DIGNITAS
Revija za človekove pravice
Slovenian journal of human rights
ISSN 1408-9653

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Ivana Tucak

Article information:
To cite this document:
Tucak, I. (2016). The Nature of Welfare Rights, Dignitas, št. 69/70, str. 133-156.

Permanent link to this doument:
https://doi.org/ 10.31601/dgnt/69/70-7

Created on: 16. 06. 2019
To copy this document: publishing@nova-uni.si

The Nature of Welfare Rights

Ivana Tucak[1]

ABSTRACT

Europe is known for its adherence to the concept of welfare rights and social justice, which represents a major shift from the American perception of human rights. This adherence is reflected in the incorporation of welfare rights into a large number of national constitutions and regional instruments. Nevertheless, welfare rights still represent a controversial topic. The paper primarily deals with the theoretical foundations of these rights. Its purpose is to search for the sources of these rights, enlighten their legal nature and stress their special features. The first part of the paper is engaged with the issue of the status of these rights and what they provide to their holders. It attempts to define them and clarify the justification of their introduction into constitutional texts and regional conventions. The second part of the paper challenges the arguments against welfare rights. First, the superficial classification and denotation of civil and political rights as negative and welfare rights as positive rights is discarded. Although the usefulness of the division into negative and positive rights is today questionable itself, the above identification should be deemed particularly controversial. The second issue relates to the possibility of their judicial enforcement. If that is possible, despite their vagueness, is there, a difference between the justiciability of welfare and civil and political rights?

Keywords: welfare rights, positive rights, justiciability of welfare rights

[1] *Ivana Tucak, PhD, assistant professor, Chair of Legal Theory, Josip Juraj Strossmayer University of Osijek*
[Fa]culty of Law Osijek, Stjepana Radića 13, 31 000 Osijek, Croatia, itucak@pravos.hr.

Narava socialnih pravic

POVZETEK

Evropa je znana po spoštovanju socialnih pravic in socialne pravičnosti, ki predstavlja velik premik od ameriškega dojemanja človekovih pravic. To spoštovanje izhaja iz vključevanja socialnih pravic v številne domače ustave in regionalne instrumente. Socialne pravice so, kljub temu, še vedno sporna tema. Članek se ukvarja predvsem s teoretičnimi temelji teh pravic. Njegov namen je raziskati vire teh pravic, razsvetliti njihovo pravno naravo in poudariti njihove posebnosti. Prvi del prispevka preučuje status teh pravic in kaj zagotavljajo njihovim imetnikom. Pri tem poskuša opredeliti in pojasniti utemeljitev njihove uvedbe v ustavnih besedilih in regionalnih konvencijah. Drugi del članka izpodbija ugovore zoper socialne pravice. Prvič, potrebno je zavreči razlikovanje med državljanskimi in političnimi pravicami kot negativnimi in socialnimi pravicami kot pozitivnimi pravicami. Drugo vprašanje se nanaša na možnost njihove sodne uveljavitve. Če je to mogoče, kljub njihovi nedoločnosti, ali je še vedno upravičeno razlikovanje med socialnimi ter državljanskimi in političnimi pravicami glede njihove iztožljivosti?

Ključne besede: socialne pravice, pozitivne pravice, iztožljivost socialnih pravic

1. Introduction

This paper deals with socio-economic or welfare rights.[2] These rights have remained controversial despite the fact that most European constitutions and some of the most significant international

[2] *I will apply the terms of socio-economic rights or welfare rights as synonyms. It is common in the existing literature. Though, there are authors who strive to advance this terminology. For instance, Mark Tushnet uses the term of "social welfare right" as a more appropriate term for denotation of this set of rights. According to Tushnet, this term more precisely reflects the essence of these rights since it is confined to rights related to "the provision of social goods to the especially needy". On the other hand, the term of socio-economic and welfare rights can be linked to rights which can be possessed by all citizens. What is particularly confusing, finds Tushnet, is the adjective economic which refers to the right to work and other affiliated rights (M. Tushnet, "Social Welfare Rights and the Forms of Judicial Review", Texas Law Review, vol. 82, 2003-2004, p. 1895, note 2). Wojciech Sadurski mostly applies the term of socioeconomic rights (W. Sadurski, "Postcommunist Charters of Rights in Europe and the U.S. Bill Of Rights", vol. 65, no. 2, 2002, Law and Contemporary Problems, p. 223.*

human rights treaties embraced them in the second half of the 20th century. Unlike civil and political rights, which are considered to be "real rights",[3] welfare rights are often regarded as goals[4] or ideals. As laid down by Onora O'Neil, "noble aspirations, which are helpful to articulate and bear in mind when establishing institutions, programmes, policies and activities that allocate obligations."[5] Joel Feinberg deemed them as rights in the weaker sense – "manifesto rights". Manifesto rights appear as "permanent possibilities of rights" or "the natural seed from which rights grow".[6]

This paper refers to the theoretical foundations of the above rights, aiming to enlighten their legal nature, sources and features which make them distinct from civil and political rights and to clarify why they should be incorporated into constitutions and what this means for their enforcement and protection.[7] The paper is divided into two parts. The first one tries to define welfare rights and explain what they need to grant their holders as well as elaborates their status in contemporary legal systems. The second one explores some of the most relevant arguments against welfare rights. First, the identification of civil and political rights with negative rights and welfare rights with positive rights is rejected. At this point, the utility of the division into positive and negative rights is taken into consideration too.

Then, the issue of the judicial enforceability of welfare rights is analysed. This issue appears as the most serious objection to the existence of this set of rights. If, despite their vagueness, these rights can be protected at court, can one speak about a difference in the enforceability between welfare rights, on one hand, and civil and political rights, on the other hand?

