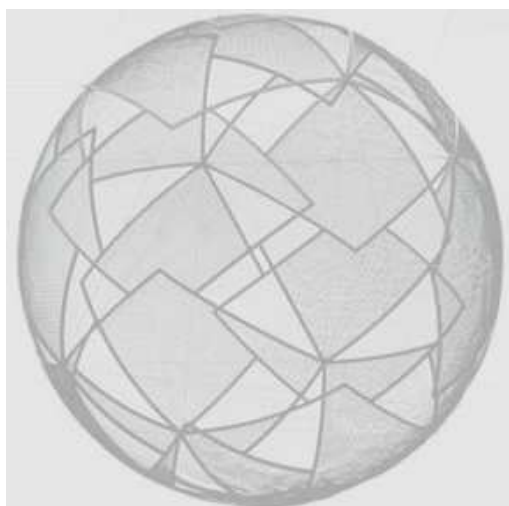


LegArg 2010

2ND CONFERENCE ON LEGAL THEORY AND LEGAL
ARGUMENTATION IN NOVA GORICA, SLOVENIA

2. KONFERENCA O PRAVNI TEORIJ IN PRAVNI
ARGUMENTACIJI, NOVA GORICA



Nova Gorica, 29. – 30. 10. 2010

organized by
European Faculty of Law in Nova Gorica
and
Graduate School of Government and European Studies



<leg|arg>



Basic Information

2ND CONFERENCE ON LEGAL THEORY AND LEGAL ARGUMENTATION IN NOVA GORICA, SLOVENIA

organized by

the European Faculty of Law in Nova Gorica and
the Graduate School of Government and European Studies

About the Conference

The Conference will take place in Nova Gorica in the Grand Meeting Hall of the Municipality of Nova Gorica on 29 and 30 October 2010.

The program is composed of two plenary lectures given by Professors Sartor and Palombella and three panels. The first panel will be dedicated to General Legal Theory and Legal Argumentation; the second panel will focus on the Law beyond the State and Global Governance, whereas the third panel will address the selected issues in Legal Philosophy.

Venue

Velika sejna dvorana (Main Conference Hall), Mestna občina Nova Gorica (Municipality of Nova Gorica), Address: Trg Edvarda Kardelja 1, Nova Gorica

Organizers

Programme

Friday 29.10.

- 15:00 Arrival and Opening of the Conference
- 15:30 Keynote speech: Giovanni Sartor: "Defeasibility in Legal Reasoning"**
- 16:30 *Coffee Break*
- 16:45 Panel I: Legal Argumentation**
- *Günther Kreuzbauer: "Legal rationality and argumentative justification"*
 - *Damiano Canale and Giovanni Tuzet: "One, None, And a Hundred Thousand Legal Systems. Use and Abuse of Intratextual Argumentation in Law"*
 - *Andrej Kristan: "Legisprudence and Argumentation"*
- 19:00 End of Day 1
- 20:00 *Conference Dinner*

Saturday 30.10.

- 9:00 Keynote Speech: Gianluigi Palombella: "Global Law and the Law on the Globe. Layers, Legalities, and the Rule of Law Principle"**
- 10:00 *Coffee Break*
- 10:15 Panel II: Law beyond the State and Global Governance**
- *Matej Avbelj: "The Idea of Pluralism as a Master Narrative"*
 - *Jernej Letnar Čerňič: "Corporate Obligations Under the Human Right to Water"*
 - *Giuseppe Martinico: "The EU As a Complex Legal System"*
- 12:00 *Light Lunch Buffet*
- 12:30 Panel III: Selected Issues in Legal Philosophy**
- *Marko Novak: "A Typological Reading of Legal Theories' Epistemology"*
 - *Vojko Strahovnik: "Raz on reasons, principles and guiding"*
 - *Rok Svetlič: "One Right Answer Thesis« - Between R. Dworkin and G.W.F. Hegel"*
 - *Luka Burazin: "Hegel's Understanding of Damage Reparation from the Standpoint of Contemporary General Theory and Philosophy of Law"*
- 14:30 End of Conference

Abstracts

Matej Avbelj

Graduate School of Government and European Studies, European Faculty of Law in Nova Gorica, Slovenia
matej.avbelj@evro-pf.si

THE IDEA OF PLURALISM AS A MASTER NARRATIVE

In this paper I would like to test and develop the idea of pluralism as a master narrative. Obviously, this is an equation with many variables. It calls on me to ask and answer a number of difficult questions. Firstly, what do I mean by pluralism? Secondly, how do I conceptualize a master narrative? Thirdly, what are my intentions with the idea of pluralism as a master narrative? What theoretical and/or practical objectives it is expected to meet?

