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Antinomy between the General Principles of Law (The "City Cemetery" Case)[1*]

as. mag. Luka Burazin

The so-called *City Cemetery* case derives from contemporary Croatian judicial practice and passed though all three decision-making levels (Municipal Court, County Court, Supreme Court).[2] It is of special interest for this presentation as it provides the basis for an analysis of several important issues from the fields of the general theory of law and legal argumentation –issues of gaps in the law, of the application of the general principles of law in the decision-making process and of antinomies in law. Another point of interest concerns the different decisions taken by the courts involved: the Municipal Court and the County Court ruled in favour of the claimant, while the Supreme Court amended their judgments and ruled in favour of the defendant. Also worth noting are the differences in opinion among first-year law students with whom I analyse this case in their seminar in order to find out how they, who still lack specific legal knowledge, would have solved the case according to their sense of justness. After I present them with only the facts of the case and answer their questions, they side with one or the other party. In most cases, the ratio is 60% versus 40% in favour of the defendant and against the claimants.

1. FACTS OF THE CITY CEMETERY CASE

In the case in question the dispute concerned the right to use two graves at a public cemetery in Zagreb. The claimants reque-

[1*] Paper presented at the International Conference "Legal Argumentation and the Challenges of Modern Europe", European Faculty of Law in Nova Gorica, Slovenia, 15-16 October 2009. Translated into English by Ana Burazin.

[2] Zagreb Municipal Court Judgment, P-1459/03 of 16 September 2003 (unpublished), Zagreb County Court Judgment, Gž-1323/04-2 of 10 October 2006 (unpublished) and Judgment of the Supreme Court of the Republic of Croatia, Rev 362/07-2 of 7 January 2009, published at http://sudskapraksa.vsrh.hr/supra

sted that the court find that they, and not the defendant, were the exclusive holders of the disputed right to use the graves and called on the court to order the defendant to complete the claimants' registration as such in the relevant grave register.

The undisputed facts of the case are as follows:

The late Ms. V. N. (in 2000) was the holder of the right to use three graves and was registered as such in the relevant grave register. Two years prior to her death (in 1998), she concluded with the claimants a contract to assign the disputed right to use the two graves (hereinafter: the disputed right of use), whilst retaining the right to use the third grave for herself. The claimants did not register the disputed right of use in the grave register which they had acquired under the said contract. In the inheritance proceedings instituted following her death, her son R. N. was named the sole heir in the final decision on inheritance of April 2002. Further, on the basis of a submitted excerpt from the grave register which showed the late V. N. was still registered as the holder of the right of use of all three graves, it was decided that the disputed right of use was included in the decedent's estate. As the heir, R. N. was registered in the relevant grave register as the new holder of the right of use for all three graves. In August 2002, R. N. concluded a contract of assignment of the disputed right of use with the defendant after having presented the latter with the final decision on inheritance and an excerpt from the grave register proving he was the holder of the disputed right of use. Thereafter, the defendant was also registered in the grave register as the new holder of the disputed right of use. Neither party disputes the fact that the defendant acted in good faith when she concluded the contract with R. N.

Thus, the only point in the dispute is whether, given the above described developments, it is the claimants who remain the holders of the right of use for two graves or whether this right was acquired by the defendant?

2. IN SEARCH OF APPLICABLE LAW

2.1. Reasoning by the Municipal Court and the County Court

When searching for applicable law to solve the dispute, the

first-instance court established in its decision, which was also confirmed by the second-instance court, that the "only relevant regulation" with respect to the preconditions for acquiring the right of use to a grave, which is to be applied to the present case, is the Graves Act.[3] As regards the issue in dispute, the Graves Act states only the following: "The user may transfer on the basis of an assignment contract the right of use of a grave to a third party. The contract of assignment of this right of use shall be submitted to the Cemetery Administration for the purpose of registering the new user in the Grave Register."[4] The court was therefore of the opinion that the only precondition for acquiring the right of use of a grave is the conclusion of an assignment contract since, according to the court, registration in the Grave Register is exclusively declaratory in nature.[5]

The court also addressed the defendant's position in view of the undisputed fact that in the matter in hand she had acted in good faith. In respect of the defendant's reference to such protection as is provided, for instance, by the law of property through the institution of the acquisition of a real right on the basis of trust in a public register (land register), the first instance court held that "in legal transactions which concern the rights of use of graves, such protection is excluded for the simple reason that the Graves Act does not contain provisions providing for such protection".[6] Moreover, the court explicitly dismissed the possibility of an (analogous) application of the Act on Ownership and Other Real Rights and the Act on Land Register on the grounds that "the scope of application of these acts is limited to real rights" and that "the right of use of a grave is definitely not such a right".[7] Furthermore, in respect of the defendant's reference to her trust in the truthfulness of the final decision on inheritance as a public document, the court excluded the possibility for the application of the rule on the protection of good faith acquisition against pseudo-heirs by stating that "what is at issue in the present case is not a pseudo-heir in terms of an incorrect determination of his right of inheritance but an incorrect declaration of the items of the estate".[8]

[3] Zagreb Municipal Court Judgment, P-1459/03 of 16 September 2003.
[4] Art. 15(4) of the Graves Act (Official Gazette 19/98).
[5] Zagreb Municipal Court Judgment, P-1459/03 of 16 September 2003.
[6] Ibid.
[7] Ibid.
[8] Ibid.

