**LegArg 2009**

*International Conference on Legal Argumentation / Mednarodna konferenca o pravni argumentaciji*

# Legal Argumentation and the Challenges of Modern Europe

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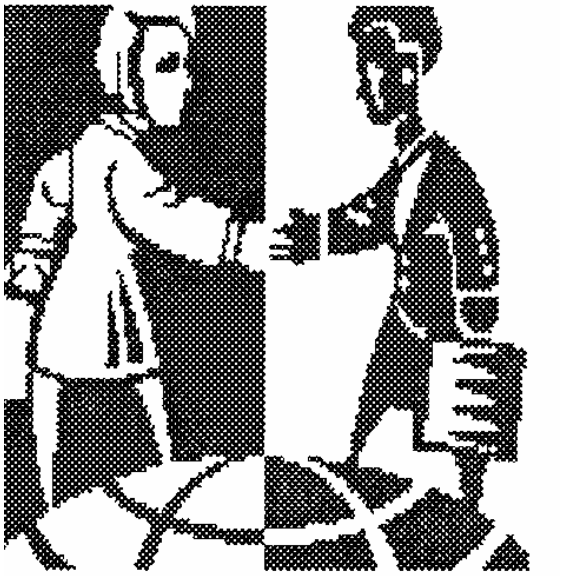
# Pravna argumentacija in izzivi sodobne Evrope



Nova Gorica, 15. – 16. 10. 2009

**European Faculty of Law in Nova Gorica**
**Slovenia**

**Evropska pravna fakulteta v Novi Gorici**
**Slovenija**

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Contents / Kazalo:

# Introduction / Uvodnik

## Legal Argumentation and the Challenges of Modern Europe

In past decades the issues of legal argumentation and legal interpretation became a very important field of research for lawyers and legal theory and for other disciplines, including in particular philosophy. The conference "Legal Argumentation and the Challenges of Modern Europe« will bring together lawyers and other researches who based on different legal, philosophical and other viewpoints will emphasis different dimensions of legal argumentation and interpretation. The conference will include the following topics: the approaches and dimensions of legal argumentation, legal logic, the validity of legal inference, justification and legal argumentation, legal decision-making, the use of legal argumentation, legal argumentation and critical discussion, methods of legal argumentation, law and democracy, cannon law and legal argumentation, ethics and law, etc. In such a manner, these topics follow the recent developments in the area of legal theory as well as give insight into the current trends in legal argumentation.

The Organizers invites all the participants to contribute their papers after the conference, which will be published in a special edition of *Dignitas*, a journal of the European Faculty of Law in Nova Gorica and the Faculty of Government and European Studies.

Organizers

## Pravna argumentacija in izzivi sodobne Evrope

V preteklih desetletjih so vprašanja pravne argumentacija in pravne razlage postale zelo pomembno polje raziskovanja in ukvarjanja pravnikov in tudi drugih disciplin, predvsem filozofije. Znanstveni sestanek »Pravna argumentacija in izzivi sodobne Evrope« združuje pravnike in ostale znanstvenike, ki bodo na temelju različnih pravnih, filozofski in svetovno-nazorskih usmeritev osvetlili različne dimenzije pravne argumentacije in razlage ter določili mesto, ki jo le-ti imata tako znotraj pravna teorije kot tudi konkretnega pravnega reda. Znanstveni sestanek se posveča naslednjim temam: pristopi in razsežnosti pravne argumentacije; pravna logika; veljavnost pravnega sklepanja, utemeljitve in pravna argumentacija; pravno odločanje, raba pravne argumentacije; pravna argumentacija in kritična razprava; metode pravne argumentacije; pravo in demokracija; kanonsko pravo in pravna argumentacija; etika in pravo. Mednarodni simpozij tako sledi najnovejšim dogajanjem na področju pravne teorije in ponuja vpogled v aktualno dogajanje hitro razvijajoče se razprave o pravni argumentaciji. Na podlagi njegovih rezultatov bo izdan tudi zbornik najpomembnejših prispevkov.

Organizatorji

## Program

### Thursday, October 15th 2009

**14:30** – opening of the conference; welcoming remarks (organizers)

**14:45 - 15:35** prof. dr. Guenther Kreuzbauer "Rationality of Jurisprudence: A comparison of the legal approach to rationality with alternative 'rationality producing technologies (RPT)' "

**15:35 - 16:25** prof. dr. Giovanni Tuzet and prof. dr. Damiano Canale "Inferring the intention"

*coffee break*

**16:40 - 17:30** dr. Vojko Strahovnik "Moral and Legal Argumentation"

**17:30 - 18:20** dr. Matej Avbelj "Integrity between Polities and Legal Orders"

**19:30** *conference dinner*

### Friday, October 16th 2009

**9:00 - 9:50** doc. dr. Marko Novak "How the context of discovery influences the context of justification in legal adjudication?"

