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SVEUČILIŠTE JOSIPA JURJA STROSSMAYERA U OSIJEKU

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DIGITALNI AKADEMSKI ARHIVI I REPOZITORIJI

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WELFARE RIGHTS IN THE CROATIAN CONSTITUTION

Abstract:

The idea that human rights involve the right not to be hungry, the right to healthcare, the right to an adequate income or the right to primary education acquired omnipresent characteristics after World War II when these rights became part of international conventions on human rights protection as well as part of national constitutions. The scope of human rights has thus been greatly expanded, which has faced some resistance. This paper is aimed at clarification of the nature of welfare or socio-economic rights and reasons behind their inclusion in fundamental human rights and their incorporation in constitutional texts. This first part of the paper elaborates specific philosophical criticism addressed to this group of rights: the criticism that challenges their universality and inalienability. The primary goal of the second part of the paper is to investigate the referring provisions of the Croatian Constitution and depict the ways in which the Constitutional Court of the Republic of Croatia interprets and thus tailors welfare rights.

Key words: *welfare rights, universality, inalienability, dignity*

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I. INTRODUCTION

Welfare rights belong to the so-called second-generation rights and are as such not incorporated in the 1776 U.S. Declaration of Independence or the 1789 French Declaration of the Rights of Man and of the Citizen.[1] These 18th-century declarations on "the rights of man"[2] contain only what is called today classic first-generation rights[3] which primarily protect an individual from abuse of discretionary powers.[4] These are, before all, the rights to the protection of personal liberty and to the protection of political freedom.[5] They encompass the rights to the judicial protection of these liberties: "the right to the rule of law", "habeas corpus", and the right to "accountable public administration".[6] These rights are often denoted as liberty rights.[7]

The idea that human rights involve the right not to be hungry, the right to healthcare[8], the right to an adequate income or the right to primary education was brought to daylight much later. After World War II, these rights became part of international conventions on human rights protection as well as part of national constitutions.[9] The scope of human rights has thus been greatly expanded, which has faced some resistance. What emerged was ideological and philosophical resistance to the newly generated rights. The ideological battle was fought between the advocates of liberal capitalism who thought that the term of rights should be restricted to civil and political rights only and those who claimed that first-generation rights mean nothing without enjoyment of economic and social benefits by an individual and that both sets of rights are equally important, some even high-

[1] A. Sen, "Elements of a Theory of Human Rights", *Philosophy & Public Affairs*, vol. 32, no. 4, 2004, p 346.

[2] Sen, pp. 316-317.

[3] Sen, p. 346.

[4] G. Zagrebelsky, "Ronald Dworkin's Principle Based Constitutionalism: An Italian Point of View", *Int J Constitutional Law*, vol. 1, no. 4, 2003, p 642.

[5] Sen, *Philosophy & Public Affairs*, p. 317.

[6] O. O'Neil, "The Dark Side of Human Rights", *International Affairs*, vol. 81, no. 2, 2005, p 428.

[7] O'Neil, p. 428.

[8] Sen, *Philosophy & Public Affairs*, 345.

[9] Sen, pp. 316-317.
The terms welfare rights or socio-economic rights are used as synonyms in this paper. This is due to their broad application in the respective literature for denotation of this group of rights. Although some authors, like O'Neil, raise the doubt about the appropriateness of the term of welfare for depiction of this group of rights. O'Neil warns that this term blurs the true nature of these rights which substantially appear as the rights to goods and services and as such contribute to the welfare of their recipients (O'Neil, *International Affairs*, pp. 427-428). She would strongly disagree with De Burca's definition of this group of rights. De Burca sees them as "a category of rights which concern economic and social wellbeing" (G. De Burca, "The Future of Social Rights Protection in Europe" in G. De Burca and B. De Witte (eds.), *Social Rights in Europe*, Oxford University Press, 1 edition, 2005, p. 3).

lighted the greater relevance of economic and welfare rights for human flourishing.[10] The United States belong to the group of states which in the period after World War II or more precisely, at the time of the preparation of an International Bill of Human Rights, did not completely embrace the concept of economic, social and cultural rights and were not willing to accept the obligations of their fulfilment.[11] Moreover, the United States is still today featured by the prevalent standpoint that economic, social and cultural rights should be subordinated to civil and political rights.[12]

Unlike the United States, contemporary Europe has mainly acknowledged welfare rights. They have been incorporated in most constitutions and are protected within the framework of the Council of Europe and the European Union. For that reason, the second chapter of the paper first offers a short appraisal of their current status in Europe and then focuses on the philosophical legal discussions on the nature of welfare rights and on preferable mechanisms for their protection. Today a great number of authors deal with this issue, trying to determine the features of welfare rights and their relation towards the civil and political rights laid down in the first declarations of human rights. There is no consent about the criteria that differentiate them, so those who assert that the difference between these two sets of rights is "ambiguous" and disputable seem to be right.[13]

The primary goal of the third chapter of this paper is to investigate the referring provisions of the Croatian Constitution and depict the ways in which the Croatian Constitutional Court interprets and thus tailors welfare rights.

II. PHILOSOPHICAL REFLECTIONS ON WELFARE RIGHTS

This chapter is divided into three sections. The first section presents the current status of welfare rights in Europe. The second one centres on the philosophical critiques of

[10] C. Fabre, "Social Rights in European Constitutions" in G. De Burca and B. De Witte (eds.), *Social Rights in Europe,* Oxford University Press, 1 edition, 2005, p. 2.

[11] The 1948 Universal Declaration of Human Rights comprises both sets of rights. The subsequent division of human rights into two main categories resulted from the controversial decision of the UN General Assembly made in 1951. More precisely, while drafting an International Bill of Human Rights, the General Assembly decided that two separate covenants on human rights should be enacted. The reason for such a decision was primarily of ideological nature, i.e. particular states were unwilling to accept the duty of fulfilment of economic, social and cultural rights. Those states were thus given a possibility to adopt only those provisions of the International Covenant on Civil and Political Rights, which they found indisputable (A. Eide, "Economic, Social and Cultural Rights as Human Rights" in A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook,* Martinus Nijhoff, 2nd Revised edition, 2012, pp. 9-12).

[12] Fabre, *Social Rights in Europe*, p. 20.

[13] J. Vande Lanotte and T. De Pelsmaeker, "Economic, Social and Cultural Rights in the Belgian Constitution" in P. Van der Auweraert, T. De Pelsmaeker, J. Sarkin and J. Vande Lanotte, (eds.), *Social, Economic and Cultural Rights: An Appraisal of Current European and International Developments*, Antwerpen-Apeldoorn, Maklu, 2002, p. 264.

welfare rights. Due to limited space, this section is largely confined to the criticism that denies the universality and inalienability of welfare rights. After offering a critical analysis of this set of rights, the third section promotes the conclusion that the philosophical foundations of both sets of rights are the same and that the integral approach is the most complete approach to rights.

2.1. Welfare Rights in Europe

As stated in the introduction, the United States is dominated by the liberal legal tradition and human rights are regarded there as a tool for protection from abuse of the discretionary powers of the government.[14] Welfare rights requiring creation and adoption of public policies which promote the wellbeing and the rights of socially disadvantaged people do not fit well into this idea. Those tasks, from the liberal viewpoint, should be performed by the legislative and not by the judicial branch of government. The concept of welfare rights implies complex "re-distribution" which should not belong to the competences of the judiciary .[15] Unlike civil and political rights, these rights do not shed light on personal liberty but on "economic justice".[16]

Europe has promoted a different concept of constitution and constitutional rights. European constitutions contain principles requiring that the rights of individuals are adapted to general interests.[17] For instance, Article 41 of the Italian Constitution reads as follows:

> "Private economic enterprise is free. It may not be carried out against the *common good* or in such a manner that could damage safety, liberty and human dignity. The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and co-ordinated for *social purposes*"(emphasis added).[18]

Based on examination of 29 constitutions of the EU Member States and states striving to join the EU, Cecil Fabre has concluded that there is a common "European culture of social justice".[19] A welfare state is the central concept of the European model.[20] Even though there are differences between states in this view, what they all have in common is the fact

[14] Zagrebelsky, *Int J Constitutional Law*, p. 642.