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[3] *J. Nickel, "Human Rights", The Stanford Encyclopedia of Philosophy (Winter 2014 Edition), Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/win2014/entries/rights-human/, (accessed 18 August 2015)).*

[4] *W. Sadurski, "Constitutional Courts in the Process of Articulating Constitutional Rights in the Post-Communist States of Central and Eastern Europe Part I: Social and Economic Rights", European University Institute, Florence Department of Law. EUI Working Paper Law no. 2002/14.BADIA FIESOLANA, SAN DOMENICO (FI). http://cadmus.eui.eu/bitstream/handle/1814/192/law0214.pdf;jsessionid=71A4340EE110407FAA34927F1D14B52F?sequence=1, (accessed 1 August 2015), p. 5.*

[5] *O. O'Neil, "The Dark Side of Human Rights", International Affairs, vol. 81, no. 2, 2005, p. 429.*

[6] *J. Feinberg, Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy, Princeton, N.J., Princeton University Press, 1980, p. 153. See also C. Wellman, An Approach to Rights, Studies in the Philosophy of Law and Morals, Dordrecht, Boston, London, Kluwer Academic Publishers, 1997, p. 105.*

[7] *This paper is only a part of broader research on the nature of these rights. On the controversies related primarily to their "universality" and "inalienability" see I. Tucak and A. Blagojević, "Welfare Rights in the Croatian Constitution" in M. Vinković (ed.), New Developments in EU Labour, Equality and Human Rights Law, Osijek, Josip Juraj Strossmayer University of Osijek, forthcoming.*

2. Constitutionalization of welfare rights

Although most contemporary countries may be classified as some form of a social state since they provide their citizens with education, the right to social security and other important services, there is still no single harmonized approach to the issue whether welfare rights need to be constitutionalized.[8] The strongest resistance to their incorporation into constitutional texts comes from societies dominated by individualistic culture and political philosophy, according to which the fundamental purpose of a constitution is to constrain the state and not to expand the scope of its action. Pursuant to this viewpoint, constitutions should neither contain nor be interpreted in a way that they recognize welfare rights.[9]

Such a perception is particularly apparent in the United States. Even though their legal science calls for changes in this attitude,[10] their Supreme Court has successfully withstood them so far.[11] In terms of the nature of the United States Constitution, the words of judge Richard A. Posner are highly indicative, the constitution is "a charter of negative rather than positive liberties... The men

[8] *Schwartz holds that the issue of constitutionalization is primarily of a theoretical nature.*
H. Schwartz, "The Wisdom and Enforceability of Welfare Rights as Constitutional Rights", Human Rights Brief, vol. 8, no. 2, 2001, p. 2.
The constitutions of some highly developed social states, such as Scandinavian countries, New Zealand and Australia, do not contain welfare rights. Sadurski, Law and Contemporary Problems, p. 228.

[9] *M. Tushnet, "Social Welfare Rights and the Forms of Judicial Review", Texas Law Review, vol. 82, 2003-2004, p. 1895.*

[10] *Frank Michelman is the author of a number of influential articles on constitutional welfare rights (especially two early papers of his: "The Supreme Court, 1969 Term. Foreword: On Protecting the Poor through the Fourteenth Amendment", Harvard Law Review, Vol. 83, 1969, p. 7, and "In Pursuit of Constitutional Welfare Rights: One View of Rawls's Theory of Justice", University of Pennsylvania Law Review, Vol. 121, 1972-1973, pp. 121-1019). Michelman in John Rawls' A Theory of Justice attempts to find grounds for justification of "justiciable welfare rights". Michelman, University of Pennsylvania Law Review, p. 967. Liu denotes it as "the most insightful and imaginative work in area'. See G. Liu, "Rethinking Constitutional Welfare Rights", Stanford Law Review, vol. 61, 2008, p. 203.*
Forbath is of a similar opinion: "No one has thought and written more deeply and imaginatively about constitutional welfare rights than Frank Michelman, and no one has approached the problem from as many fruitful perspectives." W. E. Forbath, "Constitutional Welfare Rights: A History, Critique and Reconstruction", Fordham Law Review, vol. 69, no. 5, 2001, p. 1826.
In an article entitled "Rethinking Constitutional Welfare Rights" Liu examines Michelman's assumptions and concludes that the establishment of welfare rights in John Rawls' moral principles does not handle the issue of "the legitimacy of judicial recognition of welfare rights" in an appropriate way.
Liu stresses that the legitimacy of these rights depends on "the culturally and historically contingent meanings of particular social goods in our own society". Liu leans on Michael Walzer's Spheres of Justice:
"I argue that judicial recognition of welfare rights is best conceived as an act of interpreting the shared understandings of particular welfare goods as they are manifested in our institutions, laws, and evolving social practices." Liu, Stanford Law Review, p. 203.

[11] *Sadurski, Law and Contemporary Problems, p. 228.*

who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much for them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services."[12]

The quotation is an example of the originalist interpretation of the constitution. What prevails in the United States today is the political philosophy that deems the state as "a possible threat" to the freedom of an individual.[13] If the state decides to provide its citizens with certain services (the constitution requires no such action therefrom), those services do not have to be provided "competently".[14] The state shall only abstain from compulsion.[15]

This originalist clarification of the Supreme Court's disinclination to welfare rights is not satisfactory. Various interpretations of the American Constitution have gradually made it different from what it originally represented.[16] It is particularly evident when it comes to human rights protection.

Cass Sunstein finds the realist explanation of the lack of incorporation of welfare rights into the American Constitution the most convincing of all. In fact, in the 1960s and 1970s, the USA witnessed a vivid discussion on welfare rights, not only among scholars but also within the judicature.[17] It all came to an end in 1968 when Richard Nixon was elected president and nominated four new conservative judges of the Supreme Court and hence assured dominancy of the fraction denying welfare rights.[18] The 1973 case of

[12] *Jackson v. City of Joliet, 715 F. 2d 1200, 1203 (7th Cir. 1983) (Posner, J.),* http://openjurist.org/715/f2d/1200/jackson-v-city-of-joliet-ross-d, (accessed 8 August 2015).

