

LegArg 2011

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**International Conference on Legal Theory and Legal
Argumentation**

Mednarodna konferenca o pravni teoriji in pravni argumentaciji



Nova Gorica, 11 – 12 November 2011

**European Faculty of Law in Nova Gorica
Faculty of Government and European Studies, Kranj**

*Evropska pravna fakulteta v Novi Gorici
Fakulteta za državne in evropske študije, Kranj*



FAKULTETA
ZA DRŽAVNE IN EVROPSKE ŠTUDIJE



**EVROPSKA
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V NOVI GORICI**

Program

CONFERENCE SITE: EUROPEAN FACULTY OF LAW IN NOVA GORICA (*Evropska pravna fakulteta v Novi Gorici*), Delpinova ulica 18b, 5000 Nova Gorica (“Eda Center” – the new tallest building in Nova Gorica), 1st floor, P1

Friday, November 11th 2011

14:00 – opening of the conference; welcoming remarks (Organizers)

Section 1: Issues in Legal Argumentation (Chair: Matej Avbelj)

14:15 – 14:45 Giovanni Tuzet, “Truth On Trial. Inquiry or advocacy in legal argumentation?”

14:45 – 15:15 Andrej Kristan, “Truth in Legal Discourse”

15:15 – 15:45 Žaklina Harašić, “Rationality in Legal Decisions”

15:45 – 16:15 Alessio Sarso, “Three Theories of Judicial Balancing: A Comparison”

*Coffee Break***Section 2: Perspectives on Legal Theory** (Chair: Giovanni Tuzet)

16:45 – 17:15 Marko Novak, “Explanatory Interpretation As an Outcome of Legal Interpretation”

17:15 – 17:45 Luka Burazin, “Indirectly and Directly Evaluative Legal Theory: A Reply to Julie Dickson”

17:45 – 18:15 Ivana Tućak, “Hohfeld’s Concept of Immunity”

18:15 – 18:45 Mario Krešić, “Theory of Adjudication and Interstate Legal Order”

19:30 *Conference Dinner*

Saturday, November 12th 2011

Section 3: Theory of EU Law and Beyond (Chair: Jordan Daci)

9:30 – 10:00 Matej Avbelj, “Sovereignty and European Integration”

10:00 – 10:30 Tina Orsolić, “The Relevance of the Concept of Sovereignty For the Future of the European Integration From a Comparative Constitutional Perspective”

10:30 – 11:00 Gentiana Dedaj, “Protection of Domain Names – Cybersquatting, the Newest Trademark Dispute”

Coffee Break

Section 4: Legal Philosophy (Chair: Luka Burazin)

11:15 – 11:45 Jernej Letnar Čerňič, “The Struggle for Justice in the Life and Legal Philosophy of Professor Boris Furlan”

11:45 – 12:15 Jordan Daci, “Justiciability of Economic, Social and Cultural Rights”

12:15 – 12:45 Vojko Strahovnik, “Defeasibility of Moral and Legal Norms”

12:45 – 13:15 Rok Svetlič, “Kant’s Theory of Punishment and Sophocles’ Antigone”

13:15 End of the Conference, Closing Remarks (Organizers)

Light Lunch Buffet

Abstracts / Povzetki

Matej Avbelj, Faculty of Government and European Studies

Ph.D., Assistant Professor of European Law
Dean of the Faculty of Government and European Studies

E-mail: Matej.Avbelj@fds.si

SOVEREIGNTY AND EUROPEAN INTEGRATION

This article studies a relationship between the concept of sovereignty and the process of European integration. It is argued that the nature of this relationship has been both mutually informative and transformative. As a particular understanding of sovereignty influenced and determined the perception of European integration, e.g. its conceptualization, so has the process of European integration reflected back on sovereignty and entailed its rethinking. This poses a particular challenge to a legal theorist: how to pin down the meaning of sovereignty and European integration so to put both in the best conceptual and normative light? The article responds to it, first, by looking at the traditional perspective on sovereignty and how the latter has been challenged by the process of European integration. The focus then shifts from sovereignty to European integration in order to examine how different perspectives on sovereignty, when used as an epistemic lens for understanding the process of European integration, have produced uneven conceptions of the latter. Finally, the article concludes by making a choice between the various conceptions of sovereignty and European integration to select the most persuasive.