"The consequence of trust in the final decision on inheritance", concluded the court, "is limited to the ascription of the right of inheritance to a person wrongly determined as the heir so that a *bona fide* third party acquires rights from an inheritance as if he has acquired them from the actual heir, but does not extend to the substitution of the rights that the decedent himself does not have".[9]

On the basis of the determination that the Croatian legal system does not contain a legal norm providing for the protection of a *bona fide* acquirer of the right of use of a grave, the first-instance court decided that the claimants were to remain the exclusive holders of the disputed right of use.

2.2. Reasoning of the Supreme Court of the Republic of Croatia

In deciding on the basis of the appeal lodged by the defendant, the Supreme Court adopted a different stance. First, in contrast to the view taken by the two lower instance courts, it follows from the reasoning of the Supreme Court judgment that the Graves Act does not regulate the issues in dispute in their entirety.[10] Second, in respect of the law that is to be applied to those issues which the Graves Act as *lex specialis* does not regulate, the Supreme Court took the view that it is necessary to apply regulations governing the acquisition, protection and loss of real rights, in particular the Act on Ownership and Other Real Rights as *lex generalis*.[11] Thus, the Supreme Court concluded that the right of use of a grave is a right which is exercised on a thing (a grave), that this right is covered by the scope of "rights", i.e., entitlements constituting the right of ownership (right of possession, right of disposal, right of use) and that it should, therefore, "be equated with the right over real estate" to which the Act on Ownership and Other Real Rights applies.[12] By applying the provisions of the Act on Ownership and Other Real Rights concerning the acquisition of the right of ownership on the basis of a legal transaction and the protection of the *bona fide* acquirer, the Court concluded that "the claimants, on the basis of the contract concluded with the late V. N., would have

[9] Ibid.
[10] See Judgment of the Supreme Court of the Republic of Croatia, Rev 362/07-2 of 7 January 2009.
[11] See ibid.
[12] See ibid.

acquired the right of use of the graves and, thus, would have enjoyed overall protection as would have any other owner of a thing, unless such an acquisition affected the rights of third parties over the thing in question, and this with a view to protecting such other person who had acted in good faith and had placed trust in the public records the purpose of which is to provide access to the relevant data".[13] Hence, the Supreme Court concluded that, since it was the defendant herself who in good faith and placing trust in a public record (the Grave Register), had acquired the disputed right of use, this right of hers "enjoyed protection also with respect to the claimants who, on the basis of a legal transaction, had also been assigned the right of use of the graves but had not registered their right in the public register".[14] In doing so, the Supreme Court referred to the following provision of Art. 125 par. 1 of the Act on Ownership and Other Real Rights: "When several people conclude legal transactions with the seller with the aim of acquiring ownership of one and the same piece of real property, ownership shall be acquired by the person who first applies in good faith for an entry in the land register, provided that all other conditions for the acquisition of ownership have also been satisfied."[15]

Following this line of reasoning, the Supreme Court amended the judgements of the Municipal Court and County Court and dismissed the claimants' request to order that it was they, and not the defendant, who were the exclusive holders of the disputed right of use.[16]

3. PROPOSED DIFFERENT REASONING BASED ON AN ANALYSIS FROM THE STANDPOINT OF THE GENERAL THEORY OF LAW AND LEGAL ARGUMENTATION

After having outlined the Croatian courts' lines of reasoning concerning the applicable law in the *City Cemetery* case, on the basis

[13] Ibid.
[14] Ibid.
[15] Act on Ownership and Other Real Rights (Official Gazette 91/96, 68/98, 137/99 – Decision of the Constitutional Court U-I-58/97, 22/00 – Decision of the Constitutional Court U-I-1094/99, 73/00, 114/01).
[16] See Judgment of the Supreme Court of the Republic of Croatia, Rev 362/07-2 of 7 January 2009.

of the general theory of law and legal argumentation I will proceed by analysing a different line of legal reasoning which could be then applied in order to solve the issue in dispute. I will start by claiming that there is a gap in the Croatian positive law system with respect to the legal norm regulating the issue in dispute.

