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LEGAL ARGUMENTATION IN COURT DECISIONS

ABSTRACT

The primary goal of this paper is to point out the need to conduct empirical research into the arguments used in judicial decisions and how much. Studies on legal argumentation without empirical research represent only a theoretical framework that does not correspond to social reality and dynamics, primarily because the aforementioned studies view all arguments equally. Existing research, as well as the logic of judicial reasoning, suggests that in practice the opposite is true, and that some arguments are used much more often, while others are used rarely or almost never. In addition, we will answer questions that are closely related to research on the use of arguments, of which we highlight: which court decisions fall under the so-called easy cases, and which in the so-called hard cases, the question of the existence of legal gaps and the question of the rationality of the decision, and the latter includes the question of the value of the syllogistic form of reasoning. The author presents five relevant empirical studies - Lazzaro (1970), Struck (1971), Raisch (1988), Pokol (2000) and Harašić (2010). At the same time, the author suggests that when analyzing decisions, start from the list of arguments of individual theorists and suggests the most influential lists - Tarello's and Perelman's.

Keywords: legal argumentation, empirical research, court decision, easy and hard cases, legal gaps, rationality.

1. INTRODUCTION

Argumentation - as the presentation of claims for and against in a controversial situation, is possible in every human activity - everyday speech, philosophy, morality, law, politics, etc. We are interested in argumentation in law, and in the prototype of legal activity - judicial activity, that is, in judicial decisions. Making judicial decisions is not a simple job or skill - it requires extensive legal education and knowledge of how to write decisions and argue in doing so. A large number of authors were and are engaged in legal argumentation. Since in this paper we are

not dealing (primarily) with the theory of legal argumentation in general, but with the need for empirical research into it, we will only state that the theory of argumentation appears in time in the 5th century BC with the sophists (Protagoras, Georgija, Prodicus, Hippias),¹ all the way to authors in the 20th and/or 21st centuries: e.g. Viehweg, Toulmin, Hart, Perelman, Aarnio, Dworkin, Alexy, Peczenik, Atienza, Marmor, MacCormick, Kravietz, Klatt, Schauer, Shapiro, Walton, Sartor, Zarefski, Walton/Macagno/Sartor, Eisenberg, Barnes/Dharmananda/Moran.²

2. EMPIRICAL RESEARCH OF ARGUMENTATION

Studies on legal argumentation without empirical research on how to use arguments represent only a theoretical framework that does not correspond to social reality and dynamics, primarily because the aforementioned studies view all arguments equally. Existing research, as well as the logic of judicial reasoning, suggests that in practice the opposite is true, and that some arguments are used

¹ There are numerous works on the Sophists as the originators of legal argumentation, who worked from a rhetorical aspect, and we highlight the work here: Taylor, CC; Lee Mi-K., *Sophists*, Stanford Encyclopedia of Philosophy, 2020, Edward N. Zalta (ed.), <https://plato.stanford.edu/entries/sophists/>, February 20, 2025.

² Viehweg, T., *Topik und Jurisprudenz*, C. H. Beck, München, 1953; Toulmin, S., *The Uses of Argument*, Cambridge University Press, Cambridge, 1958; Hart, H. L. A., *The Concept of Law*, Clarendon Press, Oxford, 1961; Perelman, Ch., *Logique juridique. Nouvelle rhétorique*, Dalloz, Paris, 1976; Aarnio, *On Legal Reasoning*, Turun Yliopisto, Turku, 1977; same: *The Rational as Reasonable. A Treatise on Legal Justification*, Reidel Publishing Company, Dordrecht, 1987; Dworkin, R., *Taking Rights Seriously*, Harvard University Press, Massachusetts, 1977; Alexy, R., *A Theory of Legal Argumentation. The Theory of Rational Discourse as Theory of Legal Justification*, Clarendon Press, Oxford, 1989; Peczenik, A., *On Law and Reason*, Kluwer Academic Publishers, Dordrecht (ect.), 1989; Atienza, M., *For a Theory of Legal Argumentation*, Rechtstheorie, year 21, 4/1990, 393-413; *demokratischen Rechtsstaats*, Suhrkamp Verlag, Frankfurt am Main, 1992; Marmor, A., *Interpretation and Legal Theory*, Clarendon Press, Oxford, 1992; MacCormick, N., *Legal Reasoning and Legal Theory*, Clarendon Press, Oxford, 1995; Kravietz, W. et al., *The Reasonable as Rational? On Legal Argumentation and Justification*, Duncker & Humboldt, Berlin, 2000; Klatt, M., *Making the Law Explicit; The Normativity of Legal Argumentation*, Hart Publishing, Oxford, 2008; Schauer, F., *Thinking Like a Lawyer. A New Introduction to Legal Reasoning*, Harvard University Press, Cambridge, Massachusetts, 2009; Shapiro, S. J., *Legality*, Harvard University Press, Cambridge, Massachusetts, 2011; Walton, D., *Methods of Argumentation*, Cambridge University Press, Cambridge, 2013; Sartor, G., *Defensible Legal Argumentation*, Handbook of Legal Reasoning and Argumentation, Springer, 2018; Zarefski, D., *The Practice of Argumentation: Effective Reasoning in Communication*, Cambridge University Press, Cambridge, 2019; Walton, D.; Macagno, F.; Sartor, G., *Statutory Interpretation*, Cambridge University Press, Cambridge, 2021; Eisenberg, M. A., *Legal Reasoning*, Cambridge University Press, Cambridge, 2022; Barnes, J.; Dharmananda, J.; Moran, E., *Modern Statutory Interpretation*, Cambridge University Press, Cambridge, 2023.

much more often, while others are used rarely or almost never. We are aware of five relevant empirical studies. They were conducted by: Giorgio Lazzaro in the book *Argomenti dei giudici* from 1970,³ Gerhard Struck in the book *Topische Jurisprudenz* from 1971,⁴ Peter Raisch in the book *Vom Nutzen der überkommenen Auslegungskanones für die praktische Rechtsanwendung* from 1988,⁵ Béla Pokol in the article *Statutory Interpretation and Precedent and Hungary* published in the magazine *Ostereuroparecht* from 2000,⁶ Žaklina Harašić in the book *Court argumentation* from 2010.⁷ We will present these studies.