[13] *E. Palmer, "Protecting Socio- economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights", Erasmus Law Review, vol. 2, no. 4, 2009, p. 400.*

[14] *S. Bandes, "The Negative Constitution: A Critique", Michigan Law Review, vol. 88, 1990, p. 2275.*

[15] *Bandes, p. 2274.*

[16] *C. Sunstein, "Why Does the American Constitution Lack Social and Economic Guarantees?", (January 2003), U of Chicago, Public Law Working Paper, No. 36, SSRN: http://ssrn.com/abstract=375622 or http://dx.doi.org/10.2139/ssrn.375622, (accessed 1 August 2015), p. 13.*

[17] *See Forbath, Fordham Law Review, p. 1822. Pursuant to Forbath, the sources of welfare rights can be found in "Warren Court's Fourteenth Amendment case law" as well as in the Court's support to the "war on poverty".*
The issue of the legitimacy of the judicial enforcement of welfare rights is most evident at federal courts. State constitutions frequently include welfare rights and state judges are characterized by "the greater political accountability" than federal judges are. Liu, Stanford Law Review, p. 205.

[18] *Liu, p. 206. Sunstein finds this "realist explanation" the most convincing of all since it demonstrates that American constitutional rights occur to be "a form of common law, based on analogical reasoning". The Supreme Court was just one step away from recognition of welfare rights. Sunstein, U of Chicago, Public Law Working Paper.*

San Antonio Indep. Sch. Dist. v. Rodriguez was a breakthrough in this view. Therein, the Supreme Court backed unequal funding of schools based on the difference in wealth.[19]

Lately the public could keep track of two instructive cases in which the Supreme Court refused to provide the applicants with protection based on the assumption that the constitution does not impose affirmative duties on the state.[20] In the case of *DeShaney v. Winnebago County Department of Social Services,* the Supreme Court dismissed a claim of a mother whose son needs to be permanently hospitalized due to the injuries inflicted by his father even though the social service could have deprived, based on earlier reports, the latter of the custody and thus prevented this tragic consequence.[21] In the case of *Harris v. McRea*, the Supreme Court supported "restrictions" which make legally permitted abortions virtually unavailable to poor women.[22] It is interesting that in all these cases, the Supreme Court leaned on "the simple distinction" between "the affirmative and negative responsibilities" of the state.[23]

The situation in Europe and the one in the United States are not alike. European states were more prone to accept a different political philosophy substantiating welfare rights. They have accommodated "a conception of the state in which welfare protection is regarded as a fundamental precursor to the attainment of individual freedom."[24]

After World War II, western European countries adopted new constitutions which involved welfare rights.[25] The large number of these constitutions embraced the "Austrian" model of constitutional adjudication which is bound to the theory of Hans Kelsen and is also known as Kelsen' model.[26] The role of constitutional courts is clearly defined and their basic task is to assess the constitutio-

[19] *Liu, Stanford Law Review, p. 206. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).*
[20] *Bandes, Michigan Law Review, p. 2272.*
[21] *109 S. Ct. 998 (1989).*
[22] *Harris v. McRae, 448 U.S. 297, 318 (1980). See Bandes, Michigan Law Review, p. 2272. The Supreme Court has also rejected the affirmative duties of the government with respect to the right to "decent housing" Lindsey v. Normet, 405 U.S. 56, 74 (1972); and "the right to minimal subsistence". For more details, see J. MacNaughton, "Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune", U. Pa. J. Const. L., vol. 3, 2014, pp. 750-751.*
[23] *Bandes, Michigan Law Review, p. 2272.*
[24] *Palmer, Erasmus Law Review, p. 400.*
[25] *Schwartz, Human Rights Brief, p. 1.*
[26] *D. Šarin,"Ustavni sud Republike Hrvatske kao institucionalni zaštitnik ljudskih prava i temeljnih sloboda", Zbornik radova Pravnog fakulteta u Splitu, vol. 52, no. 3, 2015, p. 758.*

nality of laws and other regulations and to protect fundamental constitutional rights and freedoms. This makes a big difference to the role of the American Supreme Court which is not explicitly authorized by the Constitution to review the constitutionality of laws "leaving it open to debate whether Chief Justice Marshall, in the renowned case Marbury v. Madison, established judicial review or not".[27]

In the period after World War II, the power was almost everywhere held by political options that promoted restriction of market activities for the purpose of human dignity protection (social-democratic parties).[28] Some were more into it than the others. For instance, France and Italy issued catalogues of welfare rights.[29] The 1949 German Basic Law encompasses negative rights for the most part. The only explicit provision containing a welfare right refers to the mothers' right to protection and support of society (Art. 6 (4) Basic Law).[30] Yet, unlike the American Supreme Court, the German Federal Constitutional Court has, on the grounds of the constitutional clauses on human dignity laid down in Article 1 (1) (2) and "the social state clause" set forth in Article 20 (1) and 28 (1) (1), developed various other sets of rights.[31]

The key decision in this view was the judgement in the 1958 *Lüth* case.[32] In this judgement, the German Federal Constitutional Court found that constitutional norms do not affect only legal relationships between an individual and the state but also those between citizens (''third party or horizontal effect'').[33] The Federal Constitutional Court regarded the judgement of the civil court as interference with the constitutional right of a citizen to freedom of expression under Article 5 (1) (1) of the German Constitution.[34]

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[27] *Kumm holds that the reasons behind this are to be found in historical experiences. The broad support of the population to the "oppressive regimes" in Western Europe in the first half of the 20th century shattered the trust in "political majorities". M. Kumm, "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice", I. CON, vol. 2, no. 3, 2004, p. 589.*

[28] *Tushnet, Texas Law Review, p. 1913.*

[29] *W. Sadurski, Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe, Second Edition, Springer, 2014, p. 256.*

[30] *R. Alexy, A Theory of Constitutional Rights (Introduction and Translation Julian Rivers), Oxford, Oxford University Press, 2004, p. 289.*

[31] *Alexy finds that these provisions may ''loosely be called positive rights". Alexy, p. 244.*

[32] *BVerfGE 7, 198.*

[33] *Alexy, A Theory of Constitutional Rights, pp. 351-352, Kumm, I. CON, p. 585.*

[34] *Alexy, p. 352.*

Erich Lüth (a writer and film director) called for boycotting a new film of director Veit Harlan, maker of the national socialist propaganda film ''Jud Süß'' (1943). This gave an incentive to the film producers to file a civil lawsuit against Lüth. The District Court in Hamburg issued judgement in favour of

