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IN EVROPSKE ŠTUDIJE

International Conference on Legal Argumentation, Nova Gorica, 15 – 16 October 2009

prof. dr. Marko Novak (ed.)

Introduction

In the past few decades the issues of legal argumentation and legal interpretation have become a very important field of research for lawyers and legal theorists and for other disciplines, especially philosophy. This was one reason the European Faculty of Law in Nova Gorica, Slovenia, and particularly its Legal Theory Department, with their shared interest in legal argumentation, organised a two-day international conference in Nova Gorica on 15 and 16 October 2009. The conference brought together legal theorists and other scholars from different Central European countries interested in the subject.

The conference was attended by Guenther Kreuzbauer from Salzburg University, Giovanni Tuzet from the Bocconi University in Milan, Ivan Padjen from Rijeka University, Marko Petrak and Luka Burazin from Zagreb University, as well as Vojko Strahovnik, Matej Avbelj, Jernej Letnar Čerňič and Marko Novak, all from the European Faculty of Law in Nova Gorica.

Guenther Kreuzbauer's paper is entitled "Rationality of Jurisprudence: A comparison of the legal approach to rationality with alternative "rationality producing technologies". There he claims that rationality has always been one of the central topics of philosophy and science. Today it is a core concept of modernity. Whenever rationality is a stake, four things are required: (1) a definition of the concept of rationality; (2) a criterion indicating whether a phenomenon is rational or not; (3) a procedure for the examination of rationality; and (4) a technology for the production of rational phenomena, i.e. a "rationality producing technology [RPT]". According to Kreuzbauer, in the context of the history of philosophy and science three dominant classical RPTs have developed:

Euclidean RPT, dialectic RPT and topical RPT. Euclidian RPT is formal and constructive, which means that rationality is to be produced by assembling cognitive units through the proper use of formal construction rules. Dialectic RPT is discursive and teleological because here the construction is free, and what counts is the goal of exploring or constructing truth in combination with a discursive evaluation of alternative attempts to do so. Finally, topical RPT is informal and constructive because here rationality should be produced with the proper application of informal construction rules, the *topoi*. Krezubauer further emphasised that today scientific RPT – basically a mixture of elements of Euclidian and dialectic RPTs – dominates. Nevertheless, there is a serious contender, i.e. modern legal RPT. This idea was first elaborated by Giambattista Vico in the 18th century and reintroduced by Theodor Viehweg in the 20th century. Legal RPT is a unique mixture of ideas stemming from dialectic and topical RPTs. Although it does not correspond to the scientific approach and, most relevantly, neither obeys the rules of modern logic nor mathematics, it is highly successful and worthy of closer examination. Hence, in his paper (after introducing all the required core concepts) the author first explains the three aforementioned classical RPTs and then details legal RPT in contrast to its scientific counterpart. What is most important and also the most interesting is the question why legal RPT is able to produce rationality at all, even though it ignores the principles of modern scientific rationality.

The topic of Giovanni Tuzet's paper is inferentialism and legal argumentation, with his paper being entitled "Inferring the Intention". The paper was actually jointly prepared by Giovanni Tuzet and Damiano Canale. There they ask the following questions: What can be inferred from the silence of the legislature about a certain circumstance that might constitute an exception to an existing rule? Agreement with existing legislation? Agreement with recent judicial opinions? A desire to leave the problem fluid? What kind of intention, if any, can be attributed to a silent legislature? Thus, they try to show that almost everything can be inferred from it, depending on the assumptions one uses as major premises of the argument purporting to inform us about the legislature's intention. Suppose that the legislature is silent on circumstance C: one could infer that C is not a relevant exception since the legislature would have mentioned it if it had the intention to treat it as such;

but one could also draw the opposite conclusion, namely that C is a relevant exception since the legislature would have treated it as such if it had had the opportunity to take it into consideration. Similar considerations may be made about circumstances that might fall under an existing rule but are not explicitly mentioned by the legislature: if the legislature had had the opportunity to take them into consideration, it would have treated them as such; if the legislature had the intention to treat them as such, it would have mentioned them. Finally, they attempt to point out the inferential conditions in which such diverse and even opposite uses of the argument from intention are justified in the legal domain.