2.1. Lazzaro

Lazzaro (1970) showed the use of five arguments in 105 decisions of the Italian Court of Cassation. It is clear that these are decisions from the period from 1948 to 1966, in which the use of the following arguments is shown: 1. the argument starting from general principles (in 22 decisions), 2. the argument of non-redundancy (20 decisions), 3. the historical argument (20 decisions), 4. the argument of preparatory works (19 decisions), 5. the apagogic argument, or more often called the argument *ab absurdo* (24 decisions). The decisions are taken from two collections - *Foro italiano* and *Giuridico Italiano*. We can object to this research that it is not clear what method Lazzaro used to select the decisions. What makes Lazzaro's research different from Struck's, Raisch's and Pokol's, and similar to that of Harašić, which we will present below, is that he showed the use of all arguments with examples, by citing the part of the reasoning in which he found the use of the arguments.

2.2. Struck

Struck (1971) compiled a catalog of 64 legal topos that he found in the explanations of German legislative, judicial and administrative acts. Topoi are used mainly in the sense of standard arguments, and the catalogue should show the extent of their distribution. The catalogue was created, as the author says, based on some generally accepted principles of classification, such as standardity, their

³ Lazzaro, G., *Argomenti dei giudici*, s. n. t, Torino, 1970.

⁴ Struck, G., *Topische Jurisprudenz*, Athenaeum Verlag, Frankfurt am Main, 1971.

⁵ Raisch, P., *Vom Nutzen der überkommenen Auslegungskanones für die praktische Rechtsanwendung*, Müller, Juristische Verlag, Heidelberg, 1988.

⁶ Pokol, B., *Statutory Interpretation and Precedent and Hungary*, *Ostereuroparecht*, year 46, 3-4/2000, p. 262-277.

⁷ Harašić, Ž., *Sudska argumentacija*, Pravni fakultet Sveučilišta u Splitu, Split, 2010.

diffusion, and importance in argumentation. The choice of *topoi* should correspond to their relevance. It is clear that these are *topoi* that are found in different branches of law, for example, in the criminal code, civil code, family law, cadastral law, and executive law. Some are considered so clear that they are rarely pronounced, for example: *lex posterior derogat legi priori*, *lex posterior derogat legi generali*, *lex iudicata pro veritate accipitur*, *ne ultra petita, audiat et altera pars*, compensation, *casum sentit dominus*, private autonomy, purpose, interest, legal certainty. Struck's research, at least when it comes to those in court decisions, was not presented in the context of the reasoning of the decisions in which he found them, but rather he merely referred to those decisions. We consider this a shortcoming of Struck's research, regardless of the purposes he wanted and tried to achieve.

2.3. Raisch

In Raisch (1988) we find a presentation of the results of research on the methods of explaining the decisions of the senate of the German Federal Court/Civil Law Section (BGHZ), which he found in the official collections of that court. A total of 92 decisions were taken. Raisch himself sees the lack of selection of decisions from the collections, because "there remained hidden opinions of court members who did not find access to the written reasons for the verdict".⁸ Raisch believes that it can be assumed that the senate that decided on publication did not attach importance to the omitted part for the course of interpretation.⁹ Raisch examined four indicators of the reasoning of judgments: reference to precedents, citation of literature, the presence of the canon of interpretation, and the presence of, as he calls them, "other arguments." At the same time, he provided very detailed statistical data.¹⁰ Precedents are referred to in 96.7% of decisions, while literature is cited in 89.1% of cases. Under the term canon of interpretation, he examined linguistic interpretation (which is represented in 60% of cases), historical interpretation (29.3%), systematic interpretation (69.3%), analogy (12%), and reference to principles of law (13%). Among the "other arguments," he classified three categories of arguments. The first group includes the argument from the nature of things, the argument from fairness, and the essence of the legal institution. The second type of "other arguments" he considers to be "traditional platitudes," by which he means the claims of the Senate about the evidence of a decision. For example: "There is no reasonable reason to decide differently"; "there is no reason that these principles should not apply here"; "there is no

⁸ Raisch, P., *op. cit.* note 5, p. 84.

⁹ *Loc. cit.*

¹⁰ *Ibid.*, pp. 88-92.

doubt...". Judges use platitudes in 36.9% of cases. In the third group of indicators, the author provides a number of topoi, such as "position of the parties' interests", "protection of trust", "experience", "legal certainty", etc. Although it is not sufficiently visible, it can be concluded that the topoi, together with the first group of other arguments, appear in 67.4% of cases.

2.4. Pokol

Pokol (2000) conducted a research on the interpretation of the law and precedents in 2000 decisions of the Hungarian higher courts. To investigate the interpretation of laws, Pokol took an equal number of civil and criminal cases from the official collection of the higher courts in Hungary, in the years 1977, 1988, 1990 and 1999. He analyzed linguistic interpretation, interpretation of legal dogmatics, interpretation referring to case law and precedents, interpretation referring to fundamental constitutional rights in the decisions of the Hungarian Supreme and Constitutional Courts, and interpretation referring to the will of the legislator. He did not investigate the reference to precedents in the same period, but starting from 1991 onwards, ending with 1999. Pokol seems to have investigated only cases in which judges name the aforementioned types of interpretation (or arguments). How Pokol expressed his results based on the data he provided about calling on precedents and case law. In 1991, there were 3 civil and 16 criminal decisions in which courts referred to precedents or case law; in 1992, the ratio was 8 civil decisions to 21 criminal decisions; in 1993, there were 4 of the former and 5 of the latter; in 1994, the ratio was 10 to 16, etc.