In this case, asserts Kumm, the Court applied what was later to become its mantra:

> (...) *according to the long standing case law of the Federal Constitutional Court, constitutional rights norms do not simply contain defensive rights of the individual against the state, but at the same time they embody an objective order of values, which apllies to all areas of law as a basic constitutional decision, and which provides guidelines and impulses for the legislature, administration and judiciary*.[35]

Constitutional norms have ”radiating effect” on the entire legal system, i.e. on the rights and duties of all who are under its jurisdiction through the concept ”of an objective order of values”.[36] ”The radiating effect” has thus set grounds for extension of ”the court's rights jurisprudence¨' to private law cases and for evolvement of ”individual rights to positive action by the state”.[37]

On the other hand, Spain and Ireland have supplied their constitutions with welfare rights which have not been made enforceable. The constitutions of these two countries detach “welfare rights“ from “welfare goals“.[38] In its section II, the Spanish constitution focuses on “Rights and Freedoms“ and its section III on “the Guiding Principles of Economic and Social Policy“.[39] The difference in the enforceability between the constitutional provisions stated in sections II and III is, with respect to the wording, revealed in the following way:

> *Any citizen may assert a claim to protect the freedoms and rights recognized in section 14 and in division 1 of Chapter 2, by means of a preferential and summary procedure before the ordinary courts and, when appropriate,* by lodging an indivi-

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the plaintiff, holding that the call for boycott was contrary to public policy. Lüth lodged a constitutional complaint against this decision. E. Šarčević (ed.), Izabrane odluke njemačkog Saveznog ustavnog suda, Fondacija Konrad Adenauer, 2009, p. 241.

[35] *BverfGe 39, 1 (41) quoted according to Alexy, A Theory of Constitutional Rights, p. 352. See also Kumm, I. CON, p. 585.*

[36] *This ”objective order of values” can be, from the viewpoint of Alexy, substituted by the concept of principles. Alexy, A Theory of Constitutional Rights, p. 352, Kumm, I.CON, p. 585.*

[37] *Kumm, p. 585.*

[38] *See Sadurski, Law and Contemporary Problems, p. 230, note 34, Tushnet, Texas Law Review, p. 1898.*

[39] *Spanish Constitution (1978, 1992),* http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf, (accessed 18 August 2015).

dual appeal for protection *(recurso de amparo) to the Constitutional Court* (emphasis added).[40]

Recognition, respect and protection of the principles recognized in Chapter 3 shall guide legislation, judicial practice and actions by the public authorities*. They may only be invoked before the ordinary courts in accordance with the legal provisions implementing them* (emphasis added).[41]

The Irish constitution lists welfare rights in its section called "Directive Principles of Social Policy". The provisions on welfare principles are thus primarily binding for the Parliament (Oireachtas). Pursuant to Article 45:

The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.[42]

Ireland has hence embraced the attitude that courts have no "policy making role".[43] Such a solution represents, for some authors, a perfect response to one of the fundamental critiques of these rights, which is elaborated in section 3.2. and which propagates that these rights, due to their nature, cannot be classified as rights since they cannot be enforced before courts.[44]

Most European countries have not only incorporated welfare rights into their constitutions but also joined a number of relating international and regional instruments.[45] Although primarily intended for protection of civil and political rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms has found a place for welfare rights through the prac-

[40] *Section 53 (2).*
[41] *Section 53 (3).*
[42] *Constitution of Ireland (1937), with Amending Acts,* http://www.taoiseach.gov.ie/eng/Historical_Information/The_Constitution/February_2015_-_Constitution_of_Ireland_.pdf, (accessed 18 August 2015).
[43] *T.D. v. Minister for Education, (2001). See Tushnet, Texas Law Review, p. 1900.*
[44] *Tushnet, p. 1919.*
[45] *For example, welfare rights are present in some of the most important human rights instruments: Universal Declaration of Human Rights (UN 1948), European Social Charter (Council of Europe 1961, Revised Social Charter 1996), International Covenant on Economic, Social, and Cultural Rights (UN 1966), Charter of Fundamental Rights of the European Union (European Union 2012).*

tice (case-law) of the European Court of Human Rights.[46] In this view, the European Court of Human Rights differentiates from the American Supreme Court and resembles the Federal Constitutional Court of Germany.[47]

In *Airey v. Ireland* the European Court held:

> *Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.*[48]

In compliance with Article 1 of the Convention, the signatory states are obliged to respect for the human rights and freedom defined in the Convention and protect them, unlike in the US Constitution, not only from the state itself but also from other individuals.[49]

The 1990 Constitution of the Republic of Croatia[50] shares many common characteristics with the constitutions of post-communist countries in Central and Eastern Europe.[51] Comparing to the other aforementioned constitutions, these constitutions involve, as noted by Sadurski, "the most generous list of welfare rights".[52] All

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[46] *J. Rivers, "A Theory of Constitutional Rights and the British Constitution", in R. Alexy, A Theory of Constitutional Rights (Introduction and Translation Julian Rivers), Oxford, Oxford University Press, 2004, pp. xvii-li.*

[47] *Rivers, A Theory of Constitutional Rights, pp. xlviii-xlix.*

[48] *Airey v Ireland (1979) 2 E.H.R.R. 305. Since the case of Airey v. Ireland (1979), the Court has, by interpreting particular provisions of the Convention (Articles 2, 3, 8, 6 and 14), developed positive responsibilities of the states in the socio-economic sphere, which seems to follow the practice of constitutional courts in the member states. The Court has not created, in Palmer's opinion, a single theory of justification of these extensions of the Convention. The commentators speak about "dynamic interpretation of the Convention in light of changing social and moral assumptions". Palmer, Erasmus Law Review, p. 402.*

[49] *X v. Netherlands (1986) 8 E.H.R.R. 235. See Palmer, Erasmus Law Review, p. 405.*

[50] *As part of its "Basic Provision" (Heading II), the Constitution of the Republic of Croatia depicts Croatia as a welfare state (Article 1). In the same heading, social justice is deemed as one of the highest values and a foundation for interpretation of the Constitution (Article 3)*
Heading III of the Constitution, entitled "Protection of Human Rights and Fundamental Freedoms", respectively regulates civil and political rights (Articles 21-47) as well as economic, social and cultural rights (Articles, 48-70).