[15] Fabre, *Social Rights in Europe*, p. 15.

[16] De Burca, *Social Rights in Europe*, p. 3.

[17] Zagrebelsky, *Int J Constitutional Law*, p. 642.

[18] Constitution of the Italian Republic (1948), with Amending Acts, https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf, (accessed 10 September 2015).

[19] De Burca, *Social Rights in Europe*, p. 5

[20] Although it is today facing great challenges. See Fabre, *Social Rights in Europe*, p. 16.

that with respect to constitutional provisions, they explicitly or implicitly refer to human dignity and equality and in most cases enumerate a number of welfare rights such as the right to education, healthcare and social assistance.[21]

When it comes to constitutional provisions on human dignity, Belgium and Italy explicitly mention dignity in their constitutions.[22] Article 23 of the Belgian Constitution reads as follows: "Everyone has the right to lead a life in keeping with human dignity". Since it says "everyone", it means that both Belgians and foreigners are holders of this right. This right is intrinsic to human nature and all the human beings are its holders.[23]

Article 3 of the Italian Constitutions stipulates as follows: "All citizens have *equal social dignity* and are *equal* before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions" (emphasis added).

Equality and social justice are some of the highest values of the constitutional order of the Republic of Croatia and represent a foundation for constitutional interpretation.[24]

The modern age is often designated as "the era of dignity".[25] Dignity is omnipresent and is regularly regarded as the foundation of the concept of human rights.[26] However, although European constitutions propagate human dignity, they do not define it clearly themselves.[27] This is a usual characteristic of constitutional provisions. Constitutional provisions as superior norms in a particular state are more indeterminate than the norms

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[21] Fabre, p. 16

[22] The Constitutions of the Czech Republic, Finland, Italy and Portugal explicitly call upon dignity too. Fabre, p. 23.

[23] The Belgian Constitution (constitutional revisions of 6 January 2014, Belgian Official Gazette of 31 January 2014), http://www.const-court.be/en/basic_text/belgian_constitution.pdf, (accessed 10 September 2015). See Vande Lanotte and De Pelsmaeker, *Social, Economic and Cultural Rights*, p. 266.

[24] Art. 3 of the Croatian Constitution. The Constitution of the Republic of Croatia, translation by B. Smerdel and A. Horvat Vuković, Zagreb, Novi informator LLC, 2010.

[25] S. Hennette-Vauchez, When Ambivalent Principles Prevail. Leads for Explaining Western Legal Orders' Infatuation with the Human Dignity Principle, EUI Working Papers, LAW 2007 /37, p. 3.

[26] Hennette-Vauchez, p. 4.
Both, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in their preambles contain provision that human rights "derive from the inherent dignity of the human person". See: International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: https://treaties.un.org/Home.aspx?lang=en, (accessed 1 May 2015), and International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407, available at: https://treaties.un.org/Home.aspx?lang=en, (accessed 1 May 2015).

[27] C. Fabre, *Social Rights under the Constitution – Government and the Decent Life*, Oxford, Oxford University Press, 2000, p. 94.

placed lower in the hierarchy – statutory provisions and administrative regulations and therefore, they are more prone to judicial interpretation.[28]

In her research of welfare rights and their meaning, Fabre leans on the philosophical, religious and political discussions which constitute the foundation of the European legal culture: "human beings have a special moral status, in that they have attributes such as the capacity for moral and rational agency which no other being has. Moreover, they have that capacity to the same degree. Accordingly, in so far as they have equal moral worth, they should be treated with equal concern and respect."[29]

Fabre clearly differentiates between the phrase "treating with concern" and the phrase "treating with respect". If someone is treated with concern, it means that his/her interests to lead a "minimally decent life" are credited and that his/her right to life and to be provided with assistance in obtaining means for leading such a life is respected. On the other hand, if someone is treated with respect, it implies that this is a rational person capable of moral action. It is this formulation that sets grounds for some welfare rights such as the right to an adequate income. Constitutions which grant the right to the minimum wage acknowledge that individuals are capable of obtaining, through their work, necessary means for leading a decent life. [30]

Accordingly, Article 56 (1) of the Croatian Constitution prescribes as follows: "Each employee shall be entitled to remuneration enabling him/her to ensure a free and suitable life for himself/herself and his/her family."

However, the meaning of the phrase minimum income is not, nor it is desirable, strictly defined. In the modern world, minimum income cannot only be regarded as the thing that satisfies the "subsistence need", i.e. the need for food, water, clothing and shelter, but also as the thing that satisfies social needs, i.e. the need for public transportation, internet, phone etc. If in contemporary societies these needs are not satisfied, individuals cannot be autonomous and they cannot lead a "minimally decent life".[31] Adequate income resulting from inclusion of both types of needs depends on the social and economic development of a certain country. [32]

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[28] M. Kumm, "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice. A Review Essay on A Theory of Constitutional Rights", *Int J Constitutional Law*, vol. 2, no. 3, 2004, p. 574.

[29] Fabre, *Social Rights in Europe*, p. 24.

[30] In Fabre's opinion, European constitutions would show much less respect to those in need if they were provided with food or clothes instead of pecuniary aid (Fabre, p. 24).

[31] Fabre, p. 17.

[32] Fabre, p. 17.

2.2. Reflections on Some Issues Concerning Welfare Rights

This section of the paper elaborates specific criticism addressed to this group of rights. We investigate the critiques of the appropriateness of the use of word right in the context of welfare rights and the disagreements on their nature. The purpose of this section of the paper is to shed light on the distinctive features of these rights and to provide an answer to the question whether welfare rights can be qualified as universal and inalienable human rights.

2.2.1. "Rights against everyone" and "rights against someone"[33]

Universal rights refer to all at all times.[34] The liberty rights laid down in the first declarations are deemed universal as well as are their correlative obligations. These are rights that can be violated by everyone and hence they are directed towards all the other individuals and institutions.[35] When it comes to the determination of one of the fundamental human rights – the right to life, it is not known whom this right is addressed to.[36] Yet, since the type of a duty imposed by this right is negative, the addressee is required not to interfere with the right to life and this duty can be violated by everyone or in other words, the right to life is a right against all.[37]

Indeed, the right of person A to life is "a conjunctive right" against everyone.[38] It is "a bundle of rights" possessed by an individual against person C, person D and person E…[39] Such negative rights with the correlative duties of non-interference do not come into mutual conflicts. They are all realisable since they do not require that individuals are provided with particular scarce resources.[40] In this regard, the following sentences of Charles Fried can be instructive: "Indeed, we can fail to assault an infinity of people every hour of the day. Indeed, we can fail to lie to them, fail to steel their property, and fail to sully their good names – all at the same time".[41] Fried therewith suggests that it is logically possible

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[33] The title has been borrowed from: M. Stepanians,"Perfecting Imperfect Duties via Institutionalization" in J.-C. Merle (ed.), *Spheres of Global Justice: Volume 2 Fair Distribution- Global Economic, Social and Intergenerational Justice*, Springer Netherlands, 2013, p. 591.

[34] Fabre, *Social Rights under the Constitution*, p. 26.

[35] O'Neil, *International Affairs*, p. 428.

[36] Stepanians, *Spheres of Global Justice*, p. 591.

[37] Everyone can perform negative action required by its correlative duty. Stepanians, p. 591.

[38] Stepanians, p. 591.

[39] Stepanians, p. 591.

[40] Fabre, *Social Rights under the Constitution*, p. 28.