Pokol points out some other characteristics of the interpretation of Hungarian higher courts. For example, the courts are completely unfamiliar with referring to special monographs or legal studies, and he notes a small number of references to commentaries on laws. Furthermore, there are no cases of references to general legal principles, while references to precedents and case law are increasing. He also provides data that most decisions of higher courts consist of 1,200 to 1,500 words. As significant features, we would like to highlight: the author analyzes a large number of decisions; determines the period of research; demonstrates the use of some arguments with examples; and provides some characteristics of the style of Hungarian decisions.

2.5. Harašić

Harašić (2010) investigates judicial argumentation, or the use of arguments, in the last ten years of the last century (i.e. from 1990 to 1999). The research examines

court decisions in a sample of decisions in civil, commercial, criminal and administrative cases. This research, unlike previous ones, is based on two premises. First, it investigates the use of arguments in complete decisions. We emphasize this because publications in which decisions are published often state the legal position, with minimal factual information, or without it. And without factual information, we cannot fully understand the argumentation. Second, it investigates the argumentation in decisions of courts of all levels, and not, as is done in publications, where only the argumentation of higher courts is cited. Higher courts act on legal remedies and address only the issues raised in legal remedies. The decisions were selected using the stratified random sample method, while in previous research it is not sufficiently clear how the sample of decisions in which the argumentation is analyzed was formed. We found that most of the arguments that appear in the decisions from the sample are on Tarello's list (1980), which the author himself claims are argumentation schemes that have a long history and can therefore be considered specifically legal.¹¹ The main goal of the research was to determine how many arguments Croatian judges refer to in their decisions and how. Starting with the most numerous, we came to the following order of appearance of arguments: 1. argument *a contrario* (5.3%), 2. objective argument, argument from authority and argument based on general principles (3.8%), 3. systematic argument (2.5%), 4. argument *a simili ad simile* (1.3%), 5. argument *a fortiori* (1.0%), 6. argument from the nature of things (0.7%), 7. argument *a cohaerentia* (0.5%), while we did not find a single example of the use of historical argument. We also showed that, of the total number of decisions in which arguments are used (44.5%), there are more decisions in which arguments appear independently (37.4%) than those in which several arguments are combined (7.1%), again by degrees. So, empirical research on argumentation has the primary goal of establishing which arguments and how many of them are used by judges in their decisions. It should be said that we can understand argumentation in a narrower and broader sense. Argumentation in the narrower sense is the use of a certain argument by the judge in such a way that it is named, or it is not named, but it is beyond any doubt that it is the use of an argument that can be recognized by some list (e.g. Tarello's or Perelman's). However, in a broader sense, just by making decisions and justifying them, judges argue, regardless of whether their argumentation can be subsumed under one of the theoretically listed arguments. Furthermore, we believe that we should adopt two basic premises from Croatian empirical research: to investigate the use of arguments in complete decisions and in decisions of courts of all instances. Why in complete decisions? Because publications in which decisions are published often state the legal position, with minimal factual information, or without it. And without factual

¹¹ Tarello, G., *Argumentacija tumačenja i sheme obrazlaganja u pridavanju značenja normativnim tekstovima*, Zbornik za teoriju prava IV, Beograd, 1990, p. 242.

information, we cannot fully understand the argumentation. However, we should investigate the argumentation in decisions of courts of all instances, and not, as is done in publications, to cite only the argumentation of higher courts. Higher courts act on legal remedies and address only the issues raised in legal remedies.

3. LIST OF ARGUMENTS WHOSE USE WE ARE INVESTIGATING

The arguments we will analyze should be taken from a specific list or lists. The most influential are Tarello's and Perelman's lists. Tarello gave his list of arguments in the book *L'interpretazione della legge* from 1980.¹² The author himself says that these are argumentation schemes that have a long history, so they can be considered specifically legal.¹³ That list consists of the following arguments: 1. argument *a contrario*, 2. argument *a simili ad simile*, 3. argument *a fortiori*, 4. argument of completeness of legal regulation, 5. argument of coherence of legal regulation, 6. psychological argument, 7. historical argument, 8. apagogic argument, 9. teleological argument, 10. economic argument, 11. authoritative argument, 12. systematic argument, 13. naturalistic argument, 14. argument fairness, 15. argument of general principles.

Unlike the arguments from Tarello's list, Perelman's list provides an overview of arguments that are applied both in legal discourse and outside of it. Those arguments are given in the book *Traité de l'argumentation. La nouvelle rhétorique* from 1958 co-authored with L. Olbrechts-Tyteca.¹⁴ Its authors point out that, in contrast to the rules of formal logic, which must be respected in order for the conclusions to be valid, there are no necessary argumentation techniques in argumentation that would determine which arguments will be connected and in what way. It depends on the speaker's commitment.¹⁵ All types of argumentation techniques can be divided into connection procedures and separation procedures. These two techniques work simultaneously and complementarily: the only difference is which one is placed in the foreground of the analysis.¹⁶ Within connection procedures, we distinguish between quasi-logical arguments, arguments based on the structure of reality, and arguments that base the structure of reality. Each of the individual types of arguments can be further analyzed, so

¹² Tarello, G., *L'interpretazione della legge*, Giuffrè, Milano, 1980.

¹³ Tarello, G., *Argumentacija ...*, *op. cit.* note 11, p. 242.

¹⁴ Perelman, C.; Olbrechts-Tyteca, L., *Traité de l'argumentation. La nouvelle rhétorique*, Presses Universitaires de France, Paris, 1958.