[51] *Yet, Sadurski warns that there is no single model of CEE constitutions. Sadurski, Law and Contemporary Problems, p. 227.*

[52] *Sadurski, p. 233.*

the constitutions from this category encompass "social security rights, health care, and education".[53] What is also widespread are the right to appropriate working conditions, the right to choose a profession freely, the right to occupational safety, the right to just remuneration for work.[54] The dominant ideology at the time when these constitutions emerged was the so-called Washington Consensus which restrains the role of the government in the implementation of its social policy.[55]

Due to their histories, these countries did not have any problems with the adoption of the constitutional provisions which assign the activist role to the state.[56] In the early 1990s, this part of the world was experiencing a real "constitutional revolution" and the constitution makers had to take sides between the American constitutional model promoted by numerous constitutional law experts who rather actively participated in relating discussions and one of the European models which appeared closer to them both geographically and culturally. In the end, the American "lobby" had to admit defeat.[57]

3. The most common objections

The complexity of the issue and the comprehensiveness of the existing literature prevent us from diving deeper into this category of rights. At this point, let us stay with the two most common misunderstandings related to welfare rights. What is challenged first is the misperception that civil and political rights are identical to negative rights as well as are welfare to positive rights. It is followed by discussions on the judicial enforceability of welfare rights.

3.1. Positive and negative constitutional rights

Welfare rights are often depicted as positive (affirmative) rights to goods or services and oppose "liberty rights"[58] or classical negative, defensive rights against the state.[59] Isaiah Berlin offered a

[53] *Sadurski, p. 231.*
[54] *Sadurski, p. 232.*
[55] *Tushnet, Texas Law Review, p. 1914.*
[56] *Sadurski, Law and Contemporary Problems, p. 228.*
[57] *Sadurski, p. 225.*
[58] *O'Neil, International Affairs, p. 427.*
[59] *Jeremy Waldron draws a line between positive and negative rights in the following way:*
Positive rights – "a right correlative to another's duty to actually do something for the right-bearer' benefits"

classical negative definition of liberties: "By being free in this sense I mean not being interfered with by others. The wider the area of non-interference the wider my freedom".[60] A holder of such liberty rights has a claim towards all the others not to interfere with his or her autonomous decision-making and action-taking.[61] Negative rights are protecting "a sphere of private immunity".[62]

As demonstrated in the previous chapter, a completely different philosophy is hidden in the background of welfare rights: it is commonly believed that they, as "factual liberties", occur to be a prerequisite for negative liberty rights or in other words, that negative liberties are useless without them.[63]

Negative rights – "a right correlative to another's duty to refrain from doing something that interferes with the right bearer's freedom". J. Waldron, Law and Disagreement, Oxford [etc.], Oxford University Press, 2004, p. 233.

[60] *One of the most quoted definitions of the difference between positive and negative rights originates from I. Berlin, "Two Concepts of Liberty",*
https://www.wiso.unihamburg.de/fileadmin/wiso_vwl/johannes/Ankuendigungen/Berlin_twoconceptsofliberty.pdf, pp. 3-4 (accessed 15 August 2015).

[61] *T. Smith, "On Deriving Rights to Goods from Rights to Freedom", Law and Philosophy, vol. 11, 1992, p. 218.*

[62] *Sunstein, U of Chicago, Public Law Working Paper, p. 4*

[63] *Also see Alexy, A Theory of Constitutional Rights, p. 337.*
Theoreticians are not unanimous about what sets grounds for these rights. Are they based on satisfaction of human needs (certain goods and services) which cannot be satisfied by individuals themselves, so their satisfaction requires assistance of other people? (O'Neil, International Affairs, p. 427, Smith, Law and Philosophy, p. 217). This discussion cannot be dived into any further at this point. Here is only to be said that those who promote the theory of welfare rights based on human needs claim: "These are alleged rights to be provided by others with certain concrete goods" (Smith, Law and Philosophy, p. 217). A person has the right to those goods only on the grounds of "her need for the goods" (Smith, p. 218).
The most powerful argument supporting welfare rights is revealed in the following quotation:
"This argument contends that welfare rights are a necessary supplement to liberty rights because rights to freedom become hollow when their bearers are not able to take advantage of their freedom" (Smith, p. 217).
Welfare rights thus appear as a particular prerequisite for liberties, a person who lives below a social minimum cannot be free (Alexy, A Theory of Constitutional Rights, p. 337).
Tara Smith comes down on these assertions with the formulation of rights as claims. Rights to goods cannot be derived from the right to freedom. All such attempts result from misunderstanding of the nature of rights themselves (Smith, Law and Philosophy, p. 230).
"Rights are inviolable claims which protect a person s freedom of choice and action against certain obstructions which other persons may impose. As such, rights do not simply express aspirations. Rather, rights are entitlements, expressing certain ways that people may not treat one another. To attribute a right to a person is not merely to observe how desirable it would be if she were to have the object of that right; it is to assert that she is wronged if she is denied it" (Smith, p. 220).
Carl Wellman, one of the most influential contemporary legal philosophers, offers a particular interesting solution. He embraces the idea of welfare rights but rejects this broadly accepted attitude that welfare rights are based on human needs. The reason for such a standpoint is disclosed in the fact that this way one cannot identify the holder of the duty of the other party in a legal relation (an individual, private organization, state) "the party who has the obligation to help one to obtain or to provide what one needs". Rights are relational (Wellman, An Approach to Rights, Studies in the Philosophy of Law and Morals, p. 24).
Feinberg saw rights as "valid claims" while welfare rights are, in his eyes, a special type of rights which he called "manifesto rights". Manifesto rights entail claims which are based only on needs and which do not have to imply the correlative duties of other people.