3.1. A gap in the law with respect to the issue in dispute and use of the argument *per analogiam*

In general, the term "gap in the law" refers to the situation of a certain social relationship which, although it should, is not actually regulated by a legal norm.[17] In other words, a gap in the law represents the state of the absence of a legal norm concerning a social relationship which should be regulated by the law.[18] And, according to Visković, social relationships which should be regulated by the law are those interpersonal relationships that are important for society's survival and well-being, that involve strong conflicts of interest and are externally controllable.[19] Such gaps in the law, with respect to the contents of which a consensus seems to have been reached at the theoretical level, are also called by some "visible" gaps in the law.[20]

The Graves Act which, as *sedes materiae* and *lex specialis* for legal relationships relating to the use of graves, should be given precedence with respect to the application of law in the analysed case, does not provide, as the Supreme Court correctly concluded in its decision, an overall normative regulation of the issue in dispute. Furthermore, neither the Ownership Act and the Land Registration Act (i.e., rules on the acquisition of real rights and the

[17] For more details on gaps in the law, see R. Guastini, L'interpretazione dei documenti normativi, Dott. A. Giuffré Editore, Milano, 2004, pp. 223-242 and N. Bobbio, Lacune del diritto, Novissimo digesto italiano, Vol. IX, Unione tipografico-editrice Torinese, Torino, 1975, pp. 419-424. On the difference between "gaps" and "open texture" in the law, see C. Perelman, Problem praznina u pravu, publ. in: Pravo, moral i filozofija, Nolit, Beograd, 1983, pp. 130 and 131.

[18] See B. Perić, Država i pravni sustav, Informator, Zagreb, 1994, p. 224, N. Visković, Teorija države i prava, Birotehnika, Zagreb, 2006, pp. 234-236, 260 and 261, D. Vrban, Država i pravo, Golden marketing, Zagreb, 2003, p. 461, V. Miličić, Opća teorija prava i države, self-published, Zagreb, 2003, p. 341, F. Bydlinski, Grundzüge der juristichen Methodenlehre, WUV, Wien, 2005, p. 59, P. Koller, Theorie des Rechts, Böhlau Verlag, Wien, 1997, p. 227. and M. Pavčnik, Teorija prava, GV Založba, Ljubljana, 2007, p. 383.

[19] See N. Visković, Teorija države i prava, p. 234.

[20] E.g. Larenz and Canaris. See K. Larenz, C.-W. Canaris, Methodenlehre der Rechtswissenschaft, Springer, Berlin [etc.], 1995, p. 198. In view of the scope of my paper, I have left out numerous views on other types of gaps in the law. For more details, see K. Larenz, C.-W. Canaris, Methodenlehre der Rechtswissenschaft, pp. 191-201, M. Pavčnik, Teorija prava, pp. 389-401 and M. Pavčnik, Why Discuss Gaps in the Law, Ratio Juris, Vol. 9, No. 1 (1996), pp. 74-83.

effects of trust in land registers) nor the Civil Obligations Act (i.e., rights on the assignment of claims and the effects of multiple assignment) cannot without difficulty be directly applied as *lex generalis* in view of the disputable legal nature of the right of use of a grave.[21] It follows that the Croatian law remains silent on whether it was the claimants who after the described developments remained the holders of the disputed right of use or whether it was the defendant who became the holder of that right.

As, on one hand, the existence of gaps in the law is a phenomenon common to every legal system[22] and as, on the other, judges are obliged to decide on an issue in dispute (prohibition of declaring a *non liquet*, *déni de justice*),[23] legal orders provide for certain methods for resolving the problem of gaps in the law in concrete cases by filling them. Of the various means for closing gaps in the law, available to those applying legal norms (judges and administration bodies),[24] in the case of "visible" gaps analogy is especially important.[25] In general, analogy (or *argumentum per analogiam*, *argumentum a simili ad simile*) is a general principle of logic on the drawing of conclusions on the basis of similarity.[26] As a rule, legal theory differentiates between statutory analogy and legal analogy.

[21] In the City Cemetery case the courts took opposing views on the legal nature of the right of use of a grave. The Municipal Court explicitly stated that, by its legal nature, the right of use of a grave is not a real right, while the Supreme Court equated the right of use of a grave with real rights. I am of the opinion, however, that if the right of use of a grave is not declared a sui generis right, it should, perhaps, rather be classified as a right in personam. The law of obligations recognises both the right of use (e.g., the right of use as an essential part of the lease contract) and the type of contract by which the right of use of a grave is transferred (assignment contract). Assuming such a position were taken, the Civil Obligations Act as lex generalis, i.e., its provisions on the assignment of a claim and on multiple assignments, would apply to multiple alienations of the right of use of a grave.

[22] On the different views on the existence or inexistence of gaps in the law, see F. Atria, On Law and Legal Reasoning, Hart Publishing, Oxford and Portland, Oregon, 2002, pp. 76-86.

[23] See C. Perelman, Problem praznina u pravu, publ. in: Pravo, moral i filozofija, p. 129 and L. Recaséns Siches, Human Life, Society and Law: Fundamentals of the Philosophy of the Law, publ. in: Latin-American Legal Philosophy, 20th Century Legal Philosophy Series, Vol. III, Harvard University Press, 1948, pp. 194-196.