¹⁵ Wilkinson, J.; Weaver, P., *The New Rhetoric: A Treatise on Argumentation*, London, Notre Dame, 1969, p. 130.

¹⁶ *Ibid.*, p. 43.

among quasi-logical arguments we distinguish those that resemble logical structures - arguments of contradiction and incompatibility, arguments of identity and transferability. The second group of quasi-logical arguments includes those that resemble mathematical relations - arguments based on the whole and the part, the argument of comparison and the argument of probability. Among the arguments based on the structure of reality, we distinguish three further groups of arguments: (1) arguments that apply to successive connections - the argument of causality, pragmatics, the argument of goals and means, etc., (2) arguments that apply to the connections of coexistence - the argument of procedures, the argument of a group member, the argument of being, of symbolization, and (3) complex arguments - the argument of double hierarchy and the argument of different degrees and order. Among the arguments that establish the structure of reality, two groups are distinguished: (1) the argument of example, illustration and role model, and (2) the argument of analogy and the argument of metaphor. Hasanbegović, among other objections to Perelman's classification, also objects to insufficient distinction, because there is an overlap of certain types of arguments, but he also finds the reason for this in that it corresponds to Perelman's understanding of the result, which is never one or correct, but can also be different.¹⁷ No matter how exhaustive Perelman's list of arguments seems, it also proves to be elastic, so that almost any statement for or against someone's point of view could be declared an argument and classified into one of the categories of arguments.

Regarding the listing and classification of arguments, we agree with the following findings: first, it is impossible to exhaustively list all arguments, since in social relations there are many controversial issues and many value and interest positions about them, and then many reasons for and against these positions; secondly, there are no final arguments, i.e. such as would close the debate on any controversial issue and for which no counter-arguments could be given; thirdly, there are no such arguments, or few of them, which are binding for all subjects in a disputed issue.¹⁸

Is it possible to hierarchically rank all legal arguments (and arguments in general)? Visković maintains that a complete systematization of argumentation is unfeasible - because it is against its essential characteristic *of ars inventoriae* that it constantly creates new and changes relationships between existing arguments.¹⁹ He believes that it would still be possible to compile a loose and flexible systematization, in which there could be room for legal argumentation using the highest and most

¹⁷ Hasanbegović, J., *Perelmanova pravna logika kao nova retorika*, Istraživačko-izdavački centar SSO Srbije, Beograd, 1988, pp. 161, 162

¹⁸ Visković, N., *Argumentacija i pravo*, Pravni fakultet u Splitu, Split, 1997, p. 50.

¹⁹ *Ibid.*, p. 83.

convincing arguments, for all legal value principles and for the interest-target argument as an expression and means of value principles.²⁰

4. EASY CASES AND HARD CASES

Another important question is whether a particular decision belongs to the cases, which are usually called *easy cases* or in cases, which are called *hard cases*. The idea of the difference between these cases is associated with the name of one of the insignificant authors of the 20th century – H. L. A. Hart. Hart himself is the first type cases most often used term *plain cases*, and for the second type he used the term *penumbral cases* ("shadowed cases").²¹ Different terminology for the aforementioned cases has sharpest critic Hart's theories on *plain cases* and *penumbral cases* - Ronald Dworkin. He is particularly deals with cases other types and names them *hard cases*. First puck cases name *easy cases*.²²

What is the difference between easy and hard cases? According to legal dogmatics, the difference between these cases is whether or not there is a written rule that represents the basis for decision-making.²³ Dworkin believed that not every judge could decide *hard cases*, so he introduces the fictitious judge Hercules, who is smart, intelligent and sharp and as such makes decisions in the most difficult cases, in which there is no legal norm that would be properly applied to the established factual situation (*hard cases*), and therefore, in such cases, he invents a legal principle that is applied to a specific case.²⁴

We can also use simplicity/complexity of interpretation as a criterion for differentiation. Thus, we would say that *easy cases* are those in which the legal norm is completely or mostly clear, so it is possible to bring the facts of the case under it without interpretation or with a simpler interpretation. On the contrary,

²⁰ *Ibid.*, p. 84.

²¹ Hart, H. L. A., *Positivism and the Separation of Law and Morals*, in: Dworkin, R. (ed.), *The Philosophy of Law*, Oxford University Press, Oxford, 1977, same: *The Concept of Law*, Clarendon Press, Oxford, 1961, p. 123.

²² Dworkin, R., *Law's Empire*, Fontana Press, London, 1986, p. 265.

²³ Pödör, L., *Easy Cases and Hard Cases – A General Overview of an Eternal Question of Legal Theory*, Elektronikus Periodika Archivum Honlap: <https://dfk-online.sze.hu/koszonto>, year 12, 1/2020, p. 55, 4 March 2025.

²⁴ Dworkin, R., *Taking Rights Seriously*, Duckworth, Cambridge, 1977. On Hercules, especially p. 105-130.

hard cases would be those in which the legal norm is not clear, which is why a more complex interpretation is needed.²⁵

Although *clear cases* are relatively neglected in legal literature²⁶ and are not theoretically very interesting, they should be given due attention. In this sense, Wróblewski very conveniently expressed: "Ignoring simple cases causes great uncertainty... The immediate suitability of a norm to decide a standard case is a necessary basis for the normal functioning of any legal system, so the increase in the number of factual situations that cause doubt and therefore the need for legal argumentation is one of the signs that something has gone wrong in the legal system."²⁷

Although we are talking about the interpretation of legal norms and legal principles here, it should be said that factual judgments, as well as conclusions and arguments in establishing facts, are no less important. And in order to arrive at those that constitute the factual situation, a qualification is carried out on the facts, which is sometimes really difficult to separate from interpretation. Factual problems can also influence the characterization of a case as "easy" or "hard". It seems that Pavčnik, for example, pointed out the importance of qualification when he said that "cases can be difficult" because they relate to complex life cases where it is difficult to establish which group of legally relevant facts is.²⁸

In our opinion, the border between these two types of cases is sometimes difficult to determine, because a case that seems clear, turns out (most often in the arguments of the higher court) to be difficult and vice versa - a case that we considered "difficult" can become "easy". Are there, as Crowe calls them, *not-so-easy cases*?²⁹

It is also important to answer the question whether the courts, in cases where the decision cannot be fully covered by legal norms, should be given discretion and

²⁵ Although the term "simple" like the term "complex", is not unambiguous. Thus Pődör says that a case can be easy for one judge and difficult for others. Thus Pődör, L., *op. cit.* note 23, p. 60.