Luka Burazin, University of Zagreb

Ph.D., Department of General Theory of Law and State
Zagreb Faculty of Law

E-mail: lburazin@pravo.hr

**INDIRECTLY AND DIRECTLY EVALUATIVE LEGAL THEORY: A REPLY TO JULIE
DICKSON**

Owing to its methodological approach, legal theory is usually divided into descriptive, presumably non-evaluative, and normative, i.e. evaluative and justificatory, legal theory. In her *Evaluation and Legal Theory* Julie Dickson rejects this dichotomy. She argues that

all legal theory is evaluative in one way or another. Therefore, she introduces a dichotomy between indirectly evaluative and directly evaluative legal theory. Whereas directly evaluative legal theory has the task of evaluating law morally, indirectly evaluative legal theory makes evaluative judgements as to what features of law are most important and significant to explain. In my paper I first set out Dickson's account of the "evaluative-but-not-morally-evaluative" view of legal theory and then consider some of the criticism of this account. Finally, I make my own remarks concerning Dickson's dichotomy, focusing on the fruitfulness of the "indirectly evaluative legal theory" concept.

Jordan Daci, Wisdom University

Ph.D., Head of Private Law Department
Professor of Human Rights Law and Public and European Law
Wisdom University, Tirana
Phone: +355694010577

E-mail: jordan.daci@gmail.com

“JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS”¹

Human Rights are natural rights that nature has given to all human beings and are inseparable, undividable and inalienable from human beings. Human rights are vital, necessary and indispensable to a modern society, which without them would be unable to function and cannot be developed.² From another perspective, “human rights are indivisible rights on individuals, based on their nature as human beings (moral persons); they protect these potential attributes and holdings that are essential for a worthy life of human beings. In other words, human rights are the rights that man enjoys just by being a man. Therefore, they imply strong moral 'prima facie' obligations, even beyond the borders of the state.”³

Nevertheless, Human Rights in general and especially Economic, Social and Cultural Rights (hereinafter ESCR) would be just illusory if they wouldn't be justiciable. In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential.⁴ Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights.⁵ This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant (on ESCR) provisions⁶, but is

¹Paper proposal for the 3rd International Conference on Legal Theory and Legal Argumentation, organized by the European Faculty of Law in Nova Gorica and the Graduate School of Government and European Studies, Kranj, to be held in Nova Gorica, Slovenia from 11 to 12 November 2011.

² Jordan Daci. “Te Drejtat e Njeriut”. Botimi III. Julvin 2, Tirana 2011, pp 35.

³ P.I.O.O.M., Alex P.Schmid. “Research on Gross Human Rights Violation”. P.I.O.O.M. P.Leiden 1989, pp 6.

⁴ General Comment No.9 “Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights” of the Committee on Economic, Social and Cultural Rights (hereinafter as CESCR), E/C.12/1998/24, par.10.

⁵ Ibid.

⁶ Ibid.

rather a result of states' attempts to justify their failure to perform their obligations under the UN International Covenant on Economic, Social and Cultural Rights. One of the most generally used excuses is based on the assumption that ESCR are not legal rights, they are not self-executing human rights, but 'programmatic rights'⁷. Certainly, this assumption and all other excuses cannot undermine the obligations of state to enforce ESCR recognized under ICESCR. These obligations should be considered under the light of the principle of international law '*Pacta sun servanda*' embodied in the Article 27 of the Vienna Convention on the Law of Treaties and under the light of the principle of the right to effective remedy recognized in many international treaties. Thus, a state seeking to justify its failure to provide to domestic legal remedies for the violation of ESCR needs to prove either such remedies are not "appropriate means" within the terms of Article 2 of ICESCR or that in view of the other means used, they are unnecessary.⁸ Therefore, the main purpose of this paper would be to emphasize that ESCR are fundamental human rights just as civil and political rights and to prove that most of ESCR are capable of immediate implementation *inter alia* using their essential interrelation with civil and political rights. In addition any effort of states seeking to justify their failure to provide domestic legal remedies for the violation of ESCR by considering them unnecessary in the view of other means used, would be inconsistent with the function and the nature of judicial remedies which guarantee that such '*other means used*' would not be rendered ineffective.

Key words: Justiciability of ESCR, ICESCR, *Pacta sun Servanda*, Right to Effective Remedy, Judicial enforcement of Human Rights, Self-executing Human Rights.