[24] For instance, the following means have been mentioned: the raising of a legislative issue, customary law, power of the judge to create legal norms on his own, principle of "the nature of a matter", general principle of freedom ("whatever is not prohibited is permitted"), legal practice, morality. See B. Perić, Država i pravni sustav, pp. 224 and 225, N. Visković, Argumentacija i pravo, PF u Splitu, Split, 1997, p. 70, D. Vrban, Država i pravo, p. 464, C. Perelman, Problem praznina u pravu, publ. in: Pravo, moral i filozofija, pp. 132-135, V. Miličić, Opća teorija prava i države, p. 344 and L. Recaséns Siches, Human Life, Society and Law: Fundamentals of the Philosophy of the Law, p. 194.

[25] See K. Larenz, C.-W. Canaris, Methodenlehre der Rechtswissenschaft, p. 202 ff. and R. Guastini, L'interpretazione dei documenti normativi, pp. 191 and 192. By contrast, Miličić holds that the filling of gaps in the law per analogiam is inappropriate and is at odds with some important postulates of the dogmatics of law. For more details on the reasons against the application of analogy, see V. Miličić, Opća teorija prava i države, pp. 343 and 344.

[26] See N. Visković, Teorija države i prava, p. 262.

Statutory analogy (*analogia legis*) refers to the application of a legal norm regulating case A to an essentially similar (analogous) case B for which no legal norm exists.[27] Essential similarity between any two cases reveals itself both as similarity between their essential characteristics[28] and as identity of interests and aims (*ratio legis*) which the law should protect with respect to both cases.[29]

In the *City Cemetery* case, as is the case when attempting to apply an act as *lex generalis*, the application of statutory analogy would at the most provide a questionable solution since the choice of a legal norm regulating a case analogous to the multiple alienation of the right of use of a grave would also depend on the previously taken view on the legal nature of the disputed right of use.[30]

When a gap in the law is encountered in the application of law and a statutory analogy does not provide a clear enough solution, the rules of a so-called legal analogy, i.e., on the use of so-called general principles of law, acquire special importance.[31] When fil-

[27] See B. Perić, Država i pravni sustav, pp. 225 and 226, R. Guastini, L'interpretazione dei documenti normativi, pp. 154-157, V. Miličić, Opća teorija prava i države, p. 343, K. Larenz, C.-W. Canaris, Methodenlehre der Rechtswissenschaft, p. 202, M. Pavčnik, Teorija prava, pp. 510 and 511, N. Visković, Teorija države i prava, p. 262, N. Visković, Argumentacija i pravo, pp. 66 and 67, E. Ottová, Teória práva, Heureka, Šamorín, 2006, p. 280, P. Koller, Theorie des Rechts, p. 231, G. Tarello, Argumentacija tumačenja i sheme obrazlaganja u pridavanju značenja normativnim tekstovima, Zbornik za teoriju prava, vol. 4 Srpske akademije nauka i umetnosti, Beograd, 1990, pp. 246-249 and L. Recaséns Siches, Human Life, Society and Law: Fundamentals of the Philosophy of the Law, p. 197.

[28] Thus, for example, the right in respect of which protection is sought in case B (for which no legal norm exists) would be essentially similar to the right in case A (for which a legal norm exists), if the legal nature of both these rights (as an essential element) were the same (e.g., two real rights) or essentially the same (e.g., the right of ownership and the property component of copyright). Furthermore, the legal relationship in case B (for which no legal norm exists) would be essentially similar to the legal relationship in case A (for which a legal norm exists), if the legal position of subjects of these relationships (as an essential element) were essentially the same (e.g., the legal position of co-heirs with respect to the estate and the legal position of co-owners with respect to property). For the second example, see Ž. Harašić, Problem razgraničenja "lakih slučajeva" (easy cases) i "teških slučajeva" (hard cases), Zbornik Pravnog fakulteta u Zagrebu, Vol. 56, No. 1 (2006), Zagreb, pp. 102-105. For more examples of essential similarity between essential features of compared cases, see M. Pavčnik, Why Discuss Gaps in the Law, pp. 80 and 81.

[29] See B. Perić, Država i pravni sustav, pp. 225 and 226, N. Visković, Teorija države i prava, p. 262, N. Visković, Argumentacija i pravo, pp. 66 and 67, D. Vrban, Država i pravo, pp. 464 and 465, K. Larenz, C.-W. Canaris, Methodenlehre der Rechtswissenschaft, pp. 202-204, F. Bydlinski, Grundzüge der juristichen Methodenlehre, pp. 63 and 64, M. Pavčnik, Teorija prava, pp. 510 and 511, M. Pavčnik, Why Discuss Gaps in the Law, pp. 80 and 81, P. Koller, Theorie des Rechts, pp. 231 and 232 and V. Miličić, Opća teorija prava i države, p. 343.

[30] See fn. 20.