²⁶ Crowe, J., *Not-So-Easy Cases*, Statute Law Review, year 40, 1/2019, p. 75.

²⁷ Wróblewski, J., *Meaning and Truth in Judicial Decision*, A-TIETO Oy, Helsinki, 1983, p. 34.

²⁸ Pavčnik, M., "Legal Decisionmaking as a Responsible Intellectual Activity: A Continental Point of View", Washington Law Review, year 72, 2/1997, p. 501.

²⁹ The difference between easy, not-so-easy and hard cases is as follows: easy cases require the judge to merely *articulate* his decision, not-so-easy cases require the judge to *explain* his decision, and hard cases require the judge to *justify* his decision (Crowe, J., *op. cit.* note 26, pp. 75 et seq.).

whether it leads to arbitrariness?³⁰ There is a view that discretion leads to arbitrariness and that judges should therefore not be given discretion. According to the same, the fight for the principle of legality (and security) is also going against the expansion of the discretionary power of judges.³¹ These authors find the theoretical basis for judicial arbitrariness in the school of free law, and later in the fanatical mysticism expressed through the "*Führerprinzip*", according to which judges apply the legal norm as the will of the national leader.³² Experience has shown, however, that judicial arbitrariness is much more dangerous than legislative arbitrariness.³³

We also state the contrary position that the fact that a judge is given discretionary powers does not mean arbitrariness at the same time. Thus, in Croatian procedural theory, it is considered that in situations where the law does not determine any rules of procedure, one cannot speak of a system of arbitrary treatment. Namely, the judge must justify his choice in the explanation of his decision; parties may criticize his choice; the higher court has the right to cancel the decision when it finds that the lower court, when choosing procedural methods, used those that are not in accordance with the spirit of the procedural system.³⁴ Dworkin's opinion is that in *hard cases*, in which the judge bases his decision on principles, and precisely because of the possibility of applying the principles, the need for the judge's discretion disappears.³⁵ It also assumes that judicial discretion is not necessary, especially in the European-continental system, because judges, at least in theory, are "operators" of a system designed by legal scholars and built by legislators, and there is only one correct solution to a legal problem.³⁶

³⁰ According to Alexi, this question arises not only in cases where the decision cannot be covered by legal norms, but also when it cannot be covered by the rules of the legal method and the doctrines of legal dogmatism. (Alexy, R., *A Theory of Legal Argumentation. The Theory of Rational Discourse as Theory of Legal Justification*, Clarendon Press, Oxford, 1989, p. 5.).

³¹ Cappelletti, M.; Merryman, J. H.; Perillo, J. M., *The Italian Legal System. An Introduction*, Stanford University Press, Stanford, California, 1967, p. 154.

³² *Loc. cit.*

³³ *Loc. cit.*

³⁴ Triva, S.; Dika, M., *Građansko parnično procsno pravo*, seventh edition, Official Gazette, Zagreb, 2004, p. 119.

³⁵ In cases where there is no legal norm on the basis of which the judge could resolve the case, one of the parties has the right to have the case resolved in its favor. The judge's duty is to discover the rights of the parties even in such "difficult cases" (the so-called *rights thesis*), and not, as Hart and the legal positivists hold, to retrospectively create new rights. See: Dworkin, R., *Taking ...*, *op. cit.* note 24, pp. 81, 82.

³⁶ Apple, J. G.; Deyling, R. S., *A Primer on the Civil-Law System*, p. 30, <https://www.govinfo.gov/content/pkg/GOVPUB-JU13-PURL-LPS55055/pdf/GOVPUB-JU13-PURL-LPS55055.pdf>, February 28, 2025.

5. LEGAL GAPS

When a judge encounters a social relationship that (in his opinion) represents a legal gap, he is obliged to fill it. Why is the issue of legal gaps important? As we will see below, there are two extreme positions – from the fact that legal gaps are numerous to the fact that legal gaps do not exist. The concept of legal gaps is very controversial.³⁷ Three types of legal gaps are usually distinguished. In its basic form, a legal gap implies an important and conflicting social relationship that is not regulated by legal norms, and due to its importance it should be.³⁸ These are normative legal gaps. The second are technical legal gaps – here the legal relationships are regulated, but technically insufficiently (due to, for example, the lack of some important element of the norm).³⁹ The third are value-based legal gaps, in which case there is a position of some subjects that the norm regulates a certain social relationship in a value-deficient, above all unjust, way.⁴⁰ To this understanding of legal gaps, let us add that the subjective positions of various interpreters (including judges) on the (non)existence of gaps can be different in the same case.

As for the understanding of the number of legal gaps, Kantorowitz's position is well-known, that there are as many gaps as there are words in the law.⁴¹ Vasić, Jovanović and Dajović, on the other hand, believe that legal gaps not only exist, but also necessarily appear due to the nature of law. They point out that this is necessary, on the one hand, due to the legislator's failure to regulate all aspects of

³⁷ Bobbio says that the problem of legal gaps becomes historically relevant from the moment when a legal source, i.e. the law, has surpassed all others, so that legislators take the position that their creations are sufficient to resolve all present and future disputes (Bobbio, N., *Lacune del diritto*, in: Comanducci, P.; Guastini, R., (eds.), *L'analisi del ragionamento giuridico*, year II, Giappichelli, Torino, 1989, p. 189.