Gentiana Dedaj, Stockholm University

LL.M., Fields of expertise: International Commercial Arbitration Law, IT Law
Storgatan 62, Lgh. 928, 17155, Solna, Stockholm
Phone: +46700579559

E-mail: gentiana.dedaj@gmail.com

PROTECTION OF DOMAIN NAMES – CYBERSQUATTING, THE NEWEST TRADEMARK DISPUTE

The rapid development of information and communication technology has brought about enormous social consequences. The number of businesses that are choosing to expand their commerce in the online world is increasing. Such businesses are using domain names for marketing as well as a communication tool and consequently, domain names are becoming of vital importance for many businesses.

⁷ Henry J. Steiner & Philip Alston. "*International Human Rights in Context*": Law, Politics, and Morals. Oxford. Fourth Cluster Reader, ERMA 2002/2003, pp. 245.

⁸ General Comment No.9 "Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights" of the Committee on Economic, Social and Cultural Rights (hereinafter as CESCR), E/C.12/1998/24, par.3.

Domain name disputes emerged in parallel with the introduction of domain name system. The paper is focused on the case law as well as the mechanisms for the resolution of such disputes. It includes a comparison between different approaches in the United States, Europe and Asia.

Žaklina Harašić, University of Split

Ph.D., Assistant Professor
University of Split
Faculty of Law
21000 Split
Phone: +385 21 393 582

E-mail: Zaklina.Harasic@xnet.hr

RATIONALITY IN JUDICIAL DECISIONS

The notion of rationality is used in specialized discussion in economics, sociology, psychology, political sciences, law etc. Here we are concerned with rationality in law, specifically in decisions made by judges. The decision is rational if it is explained; it is explained if the arguments (reasons) the decision is grounded on are noted. There are two forms of legal arguments: obligatory arguments, that is, legal rules, and additional arguments, that is argument *a contrario*, a *a fortiori*, a *a simili ad simille* etc. However, what if in his judicial decision judge didn't note legal rules on which he grounded his decision? This question is posed because a research of croatian judicial decisions shows that a great number of croatian courts - in all degrees - do not note legal rules on which their decisions are grounded. Therefore, higher courts neither note legal rules nor they sanction if courts in first degree do not note their decisions. Thus, do we consider these decisions to be rational? If so, is it sufficient that judges merely know on which reasons they ground their decisions?

Mario Krešić, University of Zagreb, Croatia

Assistant, Department of General Theory of Law and State
Zagreb Faculty of Law
Ph.D. candidate, European Faculty of Law in Nova Gorica

E-mail: mario.kresic@pravo.hr

THEORY OF ADJUDICATION AND INTERSTATE LEGAL ORDER

Is the adjudication a necessary condition for the existence of a legal order?

In the theory of law, adjudication is analyzed by several authors (Hart, Kelsen, Raz, Salmond, McCormick, Gray, Ross, Olivecrona, Pound, Posner, Dworkin, Fiss, Fuller, Kennedy). Their theories about the function and nature of adjudication, mainly based on description of municipal law, can be presented with regard to the aspect of their observation:

Normativistic (analytical) approach explains the adjudication as a special kind of norm in the legal system fundamental for the legal system's existence.

Socio-psychological approach emphasizes the importance of adjudication for forming an idea about what is law in society, which enables internalization of law by legal subjects and existence of legal order itself.

Axiological approaches emphasize the importance of adjudication for the following functions: a) protection of the legal rights; b) transformation of the social structure; and/or c) legitimization of decision making process in society.

According to the international law, states are not obliged to accept the compulsory jurisdiction. The basic tension between consensual and compulsory approach in the development of international law is reflected in the attitude toward the conceptual distinction between legal and political disputes. All the theories of adjudication in the Theory of Law suggest the importance of compulsory adjudication for the existence of legal order, while the prevailing legal doctrine of international law still retains the concept of adjudication only as one of the possible means for resolving disputes. The question is whether the current concept of international adjudication can be sufficient to support interstate legal order.