Ivan Padjen focused on the problem of the rationality of legal scholarship. In his paper entitled “Rationality of Legal Scholarship” he claims that legal argumentation is a centerpiece of legal dogmatics and, for that reason, a central subject-matter of the methodology of law as being a function of legal theory. First, legal scholarship is formulated to be distinct from law by making legally non-binding statements about law rather than statements within law, which are legally binding. Legal scholarship performs several functions which are commonly structured as a distinct but intertwined discipline. Legal dogmatics (doctrine, science), which is the core of legal scholarship, interprets law with a view of facilitating its application. Legal Theory, which is in essence a meta-theory of dogmatics, analyses fundamental legal concepts and methods, most notably the legal system concept and the method of systematic interpretation. Integral legal theory also performs functions that are characteristic of philosophy and social sciences: sociology of law, economic analysis of law etc. Following Padjen, legal argumentation is about legal arguments, with an argument being a set of one or more meaningful declarative sentences (or “propositions”) known as premises along with another meaningful declarative sentence (or “proposition”) known as the conclusion; a legal argument is an argument in or about law; legal scholarship, which both formulates and analyses legal arguments, consists of meaningful declarative sentences in and about law.

Marko Petrak entitled his paper “Regulae iuris and legal argumentation”. The purpose of his paper was to analyse the significance and role of *regulae iuris* in the context of legal argumentation in contemporary legal systems. According to Petrak, the notion of *regulae iuris* primarily refers to the legal maxims contained in

the sources of ancient Roman Law or formulated in the medieval and early modern Roman legal tradition on the basis of those ancient sources. These maxims are particularly important because they concisely express the millenarian Roman and European legal experience, ranging from fundamental legal principles to concrete solutions, and their content is incorporated into European legal systems to a large extent even today. Petrak's paper *prima facie* analyses the use of *regulae iuris* as a form of legal argumentation, particularly in the legislative procedure and in judicial practice. Finally, the paper especially questions the idea that the more intense application of *regulae iuris* that contain legal principles common to almost all European legal traditions – from the point of view of legal argumentation – is contributing to the further Europeanisation of contemporary national legal systems.

Luka Burazin's contribution is entitled "Antinomy between general principles of law" and presents argumentative problems in the Croatian City Cemetery case. After briefly presenting the relevant facts, the author highlights two major theoretical dilemmas arising from that case that was heard by Croatian courts: the problem of gaps in the law and the problem of antinomy between two principles of law (the principle of *nemo plus iuris* and the principle of good faith). In an attempt to resolve the aforementioned dilemmas, the author first presents the general stance on the problems of gaps in the law and antinomy in the law and the ways of dealing with them within the framework of the general theory of law. Further, he analyses the quality of the principles in question, including their legal weight. Finally, on the basis of the solutions given in writings on the general theory of law and the results of an analysis of the said principles, the author criticises the reasoning of the final judgment in the City Cemetery case and provides a different (theoretical) approach to solving these dilemmas.

In his paper Vojko Strahovnik deals with "Moral and Legal Argumentation". He begins with the thought that, as was the case in the development of the theory of legal argumentation, one of the basic discoveries in moral argumentation was that moral argumentation reaches beyond a simple subsumption of cases under general principles. This development further led to the radical questioning of the role of moral principles in moral thought and to an examination of the relationship between moral principles and moral reasons. First, Strahovnik's paper presents some con-

ceptions of moral principles. Second, it sketches some of the moral theories that question the role of moral principles in forming moral judgments. The consequences for moral argumentation are then examined. The paper concludes with possible analogies between moral and legal argumentation.