³⁸ Visković, N., *Teorija države i prava*, Birotehnika, Zagreb, 2006, p. 260. Comanducci believes that the problem of legal gaps, from the judge's point of view, arises when the judge believes that a certain behavior, relevant to the case he has to resolve, is not defined by law as either prohibited, mandatory, or permitted (Comanducci, P., *Sulle lacune: note in margine a Bobbio*, in: Comanducci, P.; Guastini, R., (eds.), *L'analisi del ragionamento giuridico*, year II, Giappichelli, Torino, 1989, p. 211. Guastini, on the other hand, defines them as the phenomenon where the legislator regulates a series of factual situations, but fails to regulate one or more of their possible combinations (Guastini, R., *Tumačenje i argumentacija* (from Italian translated by L. Burazin), Naklada Breza, Zagreb, 2023, p. 367.

³⁹ Visković, N., *Teorija ...*, *op. cit.* note 38, p. 236. Guastini believes that there is a technical gap in an order when it lacks a norm whose existence is a necessary condition for the ability of some other norm to operate (Guastini, R., *op. cit.* note 38, p. 132).

⁴⁰ Visković, N., *Teorija ...*, *op. cit.* note 38, p. 236. Or as Guastini says, it is about the non-existence of a norm that – according to the subjective ethical-political (i.e., value) preferences of the interpreter – should exist (Guastini, *op. cit.* note 38, p. 133).

⁴¹ Pokrovac, Z., *H. U. Kantorowitz i slobodnopravni pokret* (doctoral dissertation), Split, 1995, p. 264.

a relationship with general norms and all its peculiarities, and because the legislator cannot foresee the future and every change that occurs in a relationship or to anticipate new relationships that will yet appear.⁴² Similarly, Visković says that the starting point is that law strives to fully encompass the relationships that are its subject, and which are important for the survival of society, contain strong conflicts of interest and are externally controllable, but due to their complexity, dynamism and variability, this does not succeed in all cases, so social relationships remain unregulated or insufficiently regulated.⁴³

The possibility of legal gaps has not always been recognized. According to the oldest, but still present, legalistic conception, law is understood as an expression of the will of the legislator, and then the legislator's request that all legally relevant relations be regulated by law should be respected. Therefore, the legal system is complete and there are no gaps because the legislator orders it so.⁴⁴ The conception that understands law as the unity of general and individual norms, and in doing so particularly emphasizes the role of the judge, says that legal gaps exist with respect to the law, but not with respect to the law as a whole, since the judge also creates law and must resolve every disputed legal case.⁴⁵

Several means are provided for filling the gaps. First and foremost is certainly the argument from analogy, which is sometimes considered a procedure of interpretation in the strict sense, and not for the method of eliminating gaps.⁴⁶ Two of its forms are usually highlighted – *analogia legis*, where the gap is filled by applying a legal provision, and *analogia iuris*, where the gap is filled by applying some principle to an unregulated relationship.⁴⁷ Analogy comes into play only if there is an essential similarity between the non-normative and the normed relationship, which is determined by the objective interpretation.⁴⁸ Furthermore, in legal theory, depending on the legal systems, the following means for filling the

⁴² Vasić, R.; Jovanović, M.; Dajović, G., *Uvod u pravo*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2014, p. 367.

⁴³ Visković, N., *Teorija ...*, *op. cit.* note 38, p. 234.

⁴⁴ Only those social relations that the legislator has regulated are legally relevant, and "legal gaps do not exist either because the legislator is indifferent to all other relations or because he has tacitly qualified all other relations as permissible " (*Gény F., Methodé d'interprétation et sources du droit privé positif*, LGDJ, Paris, 1919, t. I., p. 70 et seq).

⁴⁵ Visković, N., *Pojam prava*, second edition, Logos, Split, 1981, p. 248. Comanducci hold that to problem legal emptiness, looking with location judge reports then when referee hold that certain behavior, relevant for case who must be resolved, is not determined by law as either prohibited, mandatory, or permitted (Commanducci, P., *op. cit.* note 38, p. 211).

⁴⁶ We hold that in practice there is no strict boundary between interpretation by means of *an a simili argument* and filling in gaps, and that when a judge uses an argument from analogy, he is simultaneously filling in a legal gap.

⁴⁷ E.g. Harašić, Ž., *op.cit.* note 7, p. 109.

⁴⁸ *Ibid.*, p. 56.

gaps are mentioned: principles of natural law, general legal principles, norms from comparative law, rules of social morality, norms that used to be valid, customs, norms that a judge makes based on a sense of fairness, norms recommended by legal science, norms of natural law, argument *a fortiori*, argument *a contrario*.⁴⁹ From the perspective of parliamentary sovereignty (in the continental European system), it would be most desirable for legal gaps to be filled by legislative intervention, but since it is often slow and belated, it is used much less frequently to fill gaps.