[31] See B. Perić, Država i pravni sustav, p. 226, R. Guastini, L'interpretazione dei documenti normativi, pp. 191 and 192 and K. Larenz, C.-W. Canaris, Methodenlehre der Rechtswissenschaft, p. 206. Tarello refers to restraint with respect to the "operative power" of legal analogy by noting that "in all the countries of continental Europe and irrespective of its being explicitly mentioned in some codes, it is used very rarely – since huge differences have come to be disclosed not only in terms of the nature of the general principles but also in respect of their contents". G. Tarello, Argumentacija tumačenja i sheme obrazlaganja u pridavanju značenja normativnim tekstovima, pp. 270 and 271.

ling a gap in the law by legal analogy (*analogia iuris*), the applier of the law first has to turn to the legal system in its entirety[32] and then find in it several legal norms that for different factual circumstances envisage identical legal consequences.[33] It is from these legal norms that the applier of the law goes on to draw certain general principles of law on the basis of which he then deduces the relevant legal norm and applies it to the case in hand which the law has not regulated, although it should have.[34]

Especially noteworthy in the *City Cemetery* case is the fact that throughout the proceedings both the claimants and the defendant referred in their arguments to the general principles of law as the final substantiations of their views. The claimants referred to the principle *nemo plus iuris ad alium transferre potest quam ipse habet* in order to substantiate their request for it to be determined that they were the exclusive holders of the disputed right of use, while the defendant, in defence of her claim, referred to the principle of protection of legal circulation in so far as it relates to the protection of an acquirer who acted in good faith (*bona fides*).[35]

There is no doubt that, as general principles of law, both the principle *nemo plus iuris* and the principle of protection of legal circulation represent important means of legal argumentation. Thus, for example, in Struck's catalogue of *topoi* they are described as the relevant "standard arguments,"[36] of which the majority constitute, according to Visković, "well-known legal principles or supreme axiological rules".[37]

Both the principle *nemo plus iuris* and the principle of protection of legal circulation can be drawn, in conformity with the ru-

[32] See B. Perić, Država i pravni sustav, p. 226.
[33] See K. Larenz, C.-W. Canaris, Methodenlehre der Rechtswissenschaft, p. 204 and F. Bydlinski, Grundzüge der juristichen Methodenlehre, p. 67 and 68.
[34] See B. Perić, Država i pravni sustav, p. 226, D. Vrban, Država i pravo, p. 465, V. Miličić, Opća teorija prava i države, p. 343, M. Pavčnik, Teorija prava, pp. 511 and 512, K. Larenz, C.-W. Canaris, Methodenlehre der Rechtswissenschaft, pp. 204 and 205 and E. Ottová, Teória práva, pp. 280 and 281.
According to Tarello, the method for deriving the general principles of law from the totality of all the norms of a certain positive legal system has its roots in Savigny's understanding of the law as an organic expression of the Volksgeist. Tarello further points to the belief that the general principles of law are to be deduced from the natural law (stemming from the learning of the natural law school) and the belief that the general principles of law are to be deduced from the laws recognised by the so-called civilised nations (stemming from the learning of 19th century legal liberalism). See G. Tarello, Argumentacija tumačenja i sheme obrazlaganja u pridavanju značenja normativnim tekstovima, p. 270.
[35] See the Zagreb Municipal Court Judgment, P-1459/03 of 16 September 2003 and the Zagreb County Court Judgment, Gž-1323/04-2 of 10 October 2006.
[36] See G. Struck, Katalog toposa, Pravni vjesnik: tromjesečni glasnik za pravne i društveno-humanističke znanosti Pravnog fakulteta u Osijeku, Vol. 3, No. 3-4 (1987), pp. 406 and 408.
[37] N. Visković, Argumentacija i pravo, p. 57.

les on the application of the so-called legal analogy, from a whole set of legal norms that jointly belong to the one and the same (in this case the Croatian) legal system. The principle *nemo plus iuris* provides the basis for, e.g., the rules on the acquisition of rights (right of ownership and other real rights, rights *in personam*, right of inheritance, etc.), the rules on representation and the rules on the delegation of jurisdiction. And the principle of protection of legal circulation, especially in so far as it relates to the protection of the *bona fide* acquirer, provides the basis for, e.g., the rules on the acquisition of an immovable or movable property from a non-owner, the rules on the acquisition from a pseudo-heir, the rules on the *bona fide* acquirer of a negotiable instrument, the rules on the offer and acceptance by an unauthorised person and the rules on the non-confiscation of a pecuniary gain acquired by means of a criminal deed from a third party that acquired it in good faith.

When filling gaps in the law by the so-called legal analogy it is, therefore, now necessary to deduce from these principles the relevant legal norms which it would be possible to apply to the issue in dispute in the *City Cemetery* case. Consequently, from the principle *nemo plus iuris*, it is possible to derive the legal norm according to which the assignor's right of use is a precondition for the acquisition of the right of use of a grave on the basis of an assignment contract. Of course, the defendant could not acquire the right of use of the graves from R. N. on the basis of such a legal norm, as he was not the lawful holder of the disputed right of use. On the basis of such a legal norm it would only be possible to decide that the claimants are the holders of the disputed right of use since, in the case of their acquisition, the precondition of the predecessor's right of use is met. On the other hand, from the principle of protection of legal circulation in so far as it relates to the protection of the *bona fide* acquirer it is possible to derive the legal norm according to which the acquirer, upon his registration in the grave register, acquires the right of use of a grave as if he has acquired it from its lawful holder if, acting with trust in the grave register, he has acquired it in good faith from a person who was registered as, but was not, the holder of the right of use of that grave. On the basis of such a legal norm the defendant could, of course, have acquired the disputed right of use since when she entered into the assignment contract with R. N., although R. N. was not the lawful holder of the disputed right of use, she acted with

trust in the truthfulness of the contents of the grave register, i.e., she acted in good faith. In this case, the claimants' request that it be determined that they, and not the defendant, are the exclusive holders of the disputed right of use should be refused.