My interest in these questions grows from a strand of scholarship, which has been on the rise in the recent years and has tried to capture, find the vocabulary, make sense and to guide legal and broader socio-political phenomena in and beyond the state. As a new world dis-order appears to have put many of the values and realities of modernity under an unprecedented strain, especially scholars of law have fought back by devising new theories, paradigms and narratives. These are expected to re-frame and re-order the new socio-political realities with the help of the old, but often significantly revised narratives.

The rationalist optimism of modernity, following which we can still make over the world according to our own chosen design with the help of an inclusive, comprehensive language that can describe, explain and normatively guide the reality as a whole, therefore persists. A prevailing belief – to be questioned in my paper as well – hence tends to be that a master narrative is still possible, indeed necessary in the contemporary world.

It has been suggested that the title of a master narrative could either belong to constitutionalism or international law. I will argue that, for a variety of reasons: conceptual, descriptive (historical) and normative, this is rather unlikely. Pluralism, properly construed, could be far more able to play this role. Yet, even the prospects for its success as a master narrative, provided that the latter as such retains currency in our time, are far from established. Could it be that pluralism is too pluralist to perform a constitutive, mobilizing and integrative role, the kind that is expected from a master narrative? In that case, when modernity has given way to post-modernity, what are we then left with?

Luka Burazin

Faculty of Law, Zagreb, Croatia

lburazin@pravo.hr

HEGEL'S UNDERSTANDING OF DAMAGE REPARATION FROM THE STANDPOINT OF CONTEMPORARY GENERAL THEORY AND PHILOSOPHY OF LAW

The paper outlines Hegel's understanding of damage reparation. By taking as the starting point the hypothesis on the embeddedness of paragraph 98 of Hegel's Philosophy of Right in his general theory of punishment, the author sets out the legal nature and functions that Hegel attributes to the institute of damage reparation. The presented Hegel's understanding of damage reparation is then compared with the viewpoints of contemporary general theory and philosophy of law. Finally, the author determines the extent to which Hegel's understanding of damage reparation is in line with the increasingly perceived need for a new jurisprudential explanation of tort law.

Damiano Canale and Giovanni Tuzet

Bocconi University, Milano, Italy

giovanni.tuzet@unibocconi.it

ONE, NONE, AND A HUNDRED THOUSAND LEGAL SYSTEMS. USE AND ABUSE OF INTRATEXTUAL ARGUMENTATION IN LAW

What are the identity criteria of a legal system? Do legal systems depend on the ways they are represented by legal scholars? If so, is the number of legal systems equal to the number of their different representations?

In particular, our aim in this paper is to focus on the use of intratextual argumentation, according to which the interpretation of a legal provision is justified if it is coherent or consistent with the content of other legal provisions in the same act or code. In particular, we will consider the uses of intratextual argumentation which single out one or more subsystems within the same legal system, and we will ask under what conditions the application of this canon is justified and thus acceptable in legal decision-making.

Günther Kreuzbauer

Faculty of Law, Salzburg University, Austria

guenther.kreuzbauer@sbg.ac.at

LEGAL RATIONALITY AND ARGUMENTATIVE JUSTIFICATION

Rationality has always been one of the central topics of philosophy and science and any theory of rationality at a certain point requires a definition - or at least an idea - about this concept.

In scientific literature we find two grand paradigms of rationality: (i) the rational choice approach (furthermore called 'RC') and (ii) the approach of "rationality as argumentative justification" ('RAJ'). The RC approach is connected with the idea of the homo oeconomicus and still the very basis of economic theory. This, by the way, is puzzling, because due to the heavy criticism of the last decades the homo oeconomicus concept is no longer used in its literal sense but as a strong scientific fiction. The RAJ

approach on the other hand stems from ancient European philosophic and rhetoric tradition. It is also the basis of legal philosophy and therefore, also of legal argumentation theory. Nevertheless, here RAJ becomes more and more disputed by the school of Economic Analysis of Law. This is the point where this presentation enters the stage. Its aim is threefold: First, the author will present both dominant approaches. Second, RAJ will be defended against RC and third it will be shown how RAJ can be used for the development of a concept of rationality as the fundamental concept of a theory of legal rationality. This third part will be elaborated in mere detail by the use of classic concepts of argumentation theory, like deductive validity, inductive strength etc.