[41] C. Fried, Right and Wrong, Cambridge, Mass., Harvard University Press, 1987, 16-17, quoted according to Fabre, p. 28.

to simultaneously respect an indefinite number of negative rights, which cannot be said, at least to the same extent, for welfare rights.[42]

After this short overview of the features of liberty rights, one has to raise the question if welfare rights are universal. Welfare rights include, unlike liberty rights, the positive rights to food, shelter, healthcare and subsistence.[43] Many wonder if the language of rights is convenient in this context at all.[44]

In order to qualify rights as rights in the full sense of that word, they should be defined by their providers.[45] What is needed here is coincidence between a genuine right and "its precisely formulated correlative duty".[46] O'Neil stresses that such coincidence exists only when a certain right is institutionalized. Therefore, this set of critiques of welfare rights is called "institutionalization critique".[47] Pursuant to O'Neil, welfare rights (can and) must be institutionalized in order to be regarded as rights.[48]

O'Neil's "institutionalization thesis" is based on her classical "relational" comprehension of rights.[49] The full statement of the classical relation between rights and duties comprises three elements: "the holder of the right", "the content of the right" and "the bearer of the correlative duty".[50]

Like liberty rights, welfare rights are also claim-rights which are directed towards those who are bound by correlative obligations.[51] Rights are seen as one side of the nor-

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[42] Fabre, p. 40. See section 2.2.3 "The conflict objection".

[43] K. Eddy, "Welfare Rights and Conflicts of Rights", *Res Publica*, vol. 12, 2006, p. 337.

[44] Fabre, *Social Rights in Europe*, p. 15.

[45] O'Neil, *International Affairs*, pp. 427-428.

[46] Sen, *Philosophy & Public Affairs*, p. 346.

[47] Sen, p. 346.

[48] Sen, p. 346.

[49] Stepanians, *Spheres of Global Justice*, p. 587.
Influential proponents of the interest theory of rights interpret the relation between rights and duties in a different way. Namely, MacCormick and Raz equalize rights with relevant interests. Rights are interests strong enough to support the correlative duties of others. Existence of rights does not always entail existence of the duties of others (Stepanians, p. 588, n. 1).

[50] Stepanians, p. 588.

[51] O'Neil, *International Affairs*, p. 430.
O'Neil calls them the rights to goods and services and designates them as claim-rights or entitlements (O'Neil, p. 430). On the other hand, Alexy confines the term of entitlements to the rights to positive action by the state (R. Alexy, *A Theory of Constitutional Rights* (Introduction and Translation Julian Rivers), Oxford, Oxford University Press, 2004, p. 294).
When mentioning rights, O'Neil means the Hohfeldian claim-rights. She even classifies liberty rights as rights which main constituent is the claim–right against others to abstain from interference. Consequent-

mative relation between a right holder and a duty holder. They are viewed normatively or prescriptively but not aspirationally.

> "For to say that someone, P, has a right to something, A, is not merely to say that it would be good or desirable for P to get A. It amounts to the much stronger claim that P *must* get A, and that third parties, upon whom it is incumbent to respect the right, do not have a choice in the matter (unless P releases them from their obligation)." [52]

Human rights would make no sense if there were no corresponding duty of action or abstaining from action. If someone possesses rights, there must be "identifiable others" and these can be all or "specified others" with the correlative duties.[53] Unlike rights which have to be accompanied with corresponding (correlative) duties, the latter may exist even if there are no correlative rights. These are the so-called imperfect duties which are usually perceived as moral obligations and not as, as believed by O'Neil, "an obligation of justice with counterpart rights".[54] "From the viewpoint of the agent", the duty to help or provide assistance is "imperfect" unless it has been made complete (perfect) by establishment of corresponding institutions.[55]

If international documents or constitutional texts do not include an unambiguous definition of the bearer of the correlative duty, such rights cannot be exercised.[56] Their content thus becomes incomprehensible.[57] The International Covenant on Economic, Social and Cultural Rights "allocates" the duty to respect these rights to the signatory states.[58] These duties are special (institutional) and not universal. Even when it comes to welfare rights set out in constitutions, the duty of their implementation is mostly reserved to states.

For example, the constitutional right to adequate housing is not a right against all. This is a disjunctive right against someone. This someone can be person A, person B or per-

ly, welfare rights occur to be "paradigmatic cases of claim rights" (Stepanians, *Spheres of Global Justice*, p. 588, n. 2).

[52] Fabre, *Social Rights in Europe*, p. 18.

[53] O'Neil, *International Affairs*, p. 431.

[54] O'Neil, p. 430.

[55] Stepanians, *Spheres of Global Justice*, p. 587.
Kant was first to mention the difference between perfect and imperfect obligations (Sen, *Philosophy & Public Affairs*, pp. 321-322. See I. Kant, *Critique of Practical Reason* (1788), trans. L. W. Beck, New York, Bobbs-Merrill, 1956).

[56] O'Neil, *International Affairs*, p. 428.

[57] O'Neill, *Towards Justice and Virtue*, pp. 131–32, and *Bounds of Justice*, Cambridge, Cambridge University Press, 2000, cited according to Sen, *Philosophy & Public Affairs*, p. 346.

[58] O'Neil, *International Affairs,* p. 431.

son C.[59] In that manner, the Slovenian Constitution prescribes that the state is obliged to "create opportunities for citizens to obtain proper housing".[60] The right to positive action implies respective obligations which cannot be fulfilled by everyone. [61]

O'Neil thinks that the difference between positive and negative rights is not simple that one can assume that liberty rights are rights against all and welfare rights rights against certain persons.[62] Institutions for implementation of liberties require allocation of obligations "to specified others" and not to all. O'Neil asserts that the first order obligations to respect liberty rights have to be universal. Still, second order obligations or the obligations to ensure respect for universal liberty rights must be allocated. In the eyes of O'Neil, there can be no "effective accountability of public administration" without institutions that allocate tasks to particular "office holders" and keep them responsible for the task performance. However, holds the author, the difference between these sets of rights keeps on being evident. In fact, in case of liberty rights with universal effect, it is clear who can violate them whereas in the event of welfare rights, this is not known before allocating the obligation of their implementation.

Amartya Sen rejects the institutional critique of welfare rights and the assumption that all the rights have to be supplemented with correlative obligations. According to Sen, the ethical importance of economic, social and cultural rights provides firm foundation for their exercise "through institutional expansion and reform". One of the ways to achieve this is involvement of social organizations in "demanding and agitating for appropriate legislation" and "social monitoring".[63] In case of violation of fundamental human rights, individuals and social groups have the imperfect obligations to put pressure on the authorities for the purpose of initiating institutional changes.

2.2.2. Structure of welfare rights

There is a feature of positive rights, explaining the more limited role of courts in their enforcement.[64] Positive and negative rights are structurally different.[65] In terms of welfare rights, political branches have a greater degree of discretion in the specification of action

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[59] Stepanians, *Spheres of Global Justice*, p. 47.

[60] Constitution of the Republic of Slovenia, Official Gazette of the Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13, http://www.us-rs.si/media/constitution.pdf (accessed 10 September 2015).

[61] Stepanians, *Spheres of Global Justice*, p. 47.

[62] O'Neil, *International Affairs*, p. 428.

[63] Sen, *Philosophy & Public Affairs*, p. 346

[64] Kumm, *Int J Constitutional Law*, p. 586.

[65] Kumm, p. 586.

which needs to be performed.[66] Regarding this structural difference, Robert Alexy emphasizes that negative (defensive) rights are "prohibitions on destroying, adversely affecting, and so on, directed to the addressee".[67] On the other hand, positive rights, which he calls entitlements, are "commands to protect" and "support". When it comes to negative rights, every act leading to destruction or harmful consequences is prohibited. Consequently, believes Alexy, prohibition of killing entails prohibition of every "act of killing".

In the event of positive action, every act of protection or support is not required. Indeed, a rescue command does not include every act of rescuing. As an example, Alexy mentions a drowning man and to rescue him, it is necessary to perform only one of the possible acts of rescuing, e.g. to throw him a lifebelt. It is not inevitable to swim towards him or send him a lifeboat. It means that it is sufficient to try one of the alternatives, either the first, second or third one. [68] Unlike negative obligations which have a conjunctive structure, positive obligations have a disjunctive structure.[69] It suggests that the addressee of the rescue command is provided with discretion with respect to which possible act of rescuing he/she is going to perform. [70]

Pursuant to Alexy, the reason for the difference is hidden in the fact that "refraining from each individual destructive or adverse act is a necessary condition, and only refraining from all destructive and adverse acts is a sufficient condition for satisfying the prohibition". On the other hand, Alexy underlines that fulfilment of a positive right requires adoption of only one "suitable protective or supporting act".[71]

Alexy finds this difference between defensive rights and entitlements in the case-law of the Federal Constitutional Court of Germany. This Court holds that the state should have "the protective duty", but also accentuates that the way how to fulfil this duty "in the first instance" is a matter of the legislator. In the judgement in the *Schleyer* case, the Court, regarding Article 2 (2) (1) in conjunction with Article 1 (1) (2) of the Basic Law (*Grundgesetz*) which makes the state liable to protect life, established "how the state organs are to fulfil their duty effectively to protect life is in principle to be decided by them on their own responsibility".[72]

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[66] Kumm, p. 586.