As it follows from this deduction procedure, the application of the so-called legal analogy at this stage results in *two* general principles of law on the basis of which *two* legal norms are created, the normative qualifications of which produce *two* different solutions to the legal issue in dispute.

Therefore, if we decide to resolve the issue in dispute by applying the so-called legal analogy, i.e., by using the two general principles of law, we first have to solve another issue relating to legal argumentation: the existence of antinomy.

3.2. Antinomy between the general principles of law and the use of the speciality criterion

In legal theory the term antinomy is understood as contradiction (inconsistency,[38] logical mismatch of contents,[39] incompatibility,[40] discord in obligatoriness,[41] conflict[42]) between two or more legal norms (or two or more general principles of law) relating to one and the same social relationship (i.e., factual conditions).[43] According to Ross, antinomies (inconsistencies) between two legal norms can take three different forms: 1) total-total antinomy or absolute antinomy (i.e., "where neither of the norms can be applied under any circumstances without conflicting with the other"); 2) total-partial antinomy or antinomy between the general and the particular rule (i.e., "where one of the two norms cannot be applied under any circumstances without coming into conflict with the other, whereas the other norm has in addition a further field

[38] See A. Ross, On Law and Justice, Stevens & Sons Limited, London, 1958, pp. 128-132.
[39] See D. Vrban, Država i pravo, p. 466.
[40] See N. Bobbio, O kriterijima za rješavanje antinomija, publ. in: Eseji iz teorije prava, Logos, Split, 1988, pp. 124 and 125, R. Guastini, L'interpretazione dei documenti normativi, pp. 243 and 244, N. Visković, Argumentacija i pravo, pp. 70 and 71, M. Pavčnik, Teorija prava, pp. 520 and 521 and G. Tarello, Argumentacija tumačenja i sheme obrazlaganja u pridavanju značenja normativnim tekstovima, p. 253.
[41] See V. Miličić, Opća teorija prava i države, p. 345.
[42] See G. Tarello, Argumentacija tumačenja i sheme obrazlaganja u pridavanju značenja normativnim tekstovima, p. 253.
[43] See B. Perić, Država i pravni sustav, pp. 190 and 191. According to Perelman, contradiction may exist only between a true and a false statement, whereas in the case of legal norms it is more appropriate to speak of "the existence of discord between guidelines relating to the same subject matter". C. Perelman, Antinomije u pravu, publ. in: Pravo, moral i filozofija, Nolit, Beograd, 1983, p. 116.

of application in which it does not conflict with the first one"); and 3) partial-partial antinomy or the overlapping of rules (i.e., "where each of the two norms has a field of application in which it conflicts with the other, but also a further field of application in which no conflict arises").[44]

The *City Cemetery* case deals with the existence of an ("total-partial") antinomy between two general principles of law – *nemo plus iuris* and the protection of legal circulation in so far as it relates to the protection of the *bona fide* acquirer. Specifically, the case concerns the existence of the "total-partial" antinomy between the legal norms deduced from the two abovementioned general principles of law with respect to the circumstances of the analysed case,[45] i.e., of a "total-partial" antinomy between the general principles of law *in concreto*.[46]

In view of the fact that antinomies in general, and thus also antinomies between the general principles of law, lead to negative consequences, such as the weakening of a legal system's coherence or the undermining of the legal certainty of addressees of legal norms, legal orders most frequently adopt three well-known juridical criteria for solving them: the criterion of time (*lex posterior derogat legi priori*), the criterion of hierarchy (*lex superior derogat legi inferiori*) and the criterion of speciality (*lex specialis derogat legi generali*).[47] However, as Ross correctly notes, the criteria of time, hierarchy and speciality "are not axioms, but principles of relative weight, co-operating in the interpretation with other considerations – in particular with an evaluation concerning which way of achieving harmony will best agree with common sense, popular legal consciousness, or presumed social objectives".[48] Of course, in addition to these juridical criteria, in the case of a special type of antinomy – antinomy between the general principles of law – regular reference is also made to the so-called dimension