**9:50 - 10:40** prof. dr. Ivan Padjen "Rationality of Legal Scholarship"

*coffee break*

**11:00 - 11:50** prof. dr. sc. Marko Petrak "*Regulae iuris* and legal argumentation"

**11:50 - 12:40** as. mag. Luka Burazin "Antinomy between general principles of law"

**13:00** end of the conference, closing remarks (organizers)

*lunch*

# Abstracts / Povzetki

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## Integrity between Polities and Legal Orders

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, 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.

The proposed paper is going to explore the consequences of this proposition in the context of European integration. European integration is a pluralist entity composed of twenty eight legal orders and of the same number of polities. Does this fact render it inapt for the Dworkin's conception of law? If so, how should the judges, as indeed all the 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 there allegedly is, though this has been subject to severe criticism, in a singular legal order of a self-contained nation state? If not, how to resolve the conflicts between legal orders in European integration when they emerge?

mag. Luka Burazin

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## Antinomy between general principles of law
(City Cemetery case)

After having briefly presented the relevant facts, the author of the paper highlights two major theoretical dilemmas arising from a recent case (the so-called City

Cemetery case) that was settled before the 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. Furthermore, the author analyses the quality of the principles in question, including their legal weight. Finally, on the basis of the solutions given in the writings on the general theory of law and the results of the 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 the solving of these dilemmas.

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**Rationality of Jurisprudence: A comparison of the legal approach to rationality with alternative "rationality producing technologies (RPT)"**

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) finally a technology for the production of rational phenomena, i.e. a „rationality producing technology [RPT]".

In the context of the history of philosophy and science three dominant classical RPT were developed: The Euclidean RPT, the dialectic RPT and the topical RPT. The Euclidian RPT is formal and constructive, which means, that rationality is to be produced by assembling cognitive units by the proper use of formal construction rules. The 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 the discursive evaluation of the alternative attempts to do so. Finally, the topical RPT is informal and constructive, because here rationality should be produced by the proper use of informal construction rules, the topoi.

Today the scientific RPT – basically a mixture of parts from the Euclidian and the dialectic RPT – dominates. Nevertheless, there is a serious contender, i.e. the modern legal RPT. This idea was first elaborated by Giambattista Vico in the 18$^{th}$ century and reintroduced by Theodor Viehweg in the 20$^{th}$. The legal RPT is a unique mixture of ideas stemming from the dialectic and the topical RPT. Although it does not correspond to the scientific approach and – most relevantly – does neither obey the rules of modern logic nor mathematics, it is highly successful and worth being

examined more closely. So, in his paper (after introducing all required core concepts) the author will first explain the three aforementioned classical RPT and then show the details of the legal RPT in contrast to its scientific counterpart. Most important and also most interesting is the question, why legal RPT is able to produce rationality at all although it ignores the principles of modern scientific rationality.

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**International value system, fundamental human rights and law**

This paper argues that national and international value systems derive from common and shared values such as dignity, equality and freedom. It argues that these values substantiate observance fundamental human rights. There are different ways how to justify the observance of fundamental human rights, not only by states and corporations, but by any actor in a given society. Laws represent the codification of society's moral views. All individual and communities have morality, a basic sense of right or work concerning particular activities. The validity of any national legal order reposes upon fundamental principles of dignity, equality and freedom, which are enshrined in the many rules in 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 ideological, political or moral basis. Similarly, it is observed that the universal values and fundamental human rights overlap and that such overlapping between 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 generally posited, is recognizable by human reason alone. Fundamental human rights norms are part of that reason. In sum, the national and international value systems derive from fundamental values common to all communities in the world. These communities arguably share consensus about these fundamental values.

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**How the context of discovery influences the context of justification in legal adjudication?**

In general theories of legal argumentation make a distinction between the concepts of the context of discovery and the context of justification. The first relates to the process of finding a decision while the latter to the justification of the decision. Some of such theories assert that although in legal practice it is not always possible to separate both stages in the legal decision-making process, they can allegedly be separated in legal theory for the purpose of evaluating the quality of legal justification. Futhermore, they claim that, according to the standards of legal argumention theory, judges are not obliged to give insight into the process of finding the right decision. What is the matter of research, for such aspect of legal argumention, is the rationality of legal argumention which concerns the requirments that relate to the arguments given in the context of justification, not those relating to the decision-making process.