[67] Alexy, *A Theory of Constitutional Rights*, p. 308.

[68] Alexy, p. 308.

[69] Klatt, *Heidelberg Journal of International Law*, p. 695.

[70] Alexy, *A Theory of Constitutional Rights*, p. 308.

[71] Alexy, p. 309.

[72] BVerfGE 46, 160 (164), quoted according to Alexy, p. 309.

2.2.3. "The conflict objection"[73]

One of the important objections to the universality of welfare rights refers to the scarcity of resources and the incapacity to satisfy the needs of all people.[74] Welfare rights are entitlements over potentially scarce goods.[75] There is a significant difference between negative and positive rights. Fabre calls it "scarcity division".[76] Positive rights impose the duty to provide assistance and obtain particular resources and that is why they come into mutual conflict.[77] Scarcity thus further undermines the universality of welfare rights.[78]

It can be noticed that scarcity distinction was taken into consideration when drafting the two covenants on human rights and hence there is a significant difference between them with respect to the enforcement of the rights regulated therein.[79] The provisions of the International Covenant on Civil and Political Rights are unconditional and unlimited while the provisions of the International Covenant on Economic, Social and Cultural Rights bind the signatory states to use all of their available resources to enforce the rights regulated therein.[80] Welfare rights do not require from the state to provide, "no matter what", every individual with social goods such as healthcare. Their realization depends on available state resources.[81]

Rights imply important interests.[82] The interest in proper healthcare is one of the most important interests. The appertaining right is protected by international conventions and national constitutions. For instance, Article 12 (1) of the International Covenant on Eco-

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[73] Eddy, *Res Publica*, 337.

[74] Fabre, *Social Rights under the Constitution*, p. 28.

[75] The title has been borrowed from: Eddy, *Res Publica*, p. 337.

[76] Fabre, *Social Rights under the Constitution*, p. 41.

[77] Fabre, p. 41. Pursuant to Jeremy Waldron's theory, if we embrace the interest theory of rights, we shall also accept the fact that conflicts between rights are natural and inevitable (Fabre, p. 29, Eddy, *Res Publica*, p. 339).

[78] Fabre, *Social Rights under the Constitution*, p. 31.

[79] For more details see J. Andrassy, B. Bakotić, and B. Vukas, *Međunarodno pravo*, Školska knjiga, Zagreb, 1995, p. 300.

[80] Andrassy et al, p. 300.
See Article 2 (1) of the International Covenant on Economic, Social and Cultural Rights:
"Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, *to the maximum of its available resources*, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures" (emphasis added).

[81] Fabre, *Social Rights under the Constitution*, p. 31, A. Kavanagh, "Social Rights under the Constitution – Government and the Decent Life by Cecile Fabre (Oxford, Oxford University Press, 2000) Book Review" *Journal of Law and Society*, vol. 29, no. 2, 2002, p. 356.

[82] Eddy, *Res Publica*, p. 337.

nomic, Social and Cultural Rights grants all people the right to enjoy "the highest attainable standard of physical and mental health".

It comes to a problem when due to limited resources, and healthcare is deemed a scarce resource, the interests of different individuals are mutually unsatisfialble.[83] What if an individual needs an expensive medical treatment? Has the state the duty to provide it? One can easily imagine a situation in which the rights of several persons are confronted due to the scarcity of the same good. In the well-known case of *Soobramoney v Minister of Health (Kwazulu-Natal)*, the South African Constitutional Court decided that the state is not obliged to provide a patient with kidney dialysis. In this concrete case, Mr Soobramey, a diabetic also suffering from ischaemic heart disease and cerebrovascular disease, applied for an access to a dialysis programme in a state hospital. The access was denied because the hospital, due to limited resources and an insufficient number of dialysis machines and trained nursing staff, adopted the policy that the programme can be attended only by patients who can be cured within a short period of time and by those with "chronic renal failure" who are eligible for kidney transplantation, which was not the case with Mr Soobramey.

Mr Soobramey' right to be provided with proper medical care was contrary to the rights of other patients since the hospital, in spite of only 20 available dialysis devices and room for 60 patients, had already accepted 85 patients for treatment. Mr Soobramey shared the fate of 70 % of patients who were not admitted to the dialysis programme.

The South African Constitutional Court considered that political bodies and healthcare authorities are responsible for the adoption of the healthcare budget and making decisions on respective priorities," the Court would be slow to interfere with such decisions if they were rational and taken in good faith".[84]

The Constitutional Court upheld the idea that when exercising welfare rights, the availability of resources and the equality of the requests of other individuals for welfare rights shall be taken account of.[85] Fabre find the assessment of the South African Constitutional Court well-founded since welfare rights do not place such strict requests with the state in the sense that the state is obliged to enable realization of all welfare rights.[86]

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[83] Eddy, *Res Publica*, p. 346.

[84] *Soobramoney v Minister of Health* (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997), http://www.saflii.org/za/cases/ZACC/1997/17.html, (accessed 10 September 2015).

[85] Eddy, p. 342.
See the "reasonableness" clauses in the South African Constitution regarding housing in sections 26 (2), and healthcare, food, water and social security in sections 27 (2):
"The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right" (Constitution of the Republic of South Africa, Act 108 of 1996).

[86] Fabre, *Social Rights under the Constitution*, p. 31.

Can is preferred over *ought*. The provisions on welfare rights need to be implemented in accordance with the level of the social and economic development of a particular state, considering other people's prospects of having a decent life and considering all the other costs such as the costs of police forces, motorway construction etc.[87]

2.2.4. Are welfare rights inalienable?

Some authors claim that unlike liberty rights, welfare rights are alienable or in other words, individuals can waive them. If individuals are treated with respect, it means that their capability to act morally and rationally or to dispose of their rights is recognized. Fabre stresses that unlike the Universal Declaration of Human Rights, European constitutions qualify neither human rights in general nor welfare rights specifically as inalienable. If a person decides not to take advantage of material benefits granted by the Constitution, his/her choice shall be respected.[88]

But, is it really so? Modern constitutions grant a number of welfare rights which, based on an explicit formulation, cannot be waived by their holders. In this light, Article 56 (2) and (3) of the Croatian Constitution stipulates as follows:

"Maximum working hours shall be regulated by law.

Each employee shall be entitled to a weekly rest and annual holidays with pay, and shall never waive these rights."

The reason why these rights have been made inalienable can be found in the issue of "collective harm".[89] Hardin clearly depicted it using the example of workers who have, based on a collective bargaining agreement, given their consent to the maximum number of working hours per week and hence they have generated a right which cannot be waived. One can perceive a situation in which a person wishes to work overtime, meaning more than it is envisaged by the agreement, but this would result in deterioration of the working conditions and a decrease in the salary on the part of all the members of the working class.[90] According to Russell Hardin, this example indubitably shows what happens in cases in which members of a particular class are in a potential conflict. In order to prevent emergence of collective harm, it is necessary to prevent individual members from becoming free riders who attain certain benefits because other members of the class are restraining themselves.

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[87] Fabre, p. 31.

[88] Fabre, *Social Rights in Europe*, p. 25.

[89] H. Klepper, "Mandatory Rights and Compulsory Education", *Law and Philosophy*, vol. 15, no 2, 1996, p. 155.

[90] R. Hardin, "The Utilitarian Logic of Liberalism", Ethics, vol. 97, no. 1, 1986, p 55. See also Klepper, p. 155.

