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## Research Paper

# The Role and Status of Analogy in the History of Legal Systems; with an Emphasis on the Practice of International Arbitration Tribunals

**Heidar Piri**[1]

1. Assistant Professor of Public Internatioanl Law, Department of Law, Faculty of Humanities and Socail Sciences, University of Kurdistan, Sanandaj, Iran.

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## Abstract

Argument is the life of law. In order to prove a legal issue, the science of law goes through the tortuous path of judicial reasoning to prove the legal fact of a civil or criminal case. The traditional concepts of legal reasoning and the process of inferring legal rules in international law, in addition to the traditional basic forms of logic, are based on analogical reasoning. Analogy as one of the common methods of reasoning in international legal system is not limited to the decisions of international courts, but it can be stated that the judicial decisions is only an important instance of the functions of analogical reasoning. Otherwise, this type of reasoning plays significant role in different and wide range of law particularly in the awards of international arbitration tribunals. International arbitral tribunals have been widely used analogy and legal transplant by referring to the jurisprudence of domestic courts on the one hand and to the former decisions or awards of arbitral tribunals and other international courts on the other. The analysis of the awards of arbitration tribunals shows that analogy is one of the effective methods for filling gaps and silences of law, eliminating the ambiguity and brevity of the rules and development in this field of international law. Arbitrators often explain the driving force of analogy based on justice and fairness and the idea of like cases should be treated alike or establishing the uniformity and coherence of the system. This paper, while considering the jurisprudential-legal aspects of the concept of analogy and the ground of its formation and historical background in the Islamic legal system and other legal systems, by using the descriptive-analytical method is focused on analyzing the role of analogy in the awards of international arbitration tribunals.

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**Corresponding author:**
**Address:** Assistant professor, Department of Law, Faculty of Humanities, University of Ayatollah Boroujerdi , Boroujerd, Iran.
**Tell:** +98 9120745703
**Email:** heidar.piri@gmail.com

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## Extended Abstract

### 1- Introduction

Law and Jurisprudence rely on certain logical and rational methods and include certain forms of reasoning in order to achieve their goals and scientific results. Among them, deductive, inductive and analogical reasoning have a significant place. However, analogy plays a vital role not only in deciding cases but also to discover legal rules in all legal systems and even the international law system.

Undoubtedly, in the international law, due to ambiguity of rules and non-liquet, and also the lack of a density of similar rules to regulate emerging events, unlike modern domestic legal systems, the importance of resorting to analogy is twofold.[1] Meanwhile, analogy can be used as an effective tool in identifying legal rules and general principles. This will normally happen in the jurisprudence of international courts and arbitral.

The most auspicious type of analogical reasoning in international law have been used in international jurisprudence and arbitration in which where a judge or arbitrator makes a decision based on the similarities and differences between the case at hand and the previous case whose ruling has been determined. Although, the judicial and arbitral tribunals have been silent about direct reference to the term analogy in its methodology, but one can say that analogy is not only a method of reasoning, but also is the focus of many legal analyses in the practice of that tribunals. When judges and arbitrators are faced with difficult cases (the results and consequences of which are unclear due to divergent interpretations), non liquet, ambiguous rules and obscurity of the law, analogy is particularly important and useful. Analysis of arbitral awards regarding analogy helps us to understand the nature and functions of this kind of legal reasoning. The correct understanding of the various applications of analogy in international law sheds light on the darkness of the concept and can have important consequences for the international legal order as well. Therefore, the most important question that is raised is whether arbitral tribunals have the authority to resort to analogies in case of non liquet or silence of law by judicial borrowing? Assuming a positive answer, another question is that to what extent they used analogies in their final decisions? Finally, what is the position of analogy in the process of development and evolution of the procedure of arbitral tribunal?

In order to answer these questions, in this article, first we will try to clarify the terminological concept of analogy in jurisprudence and law in order to eliminate the common mistakes in explaining legal analogies. Second, in order to better understanding of the historical origins of analogy, we look to different legal systems especially international law by reference to the jurisprudence of international arbitral awards. Finally, the teachings of arbitral tribunals regarding analogical reasoning are discussed.

### 2- Method

The article has been performed based on the descriptive-analytical research method. The necessary data has been collected by library method. Following that, relevant data from legal and jurisprudence doctrine, academic commentaries and international arbitral awards are collected and analyzed from various perspectives adopting scientific evidence in order to answer the research question. Finally, the findings are discussed.

### 3- Results

This article shows that in the legal reasoning of arbitral tribunals, analogy is cited both as the starting point of legal

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reasoning and as a fundamental element of decision making. Arbitral tribunals achieve this by referring to judicial procedure as an analogical argument, i.e., a general argument based on which like cases should be treated.

The author also believes that analogical reasoning has played a pivotal role in international arbitration. In this area, analogy has been used in a wide range of subject matters. Arbitration tribunals in clarifying the meanings of treaty texts and detecting the content and scope of the rule, among other things, turn to domestic law analogies, whenever they deem necessary and appropriate. Therefore, it is quite natural that domestic law analogies have been widely used in arbitral decisions.

By considering the arbitral awards discussed in the paper, it becomes clear that the parties to an international dispute, and what is important, a significant number of arbitration tribunals have no doubt in applying the analogy between the state and individuals and using domestic rules, concepts and arguments.

## 4- Conclusion

Certainly, there is a general consensus that international law system in full of legal gaps and non-liquet; but the wide difference of opinion is about the competence of international judges and arbitrators in filling gaps and avoiding non-liquet by various principles or techniques. But in practice, what is clear is that in the judgments of the arbitral tribunals, analogical reasoning as a useful technique has been widely used to fill the gaps between the facts of the case at hand and the rule (treaty). In other words, analogy is used to apply general legal rules to cases that are not directly included in the classification of rules. Of course, the international judge or arbitrator rarely admits that he/she has resolved the silence of the law by legal analogies. In the way of making general rules, if the discovery of the reasons and philosophy of the legislator’s intention is determined by analogy, it becomes possible to generalize the verdicts of one case to similar cases and material unity can be replaced with formal plurality. This is exactly where the similarity of the subjects leads to the unity of the judgments and the formal non-liquet in the legal system are filled. The necessity of applying such analogies can be explained based on the similarity of related legal relations and essentials of international relations.

In order to implement legal analogies, it is necessary not only to appoint judges and arbitrators from different countries with different legal systems, but also to apply general principles of law accepted by civilized nations based on article 38 of the international court of justice. Finally, despite the fact that international arbitral tribunals have repeatedly resorted to the related procedural rules and law of evidence in domestic law (e.g. jurisdiction to determine jurisdiction), but we should bear in mind that excessive resort to these analogies seems somewhat vague and complicated, because one can say that international arbitration may take the place of normal judicial proceedings in domestic law.

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## 7- Conflict of Interest

Authors declared no conflict of interest

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