In his paper, Matej Avbelj addresses the problem of integrity and legal argumentation. The paper is entitled "Integrity between Politics and Legal Orders". Avbelj argues that Ronald Dworkin's conception of law as integrity is one of the most influential theoretical approaches to law and legal reasoning. Law as integrity is an interpretative conception which is both backward and forward looking and, according to Dworkin, solves the perennial problem of adjudication: do judges find or invent the law? Integrity itself is not merely about logical consistency. It is about fidelity, not just to rules, but rather to the theories of fairness and justice that these rules presuppose by way of justification. While integrity is a political ideal of present times, Dworkin notes that it has its limits: integrity holds within political communities, not among them. Thus, in the paper the author explores the consequences of this proposition in the context of European integration. European integration is a pluralist entity composed of 28 legal orders and the same number of polities. Accordingly, Avbelj tries to answer the following questions: Does this fact render it inappropriate for Dworkin's conception of law? If so, how should judges, as indeed all other legal actors, then go about their legal business, in particular how should they reason in and between legal orders? If it is not integrity, what is it that connects the plurality of legal orders within the European common whole? Is there still one right answer between the legal orders, as has been alleged, albeit this has been subject to serious criticism, in a singular legal order of a self-contained nation-state? If not, how can we resolve the conflicts between legal orders in European integration when they emerge?

The paper by Jernej Letnar Čer nič is entitled "International value system, fundamental human rights and law". There he argues that national and international value systems derive from common and shared values such as dignity, equality and freedom, and that these values substantiate the observance of fundamental human rights. There are different ways to justify the observance of fundamental human rights, not only by states and corporations, but by any actor in a given society. Laws are the codification of society's

moral views. All individual and communities have morality, a basic sense of right or wrong concerning particular activities. The validity of any national legal order rests upon fundamental principles of dignity, equality and freedom, which are enshrined in the many rules of national legal orders, but essentially belong to categories of ethics, morality, justice and fairness. Fundamental human rights as rules of national and international law belong concurrently to morality and ethics, and must have a greater chance to be observed. Notably, every legal rule derives from an ideological, political or moral basis. Similarly, it is observed that universal values and fundamental human rights overlap and that such an overlapping of values and fundamental human rights captures the fundamental unity between the language of law and that of morality. It is argued that law is the concept of foremost moral principles that is common to all participants in the international community and, as is generally posited, is recognisable by human reason alone. Fundamental human rights norms are part of that reason. In sum, Letnar Čerňič emphasises that national and international value systems derive from fundamental values common to all communities in the world. These communities arguably share a consensus about these fundamental values.

Finally, Marko Novak was interested in the potential connection between the context of discovery and the context of justification of legal decisions. His paper is entitled “The (Ir)rationality of Judicial Decision-Making: The Typological Argument against a Rigid Separation between the Context of Discovery and the Context of Justification of Legal Decisions”. There he deals with the problem of separation between the context of discovery and the context of justification of legal decisions, which is a basic theme in legal argumentation theory. First, the context of discovery focuses on the process of reaching a decision, which comprises the following major steps: (a) identifying the facts of the case; (b) discovering the relevant legal norms; (c) deciding whether the established facts of the case can be subsumed under the legal norms, with this leading to a legal decision at the conclusion of the decision-making process. Second, the context of justification, however, is only concerned with justifying the legal decision through the application of relevant legal arguments. Therefore, a majority of legal theorists interested in legal argumentation theory support the position that the mentioned two contexts are rigidly separa-

ted, in the framework of which the process of discovery is mainly studied by psychologists while the process of justification is the only area that should be relevant to legal argumentation theory. Novak opposes such a rigid separation between the two contexts by viewing it as a position that is too idealist. Instead, in his article he supports a more realistic position of their moderate separation, whereby he recognises the importance of the discovery context while still insisting on the major relevance of the justification context.

In addition to the short excerpts from the attendees' papers presented above, in the continuation full versions of the articles by Luka Burazin, Jernej Letnar Čerňič and Marko Novak are presented. These articles were initially papers presented at the conference but were subsequently, for the purpose of being published in *Dignitas*, substantially supplemented and altered to transform them into scientific articles.