Inalienable rights can be contested for being contradictory since they restrain the liberty of their holder to do something and due to their inalienability, they are more similar to duties than to rights. However, according to Hardin, this can only be applied if inalienable rights are seen as the rights of individuals (exclusively from the viewpoint of an individual) while their real meaning will become evident if they are perceived at the level of a class. The benefit from these rights for an individual, highlighted Hardin, arises indirectly, through their impact on the whole class. The aforementioned suggests that although "welfare assistance" is funded by taxes and provided by the state, constitutional welfare rights can be violated by actors other than the state, e.g. by employers.[91] European constitutions protect a large number of rights which are provided at the workplace and shall be respected by the employer. For instance,. Article 56 (4) of the Croatian Constitution governs as follows: "Employees may, in conformity with law, participate in decision-making in their places of employment."[92]

The freedom of an individual does not depend only on government decisions and constitutions do not regulate only the relation between the state and its citizens but also relations between citizens themselves, which is demonstrated in the above example of a relation between an employee and his/her employer.[93] It means that private actors may, just like the state, have the duty to provide individuals with minimum resources necessary for a decent life.[94] Employees possess the right to require from the state to enforce certain welfare rights against such private actors.[95] Fabre identifies three kinds of duties which may be borne by the state with respect to welfare rights:

"(1) A duty to provide the resources warranted by social rights;

(2) A duty not to deprive people of these resources if they already have them; and

(3) A duty to ensure that other people such as employers fulfil all or part of its duties specified in (1) and (2)"

[91] Fabre, *Social Rights in Europe*, p. 17.

[92] See also Article 57 of the Slovenian Constitution on "participation in management".

[93] Fabre, *Social Rights in Europe*, p. 18.
It means, as believed by Fabre, that we can have welfare rights against people with whom we are in a special relation, in this case it is our employer, but it can also be our landlord and similar. Such relations are based on contracts and exclude arbitrariness regarding who has the duty to provide needy ones with assistance (Fabre, *Social Rights under the Constitution*, p. 57).

[94] Fabre, pp. 65-66.

[95] Fabre, *Social Rights under the Constitution*, p. 57.

2.2.5. "Deserved" and "Undeserved Needy"

Constitutions, though not always explicitly, make a difference between those who are "needy" without their guilt and those who are to be blamed for their situation themselves.[96] Individuals who cannot live in compliance with the principle of dignity for reasons beyond their power are entitled to compensation for their ill-fortune.[97] "The principle of redress" is placed in the centre of the concept of solidarity and represents the main reason for the existence of a social security and health insurance system.[98]

It is particularly evident in regard to the right to the adequate income where the exercise of this right is related to phrases such as "those who cannot work" and "those who cannot secure the means for their own subsistence".[99] It is revealed in section 19 (1) of the Finnish Constitution which reads as follows: "Those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care."[100] A similar provision can also be found in article 58 (1) of the Croatian Constitution "The state shall ensure the right to assistance for weak, infirm or other persons unable to meet their basic subsistence needs as a result of their unemployment or incapacity for work."

Some theoreticians and policy makers have opposing views on this issue. For instance, it can be heard that instead of detecting the individual responsibility and reasons why individuals have found themselves in a difficult situation, all the needy ones have to be provided with "unconditional basic income".[101] Yet, it is important to point out that in practice it is almost impossible to establish the difference between the undeserved and deserved needy due to the necessity of taking into consideration not only their current moves but also their upbringing, education and similar.[102] Even in rare situations in which the guilt of an individual can be ascertained, e.g. a person who refused to get vaccinated against an infectious disease and later got infected thereby, European societies do not approve if such a person is denied a medical treatment and left to go down with the illness.[103]

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[96] Fabre, p. 20.

[97] K. Raes, "The Philosophical Basis of Social, Economic and Cultural Rights', in P. Van der Auweraert, T. De Pelsmaeker, J. Sarkin and J. Vande Lanotte, (eds.), *Social, Economic and Cultural Rights: An Appraisal of Current European and International Developments*, Antwerpen-Apeldoorn, Maklu, 2002, p. 50.

[98] Raes, p. 50.

[99] Fabre, *Social Rights in Europe*, p. 20.

[100] The Constitution of Finland 11 June 1999 (731/1999, amendments up to 1112 / 2011 included). http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf, (accessed 10 May 2015).

[101] Fabre, p. 20.

[102] Fabre, p. 21.

[103] Fabre, p. 21.

2.3. Integral Approach to Rights

At the end of this chapter where the arguments about the difference between these sets of rights are critically examined, one cannot avoid the conclusion that the integral approach is the most complete approach to rights. What gives moral strength to welfare rights? It is difficult to contradict the opinion that the philosophical basis of both sets of rights is identical: an ethical idea that human beings have to be treated with respect as free beings. This attitude of respect towards human beings has to be analogously present with respect to what others are not permitted to do to them and what others owe them.[104]

These rights are based on human dignity which is deemed inalienable. An individual can neither be deprived of human dignity nor can he/she waive it since dignity is what he/she is entitled to as a member of the human species.[105] This assertion has been affirmed by various European constitutional courts in their judgements, e.g. the Federal Constitutional Court of Germany and the French Council of State.[106]

As seen by Koen Raes, in line with this integral approach to rights, both sets of rights are based on the concept that human beings are "the sources of intentions and purposes, decisions and choices". Human beings are capable of making choices and taking responsibility for their choices. The thesis that there is no intrinsic difference between these two sets of rights is not relevant only from the theoretical point of view. According to Raes, both sets of rights are part of the comprehensive view to what human beings are, what they strive for and which institutions are necessary to secure human advancement. Can one draw the line between the right not to be killed and the right not to be left to die of starvation or of a disease when both of these things can be prevented?[107] These two sets of rights are both intended to provide an individual with entitlements against abuse of the state power and to keep him/her from becoming a toy in the hands of those in power.[108]

The UN Vienna Declaration and Program of Action adopted at the Second World Conference on Human Rights in 1993 supports the thesis that there is no formal hierar-

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[104] Raes, *Social, Economic and Cultural Rights,* p. 53.

[105] Hennette-Vauchez, When Ambivalent Principles Prevail, pp. 21-22.

[106] Hennette-Vauchez, pp. 21-22. The Federal Constitutional Court of Germany has confirmed it with regard to the inalienability of the dignity of women who voluntarily appear in peep shows (BVerwGe, 15 déc. 1981, quoted according to Hennette-Vauchez, pp. 21-22). The same reasoning was offered by the French Council of State when it supported municipal orders prohibiting dwarf-throwing shows, regardless of the voluntariness of their performers. Concerning these and similar examples in contemporary legal systems, Hennette-Vauchez holds that the principle of dignity hides "politically conservative", "theoretically naturalist viewpoints" covering up paternalism and moralism which restrain legal freedom of decision-making and prevent changes (Hennette-Vauchez, p. 1).

[107] Fabre, *Social Rights in Europe*, p. 20.

[108] Raes, *Social, Economic and Cultural Rights,* pp. 45, 50.

chy between these two sets of rights. Human rights are ”indivisible”, ”interdependent” and ”interrelated”.[109]

III. WELFARE RIGHTS IN THE CONSTITUTION OF THE REPUBLIC OF CROATIA

Thanks to the dominant view in Europe (and in contrast to the constitutional tradition of the United States) - that welfare rights properly *belong* in constitutions, the Central and Eastern Europe constitution-makers were (no different from the drafters of the Western European constitutions) included these types of rights alongside civil and political ones.[110] By overall, when elaborating the welfare rights through the prism of Central and Eastern European states constitutions, we may see that nearly all of the constitutions of the region contain very broad catalogues of socio-economic rights and that nearly all[111] constitutions of the region ignore distinction in status between civil and political rights on the one hand, and socio-economic rights, on the other. The Constitution of the Republic of Croatia is not the exception.[112]

The Constitution of the Republic of Croatia is the one of the 14 constitutions[113] of the region which do not draw any meaningful distinction between socio-economic and other rights. Almost half of its provisions relate to human rights and Heading III of the Constitution entitled ‘’Protection of human rights and fundamental freedoms” is divided into three sections: 1. General provisions, 2. Personal and Political freedoms and rights, and 3. Economic, social and cultural rights. The catalogue of socio-economic rights is quite broad and it includes numerous social (right to work and freedom of work,[114] right to fair remuneration and equal working conditions,[115] right to social security and social

[109] See paragraph 5. See also G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford University Press, Second edition, 2009, p. 23.