Perelman asks whether a gap can be addressed not only when the law is silent, but also when it is unclear.⁵⁰ In doing so, Perelman raises the question of the distinction between interpretation (when the law is unclear) and gap-filling (when the law is silent). This is usually resolved by saying that interpretation presupposes that there is a legal provision for the case to be decided, while gap-filling presupposes that no provision is provided for the case, and then some legal principle must be used.⁵¹ It is possible, as Perelman says, that there is a vacillation in legal systems, so that what one system considers interpretation may be qualified as gap-filling in another.⁵²

This issue can also be considered from the following aspect. The position that proceeds from the fact that filling legal gaps is separated from interpretation, starts from the fact that the limits of interpretation are the limits of the text of the norm. The meaning that would be attached to a norm, which is linguistically untenable, is not the meaning that is arrived at by interpreting the law. When filling a legal gap, the judge does not stick to the text of the norm, but goes beyond its framework and gives a new one: when interpreting, he gives the meaning of the norm.⁵³ Thus, Zaccaria says that the argument based on analogy has a productive function and has the effect of normative invention through finding and formulating a new norm, and expands the descriptive description of the subject or type of subjects in a given provision and includes subjects or types of subjects that are not strictly

⁴⁹ On other legal means, apart from the argument of analogy, see: Ost, F.; Van der Kerchove, M., *Entre la lettre et l'esprit. Les directives d'interprétation en droit*, Bruylant, Bruxelles, 1989, p. 3; Visković, N., *Pojam ...*, cit. note 45, p. 250; D'Alessio, R., *Completezza, chiusura e integrazione dell'ordinamento*, in: Modugno, F. *Appunti per una teoria generale del diritto*, Giappichelli, Torino, 1997, p. 253-280.; Vasić, R.; Jovanović, M.; Dajović, G., *op. cit.* note 42, p. 372, 373); Lukić, R. D., *Uvod u pravo*, second edition of the 1995 edition (edited by J. Hasanbegović and M. Božić), Official Gazette, Beograd, 2022, p. 347.

⁵⁰ Perelman, C., *Pravo, moral i filozofija*, Nolit, Beograd, 1983, p. 134.

⁵¹ For example, La Torre, M.; Pattaro, E.; Taruffo, M., *Statutory Interpretation in Italy*, in: MacCormick, N. D.; Summers, R. S., (eds.), *Interpreting Statutes*, Aldershot (etc.), 1991, p. 218; Vrbanić, D., *Država i pravo*, Golden Marketing, p. 461; Vasić; Jovanović; Dajović, *op. cit.* note 42, p. 367.

⁵² Perelman, C., *op. cit.* note 50, p. 135.

⁵³ Vasić, R.; Jovanović, M.; Dajović, G., *op. cit.* note 42, p. 371.

linguistically covered, but are "similar".⁵⁴ In addition, the judge always interprets the law, but does not have to fill legal gaps, and sometimes he may not. as, for example, in criminal law.

Guastini, on the other hand, believes that in order to avoid a legal gap and resolve the case, we should probably interpret the normative text, i.e. go back to the text and interpret it differently.⁵⁵ That is, he believes that just as gaps can be avoided through interpretation, they can in some way be produced through interpretation: in the sense that available normative texts can be interpreted in such a way that a gap appears.⁵⁶

6. RATIONALITY

The conclusion of a court decision should be rational, in the sense that it should be reasons (arguments) on which the decision is based should be stated. Otherwise, it is not reasoned, and therefore not rational. In doing so, we assume that legal provisions (norms) are mandatory arguments. In addition to them, there are also optional or supplementary arguments, for example the argument *a contrario*, a. *a simili ad simile*, a. *a fortiori*, etc., which are used to interpret legal provisions (norms).

The idea of rationality is one of the most important ideas associated with law. Rationality in legal, especially judicial, work is most often discussed in connection with interpretation.⁵⁷ For example, the same text can be interpreted in completely different ways by different courts. In doing so, each judge is convinced of his own rationality. Can they all be rational if they give different interpretations of the same text? This is believed to be possible because there are no generally accepted criteria for the rationality of legal interpretation.⁵⁸

⁵⁴ Zaccaria, G., *Analogy as Legal Reasoning – The Hermeneutic Foundation*, in: Nerhot, P., (ed.), *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics*, Springer Science+Business Media BV, 1991, p. 57.

⁵⁵ Guastini, *op. cit.* note 38, p. 129.

⁵⁶ Guastini *op. cit.* note 38, p. 131.

⁵⁷ Of course, interpretation is very close to argumentation. Namely, arguments are the means used by interpretation. As Novak states, "one of the central questions of argumentation theory is when legal reasoning is considered rational." (Novak, M, *Legal argumentation in practice*, Planet GV, Ljubljana, 2010, p. 12). On rationality in argumentation see also: Kauffeld, JF, *Two views of the Necessity to Manifest Rationality in Argumentation*, <https://scholar.uwindsor.ca/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1334&context=ossaarchive>, February 10, 2025.

⁵⁸ Malec, A., *The Is-ought Problem and Legal Rationality*, *Studies in Logic, Grammar and Rhetoric*, year 11, 24/ 2007, p. 9.

When we talk about rationality, we usually mean logical rationality. *Logical rationality* says that the conclusion is valid if it logically follows from certain premises, which are logically consistent and linguistically correct. It sets a minimum logical requirement for the regularity of legal reasoning.⁵⁹ This type of rationality belongs to the field of formal logic, since the truth of the conclusion is based only on formal assumptions (premises).⁶⁰ Related to logical rationality, the prevailing view is that the syllogism is an indicator of the logical correctness of the judgment.⁶¹ This also applies to the so-called easy cases and the so-called hard cases - how we divided them considering their complexity. We defined easy cases as those in which the legal norm is completely or mostly clear, so it is possible to subsume the facts of the case without or with a simpler interpretation (argumentation), while hard cases would be those in which the legal norm is not clear, so a more complex interpretation (argumentation) is needed.⁶² Any conclusion - whether in the case of clear or difficult cases, can be presented in the traditional form of syllogism (so-called simple pipping).⁶³ If the case is more complex, in order to preserve the form of the syllogism, the above premise containing the legal norm should be formulated as a complex sentence. If we do not want to present the case in the form of a syllogism, we can also present the conclusion by introducing an additional (or additional) premise - the so-called complex (sophisticated) justification.⁶⁴

7. EXAMPLE OF ARGUMENTATION IN COURT DECISION

Here is an example of a verdict (UsZg, UsI-1753/2019-12 of October 14, 2020) in which the procedure is being conducted to determine the utility contribution for the construction of a building and the administrative court of first instance - used three arguments: systematic argument, authority argument and target argument. In this judgment, the court explicitly reasons in two places (I/ and II) with an

⁵⁹ "Logical necessity is an important condition of rationality." - Novak, M, *op. cit.* in note 57, p. 39.