My position is that these thories of legal argumentation try to establish an artificial wall of separation between the two contexts, which does not exist in reality. By making such sharp contrast betwen the two stages there is a danger, metaphorically speaking, of »officially« recognizing the fact that judges can do in the reasoning of their decisions something that was not at issue in the decision-making process.

Fortunately, there are theories of legal argumentation that do pay some attention to the context of discovery or, at least, to the connection between the discovery and justification contexts. I find such connection in the requirement of sincerity as one of the requirements of external justification in unclear cases. The ideal would then be that what is written in the reasoniing of a decision is precisely what was at issue in the decision-making process.

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**"Rationality of Legal Scholarship"**

Now that the transition to communism prompting the withering away of law by dictatorship of the proletariat has been reversed by the transition to capitalism prompted by the rule of law as set aside by the government bailing out banks while riding roughshod over union contracts, it is increasingly important to find out

whether legal scholarship, which is a constituent of continental legal systems, is rational. The transition back to the future of capitalism, especially the fate of law, is the indirect problem of this paper. The direct problem is the confusion caused by a discrepancy between the received (pre-post-modern) view of rationality, which assumes that there exist universally valid criteria of rationality applicable to all activities, including law and legal scholarship, and the mainstream post-modern thinking which takes for granted that it is not possible to provide an adequate or objective account of reality, thus expanding the received view of legal reasoning as irrational to all reasoning.

The paper is an attempt to indicate a plausible approach to the problem. The major assumptions of the paper are as follows:

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 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 nuce a meta-theory of dogmatics, analyses fundamental legal concepts and methods, most notably the concept of legal system and the method of systematic interpretation. Integral legal theory performs also functions that are characteristic of philosophy and social sciences: sociology of law, economic analysis of law, etc.

Secondly, rationality relevant to the paper is the coherence of means and ends of legal scholarship. The aspects of rationality include, on the one hand, the capacity of concepts, methods, theories and other elements of legal scholarship to be serviceable to the ends of legal scholarship, whether political or technical, such as completeness or clarity and, on the other, the capacity of legal scholarship as a whole to identify and pursue new ends, such as post-liberal social law.

Thirdly, legal argumentation is about legal arguments, an argument being a set of one or more meaningful declarative sentences (or 'propositions') known as the premises along with another meaningful declarative sentence (or 'proposition) known as the conclusion; a legal argument is an argument in or about law; legal sccholarship, which both formulates and analyses legal arguments, consists of meaningful declarative sentences in and about law.

A major point of the paper is that legal argumentation is a centerpiece of legal dogmatics and, for that reason, a central subject-matter of methodology of law qua function of legal theory.

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## Regulae iuris and legal argumentation

The purpose of this paper is to analyse the significance and role of *regulae iuris* in the context of legal argumentation in the contemporary legal systems.

The notion *regulae iuris* primarily refers to 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 due to the fact that they concisely express the millenarian Roman and European legal experience, ranging from the fundamental legal principles to concrete solutions, and their content is incorporated into the European law systems to a large extent even today.

Starting from the statement above, the paper will prima facie analyse the use of *regulae iuris* as a form of legal argumentation, particularly in the legislative procedure and in the judicial practice. Furthermore, the paper will especially question can a more intense application of *regulae iuris* that contain legal principles common to almost all European legal systems - from the point of view of legal argumentation - contribute to a further Europeanization of the contemporary national legal systems.

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## Moral and Legal Argumentation

As it was the case in the development of 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 leaded to the radical questioning of the role of moral principles in moral thought and to examination of the relationship between moral principles and moral reasons. The paper presents some conceptions of moral principles. Next, 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.

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## Inferring the intention

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? Desire to leave the problem fluid? What kind of intention, if any, can be attributed to the silent legislature? We will try to show that almost everything can be inferred from it, depending on the assumptions that one uses as major premises of the argument purported 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 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 the opportunity to take them in consideration, it would have treated them as such; if the legislature had the intention to treat them as such, it would have mentioned them. We will try to point out on what inferential conditions such diverse and even opposite uses of the argument from intention are justified in the legal domain.

## ▪ General information / Na kratko o konferenci

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# LEGAL ARGUMENTATION AND THE CHALLENGES OF MODERN EUROPE

Nova Gorica, October 15th–16th 2009

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# PRAVNA ARGUMENTACIJA IN IZZIVI SODOBNE EVROPE

Nova Gorica, 15.–16. oktober 2009

Knjižnica Nova Gorica, Trg Edvarda Kardelja 4, Nova Gorica, Slovenija

## ▪ Organization / Organizacija

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