[110] W. Sadurski, *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Second Edition, Springer, 2014, p. 257.

[111] With the exception of the constitutions of the Czech Republic and Slovakia.

[112] The Constitution of the Republic of Croatia, translation by B. Smerdel and A. Horvat Vuković, Zagreb, Novi informator LLC, 2010.

[113] Belarus, Bulgaria, Croatia, Estonia, Georgia, Hungary, Latvia, Lithuania, Macedonia, Romania, Russia, Ukraine, Montenegro, and Serbia.

[114] Article 55 of the Constitution stipulates that everyone shall have the right to work and enjoy freedom of work. Everyone shall have free to choose their vacation and occupation, and all jobs and duties shall be accessible to everyone under the same conditions.

[115] According to the Article 56 of the Constitution, employees shall have the right to fair remuneration, such as to ensure free and decent standard of living for them and their families. Maximum working hours shall

insurance,[116] right to health care,[117] right to form trade unions,[118] right to strike,[119] protection of family[120]) and economic rights (right of ownership,[121] entrepreneurial and market freedom[122]).

In addition to broad catalogue of welfare rights, Article 1 of the Constitution defines the Republic of Croatia as a social state[123] and Article 3 of the Constitution stipulates *inter alia* that equality, peace-making, social justice, respect for human rights and the rule

be regulated by law and every employee shall be entitled to paid weekly rest and annual holidays and these rights may not be renounced. In conformity with law, employees may participate in the decision-making process in their enterprise.

[116] Article 57 sec. 1 of the Constitution states that the right of employees and members of their families to social security and social insurance shall be regulated by law and collective agreement.

[117] Article 59 of the Constitution determines that everyone the right to health care in conformity with law.

[118] In order to protect their economic and social interests, all employees shall have, according to the Article 60 of the Constitution, the right to form trade unions and shall be free to join them or leave them. In addition, trade unions may form their federations and join international trade unions organizations. The formation of trade unions in the Armed Forces and the police may be restricted by law. Furthermore, employers shall have the right to form associations and shall be free to join them or leave them.

[119] Article 61 of the Constitution stipulates that the right to strike shall be guaranteed. The right to strike may be restricted in the Armed Forces, the police, public administration and public services as specified by law.

[120] Articles 62-65 of the Constitution provide the constitutional grounds for the statutory regulation of legal relations in a family. The family shall enjoy the special protection of the State, the Republic of Croatia shall protect maternity, children, and young people, parents shall have the duty to bring up, support, and educate their children, and children shall be bound to take care of their old and helpless parents. The Republic of Croatia shall take special care of parentless minors or parentally neglected children, and everyone shall have the duty to protect children and helpless persons.

[121] Section 1 of Article 48 of the Constitution provides that ''The right of ownership shall be guaranteed." In sec. 2 of Article 48, the Constitution provides that ownership implies obligations. Ownership implies obligations, and property owners and beneficiaries shall contribute to the general welfare. Furthermore, an alien may acquire property under conditions spelled out by law. The right of inheritance shall be guaranteed.

[122] Article 49 of the Constitution states: ''Entrepreneurial and market freedom shall be the basis of the economic system of the Republic of Croatia. The State shall ensure all entrepreneurs an equal legal status on the market. The abuse of the monopoly position as defined by law shall be forbidden. The State shall stimulate economic progress and social welfare ad shall care for the economic development of all its regions. The rights acquired through the investment of capital shall not be diminished by law, or by any other legal act. Foreign investors shall be guaranteed free transfer and repatriation of profits and capital invested." However, entrepreneurial freedom is not absolutely unlimited: ''The exercise of entrepreneurial freedom and property rights may exceptionally be restricted by law for the purposes of protecting the interests and security of the Republic of Croatia, nature, the environment and public health." (Article 50 sec. 2 of the Constitution).

[123] According to the Article 1 sec. 1 of the Constitution of the Republic of Croatia, the Republic of Croatia is a unitary and indivisible democratic and social state.

of law are the highest values of the constitutional order of the Republic of Croatia and grounds for interpreting the Constitution.[124]

The general picture is that, on the one hand, we may see the explicit constitutionalisation of the terms social state, social justice and social rights, while, on the other hand, the concretisation of these principles is left to the legislative branch. Here we come to the role of the Constitutional Court of the Republic of Croatia, which, of course, cannot legislate subjective welfare rights but it is authorised to review the compatibility of laws with the constitutional principles of a welfare state and with other fundamental values of the Croatian constitutional order.

When discussing the role of Croatian Constitutional Court in the area of welfare rights, we must start with a short parallel with other constitutional courts in the region which, as we stated before, have been quite active in reviewing statutes under the standards of welfare rights and which, in situation where they have had a choice between striking down a law under a general constitutional clause (such as ''social justice" or ''equality") or under a specific welfare right, usually have opted for the former.[125]

In its jurisprudence so far, the Croatian Constitutional Court has also been quite active in reviewing statutes under the standards of welfare rights. In this context, the Court deliberated, *inter alia*, on: the adjustment of pensions to trends in wages and salaries of the working population (1998);[126] the ''acquired" rights to pension and changes in the pension

[124] According to the Article 3 of the Constitution of the Republic of Croatia, freedom, equal rights, national equality and equality of genders, love of peace, social justice, respect for human rights, inviolability of ownership, conversation of nature and the environment, the rule of law and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the grounds for interpretation of the Constitution.

[125] Sadurski, W., *Constitutional Socio-Economic Rights: Lessons from Central Europe*, The Foundation for Law, Justice and Society, 2009, p. 5-6.

[126] See Decision No. U-I-283/1997 of 12 May 1998 (CRO-1998-3-011) – abstract control of constitutionality of the Act on Adjustment of Pensions and Other Allowances from the Pension and Disability Fund and Administration of Funds of the Pensions and Disability Fund, Official Gazette, No. 20/97. In reviewing the constitutionality of the disputed Act, the Court found that it is not disputable that the legislator has the competence to determine such system of pension and disability insurance as he deems reasonable, in a manner proscribed by Constitution and laws. However, in view of disputed Act, he interferes with the rights of pensioners who had retired according to another system of computation of pensions. That system was a unity with rights and obligations of pensioners and was in force during the entire time of effectiveness of the decrees and decisions restricted the amount of pensions. Furthermore, the Court found indisputable the right of the legislator to regulate the level of economic and social rights entitled in the Constitution (which are not, however, absolute) in accordance with economic strength of the State. However, the use of this right may not bring into question the fundamental constitutional rights and principles (equality, social justice, rule of law). Hence, ''the Court deems that the claim of the proponents concerning the existence of reasonable doubt that by enacting the disputed Adjustment Law, the legislator turned the temporary state created earlier by the contested decrees of the Government of the Republic of Croatia and decisions of the Pensions Fund into a permanent state with negative impact on the amount of pensions if funded". In rendering the decision on the constitutionality of the disputed provisions, the Court found that ''the legal solutions in the disputed Act changed the social status of pensioners to such

insurance system (2010);[127] the realization of the right to a children allowance (2008),[128] and so on.

For the purposes of this paper we will make a short overview of three recent Constitutional Court decisions. The first one is from 2009 and it is famous decision on so called ''Special Tax" (or the ''Crisis Tax"), and we chose it because it was pretty criticized by the experts, trade unions and the public in general, and it because it actually opened the door for some other, future reductions of welfare rights in Croatia which have been done by several legal regulations. The other two cases are very fresh – from the end of March of this year (2015), and they were also criticized, especially by the trade unions; here the

an extent that this fact leads to social discrimination of citizens". Hence, the Court determined that the provisions of the disputed Act contravene the principles ensued in Articles 1, 3, 5 and 14, sec. 2 of the Constitution of the Republic of Croatia (The Republic of Croatia is a social state; social justice is one of the highest values of the constitutional order of the Republic of Croatia; in the Republic of Croatia laws shall conform with the Constitution; all are equal before the law).