However, this division is not satisfactory. It is obvious that some civil and political rights require positive action by the state while some welfare rights require state abstention from interference.[64] Indeed, classical civil and political rights, such as the right to freedom of expression, the right to a fair trial, the right to vote or even the right to life, call for positive action by the state.[65]

In other words, some civil and political rights integrated into constitutional texts entail affirmative responsibilities of the state, e.g. the right to a fair trial which shall be granted to all citizens by the state. In line with Article 29 of the Croatian Constitution, the right to a fair trial envisages the right of an individual to have his or her rights decided upon fairly by "a legally established, independent and impartial court within a reasonable period of time".[66] The defendant has, among other things, the right to obtain information on the grounds for the charges against him or her within the shortest possible term, in a language he or she understands, with free assistance of a court interpreter if necessary, the right to be present at his or her trial, the right to interrogate witnesses, the right to a defence counsel.[67]

The fact that some duties are expressed in the negative form does not imply bare abstention of the state. Even negative rights can be defined in such a way that they require positive action by the state. Susan Bandes demonstrates it using the right to freedom of expression stated in the First Amendment to the US Constitution which, among other things, includes the formulation "Congress shall make no law... abridging the freedom of speech ". However, the meaning of this constitutional provision has changed by the time. Today it is clear that the protection of the right to freedom of expression implies a number of positive obligations of the state, such as allocation of resources, aimed at providing an access "to forums" and information.[68]

"Natural needs are real claims if only upon hypothetical future beings not yet in existence. I accept the moral principle that to have a kind of claim against the world, even if against no one in particular... When manifesto writers speak of them as if already actual rights, they are easily forgiven, for this is but a powerful way of expressing the conviction that they ought to be recognized by states here and now as potential rights and consequently as determinants of present aspirations and guides to present policies" (Feinberg, Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy, p. 153).

[64] *Sadurski, Law and Contemporary Problems, p. 227 note 19.*

[65] *K. Eddy, "Welfare Rights and Conflicts of Rights", Res Publica, vol. 12, 2006, p. 347.*

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

[67] *Bandes takes advantage of the Sixth Amendment to the US Constitution. See Bandes, Michigan Law Review, p. 2276.*

[68] *Bandes, p. 2282.*

On the other hand, some welfare rights are in essence negative rights. According to Herman Schwartz, these definitely involve the right to form unions and the appertaining right to strike which both appear to be only variations of the traditional negative rights to freedom of association and freedom to strike.[69] The workers' freedom of organization and right to organize set grounds for all welfare rights for justice and democracy reasons.[70] Powerful trade unions play the decisive role in the struggle for workers' rights, better working conditions and decent minimum wages.[71]

In this context, one should mention the "concept of a negative welfare right", which has been developed by Cecil Fabre. Apart for providing resources within the framework of welfare rights, the state has the duty not to deprive people of the resources they already possess. Fabre accentuates that the concept of a negative welfare right was inspired by "the standstill doctrine" generally utilized by the Belgian Constitutional Court.[72] The standstill clause imposes on the state the negative obligation not to decrease the existing level of protection or in other words, to prevent further exercise of a protected right. The courts may sanction violation of this clause.[73] In line with this concept, the state shall be prevented from "suppressing benefits" which have already been granted to needy ones. Fabre stresses that her perception of negative welfare rights is not so demanding, it requires from the state to abstain from "suppressing benefits" granted to needy ones if it would result in their relegation below the "decent life threshold".

Jeremy Waldron belongs to those authors who decline the utility of the distinction between positive and negative liberties. Waldron emphasizes that such a differentiation is exposed to the same problems as the differentiation between acts and omissi-

[69] *Pursuant to Schwartz, many welfare rights are attached to negative rights, among which freedom from discrimination is the most prominent one: "Most countries already have statutes creating rights to public health care, education, maternity benefits, housing, social security, and similar benefits." When enforcing these statutory rights, their recipients should not be exposed to discrimination. Schwartz, Human Rights Brief, p. 1.*

[70] *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. 51.*

[71] *Raes, p. 51.*

[72] *C. Fabre, Social Rights under the Constitution – Government and the Decent Life, Oxford, Oxford University Press, 2000, p. 55, n. 26.*

[73] *J. Vande Lanotte and T. De Pelsmaeker, "Economic, Social and Cultural Rights in the Belgian Constitution" 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. 274.*

ons is. He points to an additional difficulty appearing therewith: "a given right is usually correlative not to single duties but to arrays of duties, some of them duties of omission, others duties of action".[74]

Susan Bandes finds the distinction between the positive and negative duties of the state which build up the practice of the Supreme Court of the United States too simple. Various problems in the differentiation between action and inaction play a major role therein.[75] In order to resolve the issue, one needs to bring forward an adequate value theory, "ultimately, the distinction cannot work because positive and negative rights, like action and inaction, or state action and private action, are concepts which cannot be distinguished without a reference point, or a theory of values".[76]

The mechanistic formula what is positive and what is negative is hollow, it lacks both normative and descriptive power.[77] It only protects certain entitlements while others are left to the mercy of the open market. Condemnation of only "tangible or physical interference" preserves, as believed by Bandes, the status quo.[78] The differentiation between positive and negative duties is thus based on anachronistic assumptions which distract understanding of constitutional duties.[79] The self-proclaimed negative reasons disguise "extremely restrictive choice values concerning the role of the government". The conventional approach to constitutional duties, which is manifested in avoidance to provide the abstract principles of freedom and equality with a content by giving a simple order to the government to do nothing, leads to preservation of "the existing distribution of goods, services and entitlements" whereas injustice and inequalities generated therewith are described as inevitable results of private choices.[80]

Anyway, the reality of a state, this means the USA too, is not a passive but rather "pervasive regulator and architect of a vast web of social, economic, and political strategies and choices".[81] Elizabeth Palmer thinks that the European Court of Human Rights should also reject this obsolete distinction between positive and

[74] *Waldron, Law and Disagreement, p. 233.*
[75] *Bandes, Michigan Law Review, p. 2279.*
[76] *Bandes, p. 2323.*
[77] *Bandes, p. 2326.*
[78] *Bandes, p. 2326.*
[79] *Bandes, p. 2342.*
[80] *Bandes, p. 2343.*
[81] *Bandes, p. 2285.*

negative rights and acknowledge a new "tripartite analysis" which implies "a cluster of correlative obligation to protect, respect and fulfil inherent in all human rights".[82]