[44] A. Ross, On Law and Justice, pp. 128 and 129. Compare R. Guastini, L'interpretazione dei documenti normativi, pp. 245 and 246.
[45] On the "circumstances of a case" as a precondition for the giving of precedence to one general principle of law over another in the case of a collision of principles, see R. Alexy, On the Structure of Legal Principles, Ratio Juris, Vol. 13, No. 3 (2000), pp. 296 and 297.
[46] As a rule, the general principles of law come into conflict only when applied to a concrete case (in concreto). See R. Guastini, L'interpretazione dei documenti normativi, p. 218. On antinomies in concreto and antinomies in abstracto, see ibid., p. 244.
[47] See B. Perić, Država i pravni sustav, pp. 190-192, R. Guastini, L'interpretazione dei documenti normativi, pp. 249-251 and N. Bobbio, O kriterijima za rješavanje antinomija, publ. in: Eseji iz teorije prava, p. 125.
[48] A. Ross, On Law and Justice, p. 134.

of the "weight" or importance of a principle, which dimension should be an important factor in the giving of precedence in the application of law to one of the opposing principles when solving collisions between the general principles of law in a concrete case.[49]

According to the criterion of time, which is primarily based on the view that "he who comes later knows more than he who comes earlier,"[50] the more recent legal norm stands in preference to the earlier one with respect to the application of law. In the case of *ius scriptum*, it is not too hard to establish which legal norm is the more recent one and which the earlier one. However, it is much harder to determine the temporal order of the emergence of legal norms in the case of customary law norms,[51] and even more so in the case of applying the general principles of law. Due not only to the difficulties encountered in determining which of the two conflicting general principles of law is the earlier one and which is the more recent one, but also to their specific nature[52] defined, among other things, by the very notion of their longevity ("sediment of legal wisdom through the centuries"[53]), the criterion of time does not seem appropriate for resolving antinomies between the general principles of law.[54]

On the basis of the criterion of hierarchy, according to which a higher-ranking authority knows more than a lower-ranking authority, the higher legal norm has priority with respect to the application of law over the lower one. In the majority of cases the hierarchy of legal sources is clearly established so the use of the hierarchy argument in most cases is a relatively simple operation. However, when attempting to establish a hierarchical relationship

[49] See R. Dworkin, Taking Rights Seriously, Harvard University Press, Cambridge, Massachusetts, 1978, pp. 26 and 27, R. Alexy, On the Structure of Legal Principles, pp. 296 and 297, R. Guastini, L'interpretazione dei documenti normativi, pp. 218, 219 and 253, M. Atienza, Argumentiranje in ustava, Revus, No. 9 (2009), Ljubljana, pp. 114 and 115 and M. Novak, Poglavlja iz filozofije in teorije prava, Evropska pravna fakulteta, Nova Gorica, 2008, pp. 299 - 323.

[50] N. Bobbio, O kriterijima za rješavanje antinomija, publ. in: Eseji iz teorije prava, p. 128.

[51] See ibid., p. 125.

[52] On the basic characteristics of the general principles of law, see H. L. A. Hart, The Concept of Law, Oxford University Press, New York, 1997, pp. 260-263, R. Dworkin, Taking Rights Seriously, pp. 22-28, R. Alexy, On the Structure of Principles, pp. 299-304, M. Reßing, Prinzipien als Normen mit zwei Geltungsebenen, Archiv für Rechts- und Sozialphilosophie, Vol. 95, Heft 1, Franz Steiner Verlag, 2009, pp. 28-48 and M. Novak, Poglavlja iz filozofije in teorije prava, pp. 327 - 347.

[53] B. Perić, Država i pravni sustav, p. 181.

[54] On the inadequacy of the criterion of time for solving antinomies between the general principles of law, based on a different argumentation, see R. Guastini, L'interpretazione dei documenti normativi, p. 218.

between the general principles of law,[55] the decision of which general principle of law is the higher-ranking one and which is the lower ranking one, would be accompanied by great uncertainty in view of the nature of the general principles of law and the different views on their origins (natural law, laws recognised by the so-called civilised nations, the totality of provisions of a legal system, morality, justice etc.). Therefore, as is the case with the criterion of time, the criterion of hierarchy seems inadequate for resolving antinomies between the general principles of law.[56]

Finally, according to the criterion of speciality, which is based on the principle of justice (in the conventional sense of the word - *suum cuique tribuere*) and the notion that all the persons belonging to the same category should be treated equally,[57] a legal norm that specifically regulates a certain social relationship has priority with respect to the application of law over a legal norm that regulates this same relationship in a general manner. Thus, in order for the speciality criterion to be applied, it is necessary to determine the contents of legal norms that stand in contradiction to each other. Therefore, precisely because the use of the speciality criterion entails the determination of contents as opposed to the determination of the moments of emergence or of the hierarchical order of normative dispositions that contradict each other, the speciality criterion is an acceptable means for resolving "total-partial" antinomies between the general principles of law, as opposed to the other two criteria.[58] In other words, it is much easier to establish the contents of the general principles of law, as they represent the "sediment of legal wisdom through the centuries" and "a deep sediment of legal experience and skill, legal philosophy and logic",[59] than the moment of emergence or the hierarchical rank of an individual general principle of law.