[127] See Decision and Ruling No. U-I-988/1998 *et al.* of 17 March 2010 (CRO-2010-1-002) – abstract control of constitutionality of the Pension Insurance Act (Official Gazette Nos. 102/98, 127/00, 59/01, 109/01, 147/02, 117/03, 30/04, 177/04, 43/07 – decision of the Constitutional Court, 79/07 and 35/08). In this particular case, the Constitutional Court, *inter alia*, raised the question connected to the legal nature of the right to a pension in the pension insurance sub-scheme based on generation solidarity: is the legislator empowered, under constitutional law, to revoke particular rights from this sub-system? The Court deemed that there is no doubt the legislator is constitutionally empowered to change the laws regulating the pension insurance sub-scheme based on generation solidarity so as to adapt it to changed economic and social conditions in the country or to stabilise it, i.e. to create preconditions for a long-term viable pension scheme. The Court specially emphasised that ''the possible loss of a certain amount of the earlier pension or of another benefit from the pension insurance, which may result from the new statutory measures redefining the pension rights acquired earlier, does not a priori mean that the essence of the ''right to pension" has been damaged, as long as this loss of part of the earlier benefit from pension insurance resulted from the general redefinition of insured rights in the pension insurance scheme based on generation solidarity, and is proportional in its effects. This is a general, broadly defining principle. Everything else depends on the circumstances of a particular case."

[128] See Decision No. U-I-3851/2004 of 12 March 2008 (CRO-2008-1-005) – abstract control of constitutionality of the Children's Allowance Act (Official Gazette, Nos. 94/01, 138/06 and 107/07). In this case the Constitutional Court found that Article 8/2 of Children's Allowance Act does not comply with the Constitution. Starting from the fact that children's allowance is state aid to the person who is actually caring for, supporting, looking after and raising children, the legislator has, in Article 6/1 of the disputed Act, laid down who has the beneficiary of this allowance, while Article 8/1 prescribes which children this allowance is paid for (natural children, step children, grandchildren, and parentless children). After regulations of this kind, the Court found that there is no reason acceptable in constitutional law nor any need for the additional regulation in the disputed Article 8/2 of the Children's Allowance Act of the cases in which the fosterer has the right to the children's allowance for grandchildren and other children who have a parent. In the view of the Court, ''withholding the right to a children's allowance from the people who are really bringing up and supporting children that their parents cannot or will not support is directly contrary to the interests and welfare of the child. The disputed legal provision also contravenes the constitutional obligation of the state to take "special" care of parentally neglected children (Article 63/5 of the Constitution). Implementing this principle of constitutional law requires creating optimum conditions for protecting the rights of the child, which means bringing the child up and ensuing his or her support, if this not provided by the parents, and the reason why parental care is missing cannot be decisive in any event, nor whether the parents have lost their parental rights because of child neglect."

Court uphold two so called ''Acts on Denials" – the Act on Denial of the Payment of Certain Material Rights to Public Service Employees[129] and the Act on Denial of the Right for Enlarging Salaries Based on Seniority and Job Complexity for Public Services.[130] This decisions have once again proved, as professor Arsen Bačić concluded few years earlier, when analysing the Special Tax Decision (and we will see that this conclusion is still very actual), that ''there is an opinion present that the control of such regulations" (which represents examples of a severe reduction of social rights) ''can detect the inclination of the higher judiciary to rather defend the interests of the government than the interests of the people."[131]

Hence we may say that starting with the Special Tax on Salaries, Pensions and Other Receipts Act (hereinafter: Special Tax Act),[132] the legislative answer to the circumstances of the economic (and not just economic) crisis was reflected in several legal regulations and, unfortunately, a severe reduction of welfare rights in Croatia.

In the case of abstract control of constitutionality of the Special Tax Act,[133] the Constitutional Court had the duty to review and examine one particular legal measure: the introduction in the tax system of the Republic of Croatia, for a limited time, under conditions of economic crisis, of an extraordinary tax which in addition to the usual regular tax burden will for a maximum period of 17 months tax the receipts (salaries, pensions and other receipts as provided for in Article 4 of the Special Tax Act) of certain categories of taxpayers.

In proceedings of constitutional review the Constitutional Court had the obligation to examine, first and foremost, whether the Special Tax Act complies - in the light of the constitutional concept of the Republic of Croatia as a social state (Article 1 of the Constitution) – with the basic principles and highest values of the constitutional order, the most important of which for this case were the following: equality, social justice and the rule of law as the highest values of the constitutional order (Article 3 of the Constitution); the principle of prohibiting discrimination (Article 14 sec. 1 of the Constitution); the general principle of the equality of all before the law (Article 14 sec. 2 of the Constitution); the special principle of tax equality and equity (Article 51 sec. 2 of the Constitution); the general principle of proportionality (Article 16 sec. 1 of the Constitution) and the special

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[129] Act on Denial of the Payment of Certain Material Rights to Public Service Employees, Official Gazette, No. 143/12.

[130] Act on Denial of the Right for Enlarging Salaries Based on Seniority and Job Complexity for Public Services, Official Gazette, No. 41/14.

[131] A. Bačić, "O konstitucionalizaciji socijalnih prava i njihovu slabljenju prema sadržaju", HAZU, 50=516(2013), p. 207.

[132] Special Tax on Salaries, Pensions and Other Receipts Act, Official Gazette, No. 94/09.

[133] Decision and ruling No. U-IP-3820/2009 *et al.* of 17 November 2009 (CRO-2009-3-011) – abstract control of constitutionality of the Special Tax on Salaries, Pensions and Other Receipts Act, Official Gazette, No. 143/09.

principle of proportionality in the defrayment of public expenses (Article 51 sec. 1 of the Constitution).

When elaborating the social state[134] and the principle of social justice[135] (Articles 1 and 3 of the Constitution), the Court has outlined that the principles of the social state and social justice are expressed in a special way in the control of legislative activities by constitutional courts. This hinges on the following fundamental problem: how to determine the borderline on which the constitutionalisation of social rights clashes with democracy? This is a problem located on the very crossroads of two basic questions of political philosophy that are also important for contemporary constitutional policy: at the crossroads of the question of democracy and of the question of distributive justice.[136]

In the work of constitutional courts this problem is particularly present in the control of the constitutionality of laws that deal with public policies, especially social policy. The borderline mentioned above is also the line up to which constitutional courts may control the work of the legislature from the aspect of the social state (Article 1 of the Constitution) and social justice (Article 3 of the Constitution).

In addition, the Court has stressed that the standards for determining this borderline in constitutional-court case law, formulated by the Federal Constitutional Court of the Federal Republic of Germany, are today considered the ruling guidelines for the work of European constitutional courts:

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[134] The Court has outlined that a social state is one of the cornerstones of European constitutional identity and that, in principle, the concept of a social state fills three functions: (1) it enables various forms of positive measures by the government and public authorities in the economic field; (2) it requires the government and public authorities to influence and to interfere with the market so as to ensure basic social rights, social security and equalise or decrease extreme social differences, and (3) it prohibits the erosion of the fundamental structures of the welfare state or the radical restriction of recognised social rights. Furthermore, the Court has stressed that the constitutional character of social rights points towards two basic requirements of social state: (1) the government and public authorities are bound to follow the policy of an equitable and equal redistribution of national resources so as to equalise extreme inequality, and (2) the legislative and executive powers are legally bound to achieve a balance between the limited assets of the government budget and the social goals laid down in the Constitution. Point 13.1. of the respective Decision.