Andrej Kristan, University of Genoa

Ph.D. candidate, University of Genova

E-mail: andrej.kristan@gmail.com

TRUTH IN LEGAL DISCOURSE

On certain views the law—though it objectively exists before interpretation—is partly undetermined. One of the challenges for such a view is to articulate a theory of truth that may account for the assertive talk of lawyers, referring to this partly undetermined object. In order to explore the possibilities of meeting this challenge, I will translate into the legal discourse the problem of future contingents and propose to discuss the solutions to this problem, which were recently presented in semantics and philosophy of language.

Jernej Letnar Čerňič, Faculty of Government and European Studies

Ph.D., Assistant Professor of European Law

Vice-Dean of the Faculty of Government and European Studies

E-mail: jernej.letnar@fds.si

THE STRUGGLE FOR JUSTICE IN THE LIFE AND LEGAL PHILOSOPHY OF PROFESSOR BORIS FURLAN

This paper analyzes the life and work of one of the first Slovenian legal philosophers, Boris Furlan. His fate has never allowed him to fully develop his work. Nevertheless, he published a series of legal philosophical works that are still relevant in the modern Slovenian legal philosophy. The thread of his work was quest for justice, which, in his words, can be 'found, but not created' (B. Furlan, Problem reality of law, Ljubljana Law School, Cankarjeva založba, 2002, p. 81). In its deliberations we can even trace the origins of his idea of the independent Slovenia. This paper examines the main features of his understanding of legal philosophy focusing on his fundamental work "The problem of the reality of law'. Furlan has always sought justice, though he has never enjoyed in the totalitarian regime. Nonetheless, Furlan maintained a critical attitude to communism, even during lengthy interrogations of totalitarian investigators, and advocated for ideas of justice and the democratization of Slovenian society.

Marko Novak, European Faculty of Law in Nova Gorica

Ph.D., Associate Professor of Theory of Law and Constitutional Law
Vice-Dean of the European Faculty of Law in Nova Gorica
Head of the Department of Legal Theory

E-mail: Marko.Novak@evro-pf.si

EXPLANATORY INTERPRETATION AS AN OUTCOME OF LEGAL INTERPRETATION

Traditional outcomes of the interpretative process in the legal field include literal, restrictive, and extensive interpretations. However, it seems that such cannot cover all interpretative situations that appear particularly in the framework of constitutional law concerning the interpretation of constitutional principles and fundamental rights. Furthermore, the same also applies to the interpretation of statutory principles. The fact that the above-mentioned interpretative outcomes are not sufficient to explain what actually occurs in certain cases of the interpretation of principles and fundamental rights requires development of a new interpretative outcome, which can be named explanatory interpretation. Consequently, the paper brings a theoretical analysis of the interpretation of Art. 1 of the Slovene Constitution (the principle of 'democratic republic'), in the framework of which the Constitutional Court created the sub-principle of human dignity as being part of the mentioned principle. Thus, this case is presented as an example of the application of the so-called explanatory interpretation.

Tina Orsolić, University of Zagreb, University of Maastricht

E-mail: tinaorsolic@gmail.com

THE RELEVANCE OF THE CONCEPT OF SOVEREIGNTY FOR THE FUTURE OF THE EUROPEAN INTEGRATION FROM A COMPARATIVE CONSTITUTIONAL PERSPECTIVE

While some legal scholars nowadays argue that sovereignty is an outdated concept of no significant relevance in the present context of European integration, there are important indications that seem to prove the contrary. Namely, an increasing number of member states' actors tend to rely on sovereignty when addressing the future of the European integration and EU law as its corollary. This paper will attempt to uncover the main legal actors and the exact ways in which they use the concept of sovereignty when addressing future evolvments of EU law. Such an analysis seems as a crucial starting point not only for those interested in addressing the question of utility of sovereignty in the face of the EU, but also for those interested in assessing the adequacy of using this concept as a standard of review of EU law developments.

In order to describe why, how and for whom sovereignty still matters in the EU from a legal point of view, the author will engage in a comparative analysis of highest national tribunals' decisions dealing with the constitutional permissibility of primary EU law amendments. The results of this analysis will show that there is an ongoing and increasingly popular trend of relying on the concept of sovereignty as a crucial parameter for scrutinizing EU law changes under national constitutional norms. More specifically, it will show that debates regarding the future of EU law often seem to be dominated by the so-called 'sovereignty-related approach', which reveals a considerable amount of concern expressed by member states' actors that the evolvment of EU law might lead to a loss, or an unauthorized limitation of member states' sovereignty. In that regard, the usual calculus on part of the member states' legal actors consists in the following: as long as changes in EU law do not threaten the state's core sovereign powers, such changes will be regarded as compatible with national constitutional principles and, therefore, as acceptable.