3.2. Judicial enforceability of welfare rights

The most relevant objection to the inclusion of welfare rights in constitutional texts is, pursuant to the most influential legal theoreticians, definitely the objection to the enforceability of this set of rights.[83] As already noted in chapter "Constitutionalization of Welfare Rights", American legal thought is dominated by the standpoint that only civil and political rights can be enforceable while unenforceable entitlements cannot be considered rights.[84] What is deemed conventional is that every person whose constitutional right is violated shall have a legal remedy for such a violation of the constitution.[85] Legal remedies for violation of rights shall be "personal and present".[86]

It has been shown that due to the economic situation in their countries after the fall of communism and the expectations of their compatriots, most post-communist constitution makers did not find appropriate to classify these rights as goals of social policy.[87] Apart from involving a comprehensive list of welfare rights, these constitutions have one more thing in common. They do not prescribe the difference in the enforcement between civil and political, on one hand, and welfare rights, on the other hand.[88]

The acceptance of such a solution was the central part of numerous objections of respectable American legal and political theoreticians in the early 1990s. One of the most cited American authors in that view is surely Cass Sunstein who in his paper "Against Positive Rights" wrote that incorporation of "an endless catalogue" of welfare rights into constitutional texts, many of which are "absurd", may lead to a "disaster".[89] Sunstein accentuates that

[82] *Palmer, Erasmus Law Review, p. 403.*
[83] *Alexy, A Theory of Constitutional Rights.*
[84] *Scwartz, Human Rights Brief, p. 1.*
[85] *Tushnet, Texas Law Review, p. 1909.*
[86] *Tushnet, p. 1910.*
[87] *Sadurski, Law and Contemporary Problems, pp. 229-230, Schwartz, Human Rights Brief, p. 1.*
[88] *Sadurski, Law and Contemporary Problems, pp. 234, 235, 236.*
Pursuant to Sadurski, the only exception in this context refers to the Czech and Slovakian constitutions which include a general clause, according to which a number of listed rights can only be required within the scope of the law which is implemented by those constitutional provisions. This clause resembles a clause from section 53 (3) of the Spanish Constitution.
[89] *C. Sunstein, "Against Positive Rights", East European Constitutional Review, vol. 2, winter 1993,*

the constitutionalisation of welfare rights is contrary to the principles of free market and has a disturbing psychological effect on people in the sense of interfering with private initiatives and generating dependence on state aid.[90]

Generation of rights which cannot be exercised before courts is, according to Sunstein, expected to reinforce the cynicism about the legal system governing those countries, which is a consequence of the yearlong communist rule in which law was not respected and served only as an instrument to implement state policies. The unenforceability of welfare rights is to spill over to civil and political rights. Sunstein singles out and finds absurd the provision of the Hungarian Constitution on the right to "the highest possible level of physical health".[91] In the same context, one could observe the right to work which is incorporated into most of these constitutions. With respect to this right, Robert Alexy asserts: "The scale of conceivable interpretations extends from a utopian right of each person to any work he wishes... to a compensatory right to unemployment benefit (but how much?)." [92]

It is certain that the scope of many welfare rights is vague. Alexy speaks about "the semantic and structural vagueness of welfare rights". However, this vagueness is not typical only for welfare rights but it characterizes some other rights too. In Alexy's opinion: "The non-justiciability thesis has to maintain a second thesis: the impossibility of reaching an accurate determination of the content and structure of abstractly formulated social constitutional rights by way of specifically legal means." In case there are no "corresponding standards" for determination of the contents of these rights, courts have to touch upon the sphere of politics.[93] The task

pp. 35-36.
It should be noted that Sunstein's thesis on unenforceability is not applicable to all welfare rights and even in the United States, it is beyond any doubt that some of these rights are judicially enforceable. Schwartz, Human Rights Brief, p. 2.

[90] *According to Sunstein: "One of the enduring legacies of Communism is a large degree of cynicism about constitutions – a belief that constitutions may be pretty, but that they do not have meaning in the real world."*
If the right to "the highest possible level of physical health" cannot be judicially enforced, it may have effect on civil and political rights such as freedom of expression and freedom of association. Sunstein, East European Constitutional Review, pp. 36-37.

[91] *Sunstein, p. 37.*
This refers to the right contained in Article 12 (1) of the International Covenant on Economic, Social and Cultural Rights: "The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

[92] *Alexy, A Theory of Constitutional Rights, p. 340.*

[93] *Alexy, p. 340.*

of delimitation of the enforceability of these rights in Europe has been assigned to constitutional courts.[94]

Herman Schwartz sheds light on assertions suggesting that there is no evidence that the unenforceability of welfare rights will affect the enforceability of civil and political rights. This is confirmed by the practice of European constitutional courts after World War II, which, by interpreting civil and political rights, even expanded their scope and found a social dimension thereof. European constitutional courts are familiar with the practice of instructing the legislator which issues need to be regulated. [95]

In his paper named "Postcommunist Charters of Rights in Europe and the U.S. Bill Of Rights" Sadurski provides for a comprehensive overview of the constitutional texts and practice of Central and Eastern Europe (CEE) constitutional courts. Based on this study, Sadurski concludes that welfare rights in the analysed countries are not directly enforceable in the sense that they have the status of subjective rights against the state.