[55] On attempts at introducing a hierarchical order among the general principles of law, see B. Perić, Država i pravni sustav, pp. 181 and 182 and V. Miličić, Opća teorija prava i države, pp. 119-123.
[56] On the basis of the argument that the general principles of law are legal norms of the same rank in the hierarchical order of the sources of law, the same conclusion is also reached by Guastini. See R. Guastini, L'interpretazione dei documenti normativi, p. 218.
[57] See N. Bobbio, O kriterijima za rješavanje antinomija, publ. in: Eseji iz teorije prava, pp. 128, 130 and 131.
[58] An opposite stance is taken by Guastini who, however, proceeds from the claim that it is mostly the so-called partial-partial antinomy which occurs between the general principles of law. Hence, according to Guastini, the criterion of speciality is just as well not applicable to the solving of antinomies between the general principles of law, since in the case of the partial-partial antinomy there is no genus-species relationship between classes of factual states regulated by two principles of law. See R. Guastini, L'interpretazione dei documenti normativi, p. 218.
[59] B. Perić, Država i pravni sustav, p. 181.

Hence, after having decided to apply the speciality criterion as the most appropriate criterion for resolving the antinomy between the principle *nemo plus iuris* and the principle of protection of legal circulation in so far as it relates to the protection of the *bona fide* acquirer in the *City Cemetery* case, it is first necessary to determine their contents *in concreto* and thereafter to establish which of these two principles' contents, with regard to the conditions of the case, represent a general and which a specific legal regulation.

As has already been noted, the content of the legal norm which in the analysed case was deduced from the principle *nemo plus iuris* is the regulation of a precondition for every acquisition of a right – the precondition of the existence of the predecessor's right. On the other hand, the content of the legal norm which in the analysed case was deduced from the principle of protection of legal circulation in so far as it relates to the protection of the *bona fide* acquirer is the regulation of a precondition for the acquisition of a right when this right is acquired from a person who was not the holder of the right being acquired. It follows therefrom that the two principles' normative dispositions with regard to the circumstances of the *City Cemetery* case are not equal in scope. While the principle *nemo plus iuris* refers to the general category of "acquisition of rights", the principle of protection of legal circulation in so far as it relates to the protection of the *bona fide* acquirer concerns one particular category of "acquisition of rights in good faith". Consequently, it may be concluded that under the circumstances of the analysed case the *nemo plus iuris* principle is represented by a general deduced normative disposition, while the principle of protection of legal circulation in so far as it relates to the protection of the *bona fide* acquirer is represented by a special deduced normative disposition.

Since antinomy between the general principles of law may arise only *in concreto*,[60] when opposing principles come into conflict with each other through legal norms deduced from these same principles, it seems that the use of the dimension of "weight" or importance of the general principles of law in the case of the "total-partial" antinomy between principles, thus actually amounts to the application of the criterion of speciality to the solving of

[60] For the two levels of validity of the general principles of law (the abstract and the concrete), see M. Reßing, Prinzipien als Normen mit zwei Geltungsebenen, pp. 46-48.

an antinomy between legal norms deduced from these principles under the circumstances of a concrete case.[61] In this context, the application of the criterion of speciality should be understood in Bobbio's sense of the word, as the achievement of the principle of justice *suum cuique tribuere*.

4. CONCLUSION

By using the speciality criterion as the most appropriate criterion for resolving the antinomy between the contents of the analysed principles *in concreto*, priority should be given to the principle of protection of legal circulation in so far as it relates to the protection of the *bona fide* acquirer, as a special normative qualification that in the case in hand has derogative force with regard to the general normative qualification from the *nemo plus iuris* principle.

Furthermore, by applying the principle of protection of legal circulation in so far as it relates to the *bona fide* acquirer when filling the gap in the Croatian law concerning the regulation of the issue in dispute in the *City Cemetery* case, it is to be concluded that the defendant, and not the claimants, is the exclusive holder of the disputed right of use.

Finally, it appears to follow from the analysed case that when the "total-partial" antinomy between the general principles of law *in concreto* is at issue, the dimension of weight and the balancing between principles can be replaced by the "dimension of speciality", i.e., the "dimension of justice", by applying the criterion of speciality in order to solve the resulting antinomy and achieve the principle of justice as it is understood in the classical sense of *suum cuique tribuere*.

[61] The same conclusion may also be drawn from the case cited by Alexy as an example of collision between the general principles of law. According to the rule-of-law principle in so far as it obligates the state to provide for a functioning system of criminal justice, the said case concerns the competent bodies' duty to try the accused. However, from the right to life and the inviolability of one's body the court derives the legal norm according to which these rights should take precedence in respect of the application of application of law over the principle of a functioning system of criminal justice if in a concrete case "there is a clear and specific danger that the accused will forfeit his life or suffer serious bodily harm in case the trial is held". Of course, the legal norm regulating the specific case in which the performance of a trial could seriously endanger the life of the accused or his bodily integrity is lex specialis in relation to the legal norm regulating the general duty of performing a trial against an accused. See R. Alexy, On the Structure of Principles, p. 296.