⁶⁰ Cerar, M, *(I)rationality of modern law*, BONEX ZALOŽBA, Ljubljana, 2001, p. 125.

⁶¹ Uzelac, on the other hand, considers the doctrine of legal syllogism to be "obsolete and outmoded". Uzelac, A., *Istina u sudskom postupku* (master's thesis), Zagreb, 1992, p. 22.

⁶² *Supra* note 25.

⁶³ According to the point of view of some authors, all ways of justifying a court decision can be reduced to three models: the model of simple pipping, complex or sophisticated pipping, and discursive alternative pipping. V. Summers, R.; Taruffo, M., *Interpretation and Comparative Analysis*, in: McCormick, N. D.; Summers, R. S. (ed.), *Interpreting Statutes*, Aldershot (etc.), 1991, p. 492.

⁶⁴ *Loc. cit.*

isthematic argument, since the provisions of the mentioned laws are interpreted by bringing them into relation:

I/ "Article 23, paragraph 1 of the Act on Municipal Economy (Official Gazette, No. 36/95, 109/95, 21/96, 70/97, 128/99, 57/00, 129/00 and 59/01 - hereinafter referred to as the Act), stipulates that municipal contributions are public monetary payments paid for the construction and use of facilities and devices of the municipal infrastructure referred to in Article 30, paragraph 1 of this Act." Therefore, the court connects Article 23, paragraph 1, and Article 30, paragraph 1 of the Act.

Article 2, paragraph 6 of the General Tax Act (Official Gazette, No. 127/00, 86/01 and 150/02) stipulates that contributions are monetary payments paid for the use of certain services or the exercise of rights.

Comparing the aforementioned provision of the General Tax Law with the aforementioned Article 23, paragraph 1 of the Law, ... it is evident that "a fee paid for the construction and use of facilities and devices of communal infrastructure" is precisely "a monetary fee paid for the use of certain services."

Article 2, paragraph 6, and Article 23, paragraph 1 of the Act are linked.

II/ "Article 90, paragraph 2 of the General Tax Act stipulates that the statute of limitations for the determination of tax liabilities and interest begins to run after the end of the year in which the tax liabilities and interest should have been determined.

Article 92 of the General Tax Act stipulates that the absolute limitation period for the tax authority's right to determine tax liability and interest, initiate misdemeanor proceedings, collect taxes, interest, enforcement costs and fines, and the taxpayer's right to a refund of taxes, interest, enforcement costs and fines begins six years from the date on which the limitation period first began to run.

Article 24, paragraph 2 of the General Tax Act stipulates that rights arising from tax-debt relations shall expire upon statute of limitations.

Having observed the above provisions, the Court concludes that the statute of limitations began to run ... and has expired ... Therefore, this Court concludes that the issuance of a decision on the determination of the utility contribution after the absolute statute of limitations has expired is unlawful ..."

Here the court connects Article 90, paragraph 2, Article 92 and Article 24, paragraph 2 of the Act.

The second argument used by the court is the argument of authority referring to the decision of the Constitutional Court, which reads:

"The decision of the Constitutional Court of the Republic of Croatia, Case No. U-III-1104/2017, dated 13 September 2017, adopted a binding legal position stating that the communal fee, or communal contribution, is a monetary public benefit which, as a form of public benefit, falls within the scope of Article 2, paragraph 6 of the General Tax Act."

In the third case, we show the use of the target argument:

"*The meaning of the limitation period is that no one can indefinitely take the right to claim or establish a specific benefit from another person, because such a circumstance would lead to the consequence that the debtor's successor, even after fifty years, would be determined to have a certain obligation that he does not even know exists.*"

We believe that the use of the objective argument is undoubtedly supported by the fact that the court here views the legal institution of limitation in general with regard to its purpose, goal, or, as the court states, "meaning." That purpose is: establishing legal certainty and certainty.

So, we quoted the part of the decision from which the argumentation is visible. Let's note that this is argumentation in the narrower sense, it means the use of a certain argument by the judge in such a way that it is named, or it is not named, but it is beyond any doubt that it is the use of an argument that can be recognized by Tarell's list. Based on the criteria of argumentation complexity and the use of three arguments, this is a hard case. The conclusion of the decision is explained and therefore rational.

8. CONCLUSION

In this paper, we have pointed out the need to conduct empirical research on argumentation on which arguments and in what number are used by judges in making decisions. As we have said, studies on legal argumentation without empirical research represent only a theoretical framework that does not correspond to social reality and dynamics, primarily because the aforementioned studies view all arguments equally. Existing research, as well as the logic of judicial reasoning, suggests the hypothesis that in practice the opposite is true, and that some arguments are used much more often, while others are used rarely or almost never. In addition, we answered questions that are closely related to research on the use of arguments, of which we highlight: which court decisions fall under the so-called "easy cases", and which in the so-called "difficult cases", the question of the existence of legal gaps and the question of the rationality of the decision, and the latter includes the question of the value of the syllogistic form of reasoning. The author presents five relevant empirical studies - Lazzaro (1970), Struck (1971), Raisch (1988), Pokol (2000) and Harašić (2010), with their advantages and disadvantages. The author suggests that when analyzing decisions, one should start from the lists of arguments of individual theorists and suggest the most influential lists – Tarello's and Perelman's.

We have shown with an example, how we think arguments in court decisions should be analyzed. We believe that the analyzed case is a hard case.

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