While identifying this virtually uniform approach by highest national tribunals across Europe, the paper will also point to some problems attached to it. Namely, it will show that none of the tribunals that used the identified approach have been able/willing to provide a clear definition of the term 'sovereignty'. The author will argue that this finding is, in turn, quite indicative in terms of assessing the transparency and, ultimately, the adequacy of employing the sovereignty-related approach in the future, especially given various existing conceptions of sovereignty that may produce divergent results when applied as a part of the described equation.

In short, the paper will thus attempt to answer the following questions of interest to those exploring the role of sovereignty in the EU, namely: Does sovereignty still matter in the European legal context?, For whom and how does it matter? and, finally, What is problematic about the presently assumed approach to sovereignty?

Alessio Sardo, University of Genoa

E-mail: alessiosardo@ymail.com

THREE THEORIES OF JUDICIAL BALANCING: A COMPARISON.

After the Second World War, *judicial balancing* has quickly become a pervasive form of argumentation in Western democracies; more recently, it has been applied almost *by default* in several Constitutional Courts. *Judicial balancing* can be considered in all respects as one of the main features of the so called *new constitutionalism*. It is a concept which is also directly connected with several meta-ethical issues, basically concerning the legal implications of *value pluralism* and the opposition between *particularism* and *universalism*. These features raise important methodological and substantial issues that can not be underestimate.

This paper will attempt to analyse and compare three of the most prominent theories of *judicial balancing*, considering both their meta-ethical presuppositions and their relations with legal interpretation: a) The first one is the theory developed by Riccardo Guastini – which is skeptical and emotivist; b) The second one is the logicist and formal theory proposed by José Juan Moreso; c) The third one is Robert Alexy's well known theory of *balancing*, which is procedural in a strict sense and which can be considered a half-way between *particularism* and *universalism*. Of these three theories, only the first one provides a real descriptive model.

KEYWORDS: judicial balancing, new constitutionalism, value pluralism, particularism, universalism.

Vojko Strahovnik, Faculty of Government and European Studies

Ph.D., Assistant Professor

IPAK institute, Faculty of Government and European Studies, Kranj

E-mail: vojko.strahovnik@gmail.com

DEFEASIBILITY OF MORAL AND LEGAL NORMS

The paper discusses the notion of defeasibility and defeasible norms. It starts with the examination of different notions and understandings of defeasibility of moral norms and then presents four such models of moral principles, namely the recently proposed models of (a) that's it moral principles, (b) default moral principles, (c) hedged moral principles and (d) defeasible moral principles. The most interesting models are models of hedged and defeasible principles, but it is further claimed that they are best understood within the distinction between basic and derivative moral reasons. The general idea is that such principles include merely derivative reasons and are thus clearly susceptible to

exceptions. This debate is then shifted to the field of legal norms and locates similarities and differences between both domains.

Keywords: moral principles, legal norms, defeasibility, exceptions, basic and derivative reasons, normative closure.

Rok Svetlič, University of Primorska

Ph.D., Associate Professor

E-mail: rok.svetlic@zrs.upr.si

KANT'S THEORY OF PUNISHMENT AND SOPHOCLES' ANTIGONE

Immanuel Kant is rather unpopular figure among many legal philosophers due to his fanatic concept of punishment: *fiat iustitia, et pereat mundus!* Beside firm persistence in capital punishment an aversion is provoked also by his metaphor of an island, where the dissolution of the whole society will be carried out, but all condemned persons must be executed – solely due to the principle. No less inexorable is the duty to obey the law; a mere speculation about the origins of the power of the government is held to be unacceptable.

For that reason it is quite surprising Kant's remark which holds that in some circumstances certain »reservation« arises in concernment of the punishment, although the case is legally unquestionable. He gives two, today quite unusual examples: infanticide and murder in affair of honor. The reason is the extreme discrepancy between natural and positive law. The parallelism with Antigone's intentional disobedience of king's Creon orders is intruding. The similarities and differences between these concepts of disobedience will be analyzed in this paper.

