who spoke to the witness and there is always true sayings by original person.

Here the author, relying on commonsense of the ordinary citizen as evidence law shows, assumes that behind the meaning that each "fact" is supposed to carry, we can find out a real substantive element of happenings. For example, if Fact1 contains the fact that the plaintiff was "forced to jump into the cut" the coal strip-mining operation made, then we as ordinary intellectuals assume that the deed of jumping and the deformed shape of ground were really "existed". We can out of our experience think that we touch the soil of the cut or trench the operation made and that through a photo coincidentally taken by a bystander we saw the plaintiff pushed to jump, and that we think the incident is "real".

However, are the facts genuinely "real substance"? Rather, are those creatures of our subjective recognition and variable phenomena depending upon the garden variety of eyesights of observers for recognition? Those questions as all knows belong to one of the fundamentals of philosophy closely related to "linguistic turn". We need to talk them in detail later.

4 What should be "Created" – through math-logic, wild-politics, or tearing morality?

[4] Even before starting the analysis, the targeted conclusion should be kept in mind in very lawyer's intellectual process because conclusion is one of important factors to think about "relevancy" of the comparing cases.

The author of this paper think that distinction or analogy with two sets of facts, that is, Fact1 and Fact N would be dependable upon very shaky database such as the quasi math-logic, wild-politics, or tearing-morality and others that each interpretator have in her mindset. Therefore, forecasting the conclusion of a new case would be the same as forecasting the next intellectual behavior the person who has the authority to interpret the case – they are usually judges -.

Therefore, creativity, if any, would be here to be found out.

Issues here are then,

1) Whose creativity?
3) Is a mere difference with previous organization of "facts" (i.e. subjective recognition) called creativity?
4) Is there any possibility that interpretator of "facts" make up "facts"? And is the making-up fruit of creativity?

The author of this position paper would not be bold enough to say something definite on those issues but promise to keep thinking, although Some tentative ideas were disclosed at a conference at Meijigakuin School of Law, August 4,2003.