[The author would like to indicate, that he presented his theory of legal rationality in Nova Gorica at the conference of 2009. So this year's presentation explores the core concept of what was presented last year.]

Andrej Kristan
University of Genoa, Italy
andrej.kristan@gmail.com

LEGISPRUDENCE AND ARGUMENTATION

Summary: Luc J. Wintgens has construed a trade-off model of the social contract, on which every legislative action calls for its argumentation (Wintgens 2005, 2006). In the first part of my presentation, I will show that even in the proxy model of the social contract legislators have to motivate their choices. In the second part, I will develop on my own reconstruction of the Rule of Law (Kristan 2009) and claim that the legislator's obligation to motivate its choices is inherent also to this very fundament of a contemporary constitutional state.

Jernej Letnar Čerňič
Graduate School of Government and European Studies, European Faculty
of Law in Nova Gorica, Slovenia
jernej.letnar@googlemail.com

CORPORATE OBLIGATIONS UNDER THE HUMAN RIGHT TO WATER

Almost a billion people do not have access to clean and safe water. Access to safe drinking water and sanitation is increasingly being considered a fundamental human right. Corporations play an important role in the realisation of the right to water. For example, they can become violators of the right to water where their activities deny access to clean and safe water or where water prices increase without warning. Corporations can have a positive or negative impact on the human rights of individuals, wider communities and indigenous peoples. This paper argues that corporations bear a certain responsibility for the realisation of the human right to water, which can be derived from international as well as national (constitutional) law. Corporate obligations under the human right to water can potentially be based on the right to water as set in national law and in the international human rights treaties and in corporate codes of conduct. It is asserted that this responsibility is different and separate from the responsibility of state governments and should never undermine state obligations to observe the human right to water. In short, the paper argues that corporations have an obligation to respect, protect and fulfil the right to water deriving primarily from national legal orders.

Giuseppe Martinico

European University Institute, Florence, Italy
giuseppe.martinico@eui.eu

THE EU AS A COMPLEX LEGAL SYSTEM

This work aims to analyse the latest constitutional trends of the European integration process in light of the idea of complexity. The adopted notion of complexity stems from a comparison of the different meanings of this word as used in several disciplines (law, physics, mathematics, psychology, philosophy) and recovers the etymological sense of this concept (complexity from Latin *complexus* = interlaced). By applying the idea of complexity developed by Morin to the supranational context, I argue that the European Union legal order is a complex entity that shares some

features with complex systems in natural sciences. The *mot-problème*¹ “complexity” is used in several ways. Millard, for instance, recalls at least four different meanings of the word complex². Complex, in fact, is often used as a synonym of “complicated” and in this sense an antinomy may be understood as complex given its difficulty in being solved because of the legal abundance caused by the coexistence of so many legislators in the EU and of the consequent difficult manageability of the several materials, languages and meanings present in the multilevel system. Secondly, complexity may refer “à la situation d’un objet fragmentée, découpée. L’ensemble social n’est pas simple, au sens d’une théorie des ensembles: il résulte de l’addition ou de l’interaction entre une pluralité d’ensembles partiels, eux mêmes sans doute s’entremêlés”³. Thirdly, complex is understood as non-aprioristic/pragmatic; in this respect a reason is complex when it cannot infer choices and decisions from general, clear and abstract principles which were defined aprioristically. Finally, complexity is meant as interdependency of the objects with regard to their relative autonomy: in this paper I am going to focus on the relative autonomy of the legal orders (national, supranational and international) in the multilevel system. This paper is divided into two parts: in the first part I will frame my view within the vast debate on the European Constitution. After reviewing the literature in this field I will move to an analysis of the main features of my view and finally I will try, in the second part of this paper, to give a sample of the normative consequences of this view, focusing on the problem of interpretation in the multilevel legal system.

¹ E. Morin, *Introduzione al pensiero complesso*, Milan, Sperling & Kupfer, 1993, and idem, *Conoscenza della conoscenza*, Milan, Feltrinelli, 1989. On Morin: M. Sandri, “La complessità: verità acquisite e falsi miti”, *Kéiron*, 7, 2001, 98 ff. On Europe as a complex system see: E. Morin, *Pensare l’Europa*, Milan, Feltrinelli, 1988.