Ivana Tućak, J. J. Strossmayer University of Osijek

Ph.D., Senior Assistant
The Chair of Legal Theory
Faculty of Law in Osijek
S. Radića 13, 31000 Osijek
Phone: +385 31 224 543; fax: +385 31 224 540

E-mail: itucak@pravos.hr

HOHFELD'S CONCEPT OF IMMUNITY

Our age is often depicted as the age of rights. Still, the concept of right is imprecise and ambiguous. The real meaning thereof implies comprehensive discussions on legal,

political and moral theory. A large number of authors start their considerations on the nature and foundation of rights with the analytical scheme of fundamental legal concepts by W. N. Hohfeld. Hohfeld did not support the thesis that all the legal relations can be reduced to rights and duties. Instead he split the term of "right" into four different terms: "claim-right", "privilege", "power" and "immunity" and the term of "duty" into "duty", "no-right", "liability" and "disability". Each and every of these terms was given a precise meaning. It might be superfluous to further interpret why attaching a single meaning to legal concepts is of great importance in legal reasoning.

The topic of this paper is analysis of Hohfeld's concept of immunity. The paper is divided into three sections. The first part includes analysis and evaluation of Hohfeld's concept of immunity. The main goal of this section is to outline using existing knowledge what is relevant and still not satisfying in Hohfeld's concept of immunity and how these flaws can be corrected. The second part reviews contemporary debates on Hohfeld's concept of immunity. Arguments for and against inclusion of immunity into a type of legal rights are investigated in this part. The third part is aimed at showing that it is not possible to analyse some extremely relevant constitutional rights without the concept of immunity. Hohfeld's fundamental legal concepts enable precise interpretation of what is understood by people when they require their rights. The concept of Hohfeldian immunity is useful for denoting a specific status of citizens protected from a particular harmful change by means of constitutional restraints or by the disability of the legislator. Unlike the relation right-duty which refers to required conduct, the relation immunity-disability is characterized by conduct which cannot bring to legal changes. The concept of immunity is irreplaceable when it comes to the "rights" of citizens not to be deprived of their property or freedoms without due process of law, then when it comes to the right to freedom of speech, the right to freedom of confession, the principle *ne bis in idem*.

Giovanni Tuzet, Bocconi University

Ph.D., Assistant Professor

E-mail: giovanni.tuzet@unibocconi.it

TRUTH ON TRIAL. INQUIRY OR ADVOCACY IN LEGAL ARGUMENTATION?

Today many scholars claim that finding the truth is not among the aims or functions of a trial. What should be done by judges, rather, is assessing the evidence at disposal and taking a decision on what is at stake.

This line of thought emphasizes the differences between inquiry and advocacy, truth and justice, dialogue in science and conflict in law. One of the reasons presented in favor of this contemporary view is the nature of the adversary system in law: parties are conceived as "fighters", and judges as "referees" who do not participate in the collection of the evidence and must avoid any "inquisitorial" procedure in deciding cases. Because of this, it is said, trials do not and cannot aim at truth.

In the same spirit, legal argumentation is conceived as a “fight” device that parties use to win the case, not as a dialogical effort for a true representation of what is at stake.

But according to the traditional view adversary procedures such as cross-examination are the best means we have to find the truth. I will try to defend this traditional view claiming that: 1) truth is a necessary condition of justice, 2) legal argumentation is truth-oriented, and 3) fallibilism requires adversary procedures.

List of Paper-Givers / *Lista referentov*

***Avbelj Matej*, Faculty of Government and European Studies, Slovenia**

***Burazin Luka*, University of Zagreb, Croatia**

***Daci Jordan*, Wisdom University, Albania**

***Dedaj Gentiana*, University of Stockholm, Sweden**

***Harašić Žaklina*, University of Split, Croatia**

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***Kristan Andrej*, University of Genoa, Italy**

***Letnar Černič Jernej*, Faculty of Government and European Studies, Slovenia**

***Novak Marko*, European Faculty of Law in Nova Gorica, Slovenia**

***Orsolić Tina*, University of Zagreb, Croatia, University of Maastricht, Netherlands**

***Sardo Alessio*, University of Genoa, Italy**

***Strahovnik Vojko*, Faculty of Government and European Studies, Slovenia**

***Svetlič Rok*, University of Primorska, Slovenia**

***Tučak Ivana*, University of Osijek, Croatia**

***Tuzet Giovanni*, Bocconi University, Italy**