[135] According to the Article 3 of the Constitution, social justice is a highest value of the constitutional order of the Republic of Croatia and a ground for interpreting the Constitution. In its case-law the Constitutional Court has confirmed that Article 3 of the Constitution has an additional function: besides serving as the ground for interpreting the Constitution, this Article is also a guideline for the legislator in the elaboration of particular human rights and fundamental freedoms enshrined in the Constitution. The Court has outlined that social justice is a component of the social state, because "this kind of a state demands the establishment and preservation of social justice. Therefore, the concept of the social state is violated when the help provided for those who need it does not comply with the requirements of social justice, either because the distribution of some social benefits has been wrongly restricted, or because a social group has not been provided with social protection." Point 13.2. of the respective Decision.

[136] Point 13.3. of the respective Decision.

> "The principle of the social state may surface in the interpretation of fundamental rights and in the interpretation and assessment by constitutional courts – according to the criteria of the kinds of restrictions permitted by law – of laws that restrict fundamental rights. However, this principle is not suitable for directly restricting fundamental rights without closer specification by the legislator. It lays down the state's obligation to ensure an equitable social order (...); in the fulfilment of this obligation the legislator has a wide margin of free decision-making (...). The principle of the social state, therefore, places an obligation before the state but does not give the details as to how this obligation should be fulfilled – were it otherwise, the principle of the social state would contradict the principle of democracy: the democratic order of the Basic Law, as an order of a free political process, would be fundamentally restricted and deprived if a prior constitutional obligation of a particular and no other solution was imposed on the formation of political will. Because of this openness the principle of the social state cannot directly impose boundaries on fundamental rights (...)."[137]

In short, therefore, the Court outlined that the substance of the concepts of the social state, the principle of social justice, even constitutionally recognised social justice are abstract in nature, although of different levels of abstraction. This can be seen from the fact that the writer of the Constitution left it to the legislator to regulate and elaborate all the constitutionally defined social rights, and this authority is usually explicit because the Constitution explicitly requires the enactment of a law for the application of some "social" norm. Therefore the constitutional provisions about the social state and social justice, even about constitutionally recognised social rights, cannot be applied directly. For them to be applied, they must first be elaborated in a law and very often they must be further specified in subordinate legislation for the operation of the relevant law.[138]

And the findings of the Constitutional Court were, *inter alia*, that the special importance that the Special Tax Act has for the stability of public expenditures of the Republic of Croatia at specific moment had priority over the requirements for achieving absolute equality and equity in levying the special tax. The Court held that the temporary levying of the special tax was based on a qualified public interest, so some differences that the Special Tax Act created among its addressees, although subject to criticism, did not reach the degree because of which this act could at that moment be proclaimed in breach of the Constitution.

However, we believe that there were reasons for serious considerations of some objections of the proponents, especially having in mind the fact that no state of economic emergency is a reason for non-compliance with fundamental constitutional values and human rights. Hence we agree with professor Arsen Bačić who perfectly explained why

[137] Point 13.3. of the Decision.

[138] Point 13.3. of the Decision.

the Constitutional Court could decide differently in this case : because the Special Tax Act **did not** ''promoted economic and cultural progress and social welfare" (quoted form the Historical Foundations of the Constitution), because with this Act the legislator has reduced the already questionable *Existenzminimum* of the majority of citizens; because this Act *was contrary* to the principle of social state (since it threatened the existence of the poorest citizens), the principle of equality (since the special tax did not included all the categories of taxpayers), the principle of social justice (since it contradicted to the principle of equality and justice) and the principle of respect of human rights as the highest value of the constitutional order (since it reduced the possibility of constitutionally guaranteed social security and dignity in personal and family life of citizens).[139]

Unfortunately, in the second and third ''Act on Denials" cases,[140] the Constitutional Court again decided to defend the interest of the government and its measures to deny the payment of certain material rights to public service employees for a specific period of time (for 2012 and 2013, and then also for 2014) and to deny the right for enlarging salaries based on seniority and job complexity. The background is as follows: under the Act on Denial of the Right for Enlarging Salaries Based on Seniority and Job Complexity for Public Services, civil and public service employees were denied the right to salary increases based on seniority in the period from 1 April to 31 DE ember 2014. However, the Government's negotiations with trade unions were not finalised for all branch collective agreements by end 2014. Hence, in order to continue the measures already underway, the Government has adopted a Decree on amendments to the respective Act. By virtue of this Decree, the application of the Act reducing employees' rights has been extended until 31 March 2015. Under the Act on Denial of the Payment of Certain Material Rights to Public Service Employees, the Government has abolished the paid annual leave and Christmas bonuses for the period from 2012 to 2014 and for 2015.

The Court held that these ''Acts on Denials" were in line with the Constitution. In both cases the Court held that ''denial of certain benefits for a limited period in order to consolidate the economic situation of the country may be a measure in the area of economic policy because of the circumstances that existed at the time when the Croatian Parliament was not in session".[141] However, the Court outlined that any eventually further extending

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[139] A. Bačić, "O konstitucionalizaciji socijalnih prava i njihovu slabljenju prema sadržaju", p. 201-203.

[140] Decision No. U-I-4405/2013, U-II-3222/2014 of 31 March 2015 – abstract control of constitutionality of the Act on Denial of the Payment of Certain Material Rights to Public Service Employees and of Decree on amendments to the Act on Denial of the Payment of Certain Material Rights to Public Service Employees, and Decision No. U-I-1625/2014 *et al* of 30 March 2015 – abstract control of constitutionality of the Act on Denial of the Right for Enlarging Salaries Based on Seniority and Job Complexity for Public Services.

[141] Decision on constitutionality of the Act on Denial of the Payment of Certain Material Rights to Public Service Employees and of Decree on amendments to the Act on Denial of the Payment of Certain Material Rights to Public Service Employees, Point 44, and Decision on of constitutionality of the Act on Denial of the Right for Enlarging Salaries Based on Seniority and Job Complexity for Public Services, Point 28.

of the respective measures could lead to the fact that the problem of denial of payment of certain material rights turns into the problem of achieving the rule of law, the principle of legal security, legal certainty and legal predictability.

Furthermore, in this two cases the Court held that there were some procedural mistakes (''derogation from full respect of the rules of democratic procedure of collective bargaining"), but only to a lesser extent, and the emphasis was placed on economic circumstances in which these acts were adopted. We may see that constitutional judges have made decisions on economic policymaking for which they have, as Sadurski concluded when analysing constitutional development in Central and East Europe, ''questionable competence, knowledge, or legitimacy."[142]

To sum up**:** in Croatia, we have broad catalogue of welfare rights in the Constitution, we have numerous legal regulations which are constantly being amended and which in the circumstances of the economic crises represents severe reduction of welfare rights, and we have Constitutional Court praxis which is, unfortunately, well-disposed to this reductions of welfare rights.

IV. CONCLUSION

Welfare rights in most European countries are constitutionalized. Courts appearing in the role "of the final arbiter of constitutional claims" often face "politically controversial issues" and thus become a major political actor.[143] What is crucial here is the issue of the limits of court power to repeal laws on the ground of their unconstitutionality.[144]

The second chapter of the paper attempts to underpin the integral approach to rights, implying denial of the existence of a fundamental difference in the philosophical foundations of first- and second-generation rights.[145] These two groups are interconnected and mutually dependant. The democratic legitimacy of the government relates to the capacity to honour both sets of rights.[146]

In the third chapter of the paper, when discussing the role of Constitutional Court of the Republic of Croatia in the area of welfare rights, we have drawn a parallel with other constitutional courts in the region which have been quite active in reviewing statutes under the standards of welfare rights and which, in situation where they have had a choice

[142] Sadurski, *Constitutional Socio-Economic Rights: Lessons from Central Europe*, p. 6.

[143] Kumm, *Int J Constitutional Law*, 574.

[144] Kumm, p. 574.

[145] Raes, *Social, Economic and Cultural Rights*, p. 44.

[146] Raes, p. 52.

between striking down a law under a general constitutional clause (such as "social justice" or "equality") or under a specific welfare right, usually have opted for the former. As we have shown, in its jurisprudence so far, the Croatian Constitutional Court has also been quite active in reviewing statutes under the standards of welfare rights. Unfortunately, the Constitutional Court praxis, especially the recent one, has shown that this Court is well-disposed to reductions of welfare rights.