² E. Millard, “Eléments pour une approche analytique de la complexité”, in M. Doat, J. Le Goff and P. Pédrot (eds.), *Droit et complexité (Pour une nouvelle intelligence du droit vivant)*, Rennes, Presses Universitaires de Rennes, 2007, 141-153.

³ *Ibidem*, 143.

Marko Novak

European Faculty of Law in Nova Gorica, Slovenia

marko.novak@evro-pf.si

A TYPOLOGICAL READING OF LEGAL THEORIES' EPISTEMOLOGY

Abstract: In the history of philosophy the debate between the rationalists and the empiricists concerning the »true« source of human knowledge has been a classical one. Moreover, in legal ontology such a debate has been reflected in the classical opposition between natural law and legal positivist perspectives. Even contemporarily predominant integralist perspectives on the nature of law, such as inclusive legal positivism and inclusive legal non-positivism, are no immune to such a basic epistemic dichotomy. In my paper I will try to present an understanding of such basic epistemological problems in legal philosophy from the philosophical-psychological theory of types by Carl G. Jung.

Gianluigi Palombella

University of Parma, Italy

gianluigi.palombella@unipr.it

GLOBAL LAW AND THE LAW ON THE GLOBE. LAYERS, LEGALITIES AND THE RULE OF LAW PRINCIPLE.

The emergent 'global law' and global governance are often evoked as a multiversum in the absence of a controlling principle, or alternatively as a complex set of normativity to be encompassed by a holistic constitutional architecture. Focusing on the Rule of law, which is cherished in our most solemn legal documents, might promise to address the quest for the essential role of legality in the extended beyond- the- state- space, without the pursuit of a further guiding "meta-principle".

One can readily assume that the Rule of law is not a system-relative, or jurisdiction-related notion, i.e. a 'parochial' shield. As I submitted elsewhere, it means more than compliance with rules, certainty and predictability. I will return on it as an ideal asking for legal structures to counter the possibility that the whole extent of available law be reduced

to a sheer instrument in the hands of those in power (a rule by law). Its principle can be shared externally, outside the limits of domestic self-legitimation. I shall maintain that its place in a global setting is the relationships in the complex transformative multiversum of legalities. It allows them to mutual confrontation. This can cause claims to be heard, differences to be considered, without supporting neither sheer self closure nor monistic dogmas, that would ignore the plurality of legal worlds.

Reaching this conclusion is, however, consequential to a recognition of the 'global law' as incapable of replacing or 'englobing', due to its nature, contents, commitments, and 'limits', the normative universe which many other levels of legal ordering embody. I shall look at the 'global law' especially from the empirical and theoretical observation angle refined from the global administrative law approach. As a matter of legal theory, the autonomy of the global normative space needs to be examined, and it must be assessed whether or not its status as law and as a legal order is plausible. In either case, I shall exclude that it can pretend a hierarchic normative primacy.

This conclusion apparently leaves us with the (not- ordered) array of the self-observing and most times self-referring legalities that populate the globe: one which causes to fade the view over the 'whole' once implied by the limited range of State based legal systems, and now turned inevitably to be but a metaphysical aspiration. Multiple orders, multiple normativities keep separate and disconnected even in the face of substantial material problems which- mainly due to globalisation- are instead mutually interconnected. Thus, the theoretical recognition of plurality, autonomy and distinctiveness covers only one side of the moon. The other side discloses the matter of interconnections, and has to do with how to handle with them, while a project of global, legal or 'substantive' overall control seems out of reach.

In the complex interplay among different orders, and along with the slow, case by case construction of judicial confrontation, I shall unfold the role that the normative assumption of the Rule of law is to play, one that is crucial to legal coexistence and to viability of global governance: it concerns the framing of a (non substantially pre-determined) scheme of coexistence and the weaving of further rules of recognition. Out of the

inevitable interaction and interdependence, this ideal, regarding the quality of legal matrix, works as well as a template of the (desirable) tension among countervailing needs and expectations and points to preventing one sidedness and unilateral conceptions of the good from being shielded “globally” by a merely instrumental code of legality.

In the general reasoning, and essential to the understanding of the view that I propose here, some further concepts shall be taken to matter, like accountability and responsibility, non domination, the “right” and the avoidance of injustice.

Giovanni Sartor

European University Institute, Florence, Italy
giovanni.sartor@gmail.com

DEFEASIBILITY IN LEGAL REASONING

I shall first introduce the idea of reasoning, and of defeasible reasoning in particular. I shall then argue that cognitive agents need to engage in defeasible reasoning for coping with a complex and changing environment. Consequently, defeasibility is needed in practical reasoning, and in particular in legal reasoning.

Vojko Strahovnik

IPAK Institute and Graduate School of Government and European Studies,
Slovenia
strahovnik@ipak-zavod.si

RAZ ON REASONS, PRINCIPLES AND GUIDING

In his work in the field of theory of value and action Joseph Raz defends some genuinely original and very interesting ideas on the nature of normativity, reason and value. He defends the idea that reason has the guiding function in our lives. In this vein he also puts forward a critique of moral particularism as a view that radically challenges the role of moral

principles and rules in our deliberation and action. He presents a complex argument and accuses particularism of being subject to the so-called guiding problem. In this paper I analyze this argument and give some suggestion how particularists can defend themselves against it. In the last part I also examine some lessons from this debate that can be applied to our understanding of legal reasoning.

Rok Svetlič

The Faculty of Humanities, University of Primorska, Slovenia
rok.svetlic@zrs.upr.si

»ONE RIGHT ANSWER THESIS« - BETWEEN R. DWORKIN AND G.W.F. HEGEL

The perfect match of a law and a concrete legal decision was always the ideal of jurisprudence. One way to achieve this was supposed to be obtained by total passivity of the judge who should only borrow his mouth to the law and become *viva vox legis*. Counterpart to this naivety is merely negative comprehension of common sense: it is impossible to exclude judge's interpretative act and, therefore, it is necessary for different judges to make different decisions. The most interesting theoretical projects, however, are those which accept the unavoidable active attitude of the judge but still insist on the thesis, that it is possible to indicate one and only correct decision.

In the 20th century the most famous was Dworkin's "One Right Answer Thesis", that believes that special interpretative procedures exist which can, at least idealiter, indicate only one correct decision. This contribution will confront Dworkin's thesis with Hegel's doctrine of legal decision making. It will be demonstrated that Dworkin, paradoxically, still insists on the same attitude toward empirical fact, as naïve *viva vox legis* thesis did. The only one right answer, however, doesn't exist in concrete empirical decision but in our correct attitude toward the decision as such.

Participants

- Matej Avbelj, Graduate School of Government and European Studies
- Luka Burazin, Faculty of Law, University of Zagreb
- Damiano Canale, Bocconi University, Milan
- Günther Kreuzbauer, Faculty of Law, University of Salzburg
- Andrej Kristan, University of Genoa
- Jernej Letnar Čerňič, Graduate School of Government and European Studies, European Faculty of Law in Nova Gorica.
- Giuseppe Martinico, European University Institute, Florence
- Marko Novak, European Faculty of Law in Nova Gorica
- Gianluigi Palombella, University of Parma
- Giovanni Sartor, European University Institute, Florence
- Vojko Strahovnik, IPAK and Graduate School of Government and European Studies, Kranj
- Rok Svetlič, The Faculty of Humanities, University of Primorska
- Giovanni Touzet, Bocconi University, Milan

General information

LegArg 2010

**2ND CONFERENCE ON LEGAL THEORY AND LEGAL
ARGUMENTATION IN NOVA GORICA, SLOVENIA**

**2. KONFERENCA O PRAVNI TEORIJI IN PRAVNI
ARGUMENTACIJI, NOVA GORICA**

Nova Gorica, October 29th – 30th 2010

Velika sejna dvorana (Main Conference Hall), Mestna občina Nova
Gorica (Municipality of Nova Gorica),
Trg Edvarda Kardelja 1, Nova Gorica, Slovenia

▪ **Organization**

European Faculty of Law in Nova Gorica
Graduate School of Government and European Studies

▪ **Organizing Committee**

doc. dr. Marko Novak; European Faculty of Law, Nova Gorica, Slovenia
(president)

doc. dr. Matej Avbelj; European Faculty of Law, Nova Gorica and Graduate
School of Government and European Studies

doc. dr. Vojko Strahovnik; IPAK Institute and Graduate School of Government
and European Studies