> *But the fact that socio-economic rights are not directly enforceable by the Courts...does not prevent these rights from becoming grounds for constitutional challenges to laws and policies through the process of abstract judicial review...As a result, constitutional courts have been quite active in reviewing, and at times invalidating, statutes under the standards of socio- economic rights.* [96]

However, worth attention is his remark that judges in the analysed countries have not refuted laws based on a distinctive list of welfare rights but based on the general constitutional provisions on "social justice" or "equality".[97]

In a number of its decisions, the Constitutional Court of the Republic of Croatia has shaped the Croatian version of a social state.[98] One of the most prominent such decisions is surely the Decision of 12 May 1998, by means of which the Constituti-

[94] *Sadurski, Law and Contemporary Problems, p. 236.*
[95] *Schwartz, East European Constitutional Law Review, p. 2.*
[96] *Sadurski, Law and Contemporary Problems, pp. 236-237.*
[97] *Sadurski, p. 237.*
[98] *S. Rodin, "Ustavni sud definira socijalnu državu", Revija za socijalnu politiku, vol. 5, no. 2-3, 1998, p. 118. On the ways in which the Croatian Constitutional Court interprets and thus tailors welfare rights see I. Tucak and A. Blagojević, New Developments in EU Labour, Equality and Human Rights Law.*

onal court repealed, due to incompliance with the Constitution, some of the provisions (Articles 1, 2, 3, 4 and 6) of the Act on Harmonisation of Pensions and Other Cash Inflows from Pension and Disablement Insurance, and on the Management of Pension and Disablement Insurance (hereinafter Act on Harmonization).[99]

The 1983 Pension and Disability Insurance Act of the former Socialist Republic of Croatia remained in force in the Republic of Croatia after the transition process and separation from the former Yugoslavia, precisely until 31 December 1996 when the Act on Harmonisation was passed. The new law has prescribed a mode of setting the pension level, which is less convenient for pensioners. The former mode was ''based on statistical data emerging from the nominal personal income of all the workers in the Republic of Croatia'' while the new mode stipulated that pensions should be derived from statistical "data emerging from the average costs of living flows starting from 1 January 1999".[100]

It needs to be said that in this case, it came to abstract review of the constitutionality of a law or more precisely, to assessment if the respective Act is compatible with the Constitution and not if the subjective rights of pensioners had been violated. Like other CEE courts, the Constitutional Court of the Republic of Croatia is in no position to "legislate subjective social rights".[101] Yet, its relevance is reflected in the power to "review the compatibility of laws" with the constitutional concept of social state (Article 1 of the Constitution) and other constitutional values such as social justice (Article 3 of the Constitution). [102]

However, the more recent standpoints of the Constitutional Court on welfare rights are more controversial. The case which deserves attention in this context was before the Constitutional Court in 2009 when this Court rejected both the request of the president of the Republic of Croatia and proposals of numerous citizens and associations to review the conformity of some provisions of the Special Tax on Salaries, Pensions and Other Rece-

[99] *No. U-I-283/ 1997 of 12 May 1998, Official Gazette no. 20/1997.*
[100] *J. Omejec, President of the Constitutional Court of the Republic of Croatia, World Conference on Constitutional Justice, Cape Town, 23–24 January 2009, Theme: "Influential Constitutional Justice: its Influence on Society and on Developing a Global Human Rights Jurisprudence", http://www.venice.coe.int/WCCJ/Papers/CRO_Omejec_E.pdf, (accessed August 2015).*
[101] *Rodin, "Ustavni sud definira socijalnu državu", p. 118.*
[102] *Rodin, p. 118.*

ipts Act (Official Gazette, no. 94/09) with the Constitution.[103] This was the so-called "crisis tax" which served as a Government's tool to overcoming the economic crisis and which, in the eyes of the above applicants, violated fundamental constitutional principles and values. In its decision and ruling, the Constitutional Court affirmed the broad discretionary power of the legislator and the independence in deciding on the choice and implementation of public policies.

The Court held that it is not "competent to judge whether the general taxation system or particular forms of tax... are appropriate and justified". It has also found that the concept of a welfare state, social justice and welfare rights are of an abstract nature and that they cannot be directly applied unless they have been previously "elaborated in law".[104]

This standpoint on welfare rights and fundamental constitutional values has provoked harsh criticism. Constitutional law scholar Sanja Barić claims that the practice of the Constitutional Court regarding social rights have, despite their incorporation into Heading III of the Constitution ("Protection of Human Rights and Fundamental Freedoms") deviated from the feature of fundamentality and turned to the "flexible" and "controversial" practice of Government's law-making interventions.[105]

The aforementioned reveals that the constitutionalisation of welfare rights implies the issue of "separation of powers"[106] and making decisions on spending budget funds.[107] Although enforcement of all rights is expensive, welfare rights still represent the heaviest financial burden.[108] The nature of this distinction betwe-

[103] *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. See the decision analysis in I. Tucak and A. Blagojević, New Developments in EU Labour, Equality and Human Rights Law.*

[104] *Point 13. 3. of the Decision. See also The Bulletin on Constitutional Case-Law, European Commission for Democracy through Law, Council of Europe Publishing, Strasbourg, September 2010, pp. 493-495, http://www.venice.coe.int/files/Bulletin/B2009-3-e.pdf, (accessed August 2015).*

[105] *S. Barić, "Normativna djelatnost kao izazov ostvarenju socijalnih prava" in N. Bodiroga Vukobrat and S. Barić (eds.), Socijalna prava kao temeljna ljudska prava, Zagreb, 2010, p. 55.*

[106] *From Michelman's point of view, the whole story about the constitutionalization of welfare rights comes to the issue of the separation of powers. Michelman, Oxford University Press and New York University School of Law, 2003, I. CON, p. 15.*

[107] *Schwartz, Human Rights Brief, pp. 1-2. Alexy, A Theory of Constitutional Rights, p. 341.*
Sadurski speaks about "institutional competence argument". Sadurski, Law and Contemporary Problems, p. 230.

[108] *Holmes and Sunstein concluded that enforcement of rights is generally expensive and they have proved it using the examples of contract and property enforcement. S. Holmes and C. R. Sunstein, The Cost of Rights: Why Liberty Depends on Taxes, 2013. For a comment thereabout see Tushnet, Texas Law Review, p. 1896.*

en the two sets of rights would be then "quantitative" and not "qualitative".[109]

Critics emphasize that if we constitutionalize welfare rights decisions on relevant issues are going to be made by constitutional courts (instead of democratically elected bodies), the legitimacy of which is in this view doubtful as well as is their knowledge of shaping social policies.[110] When violation of constitutional welfare rights is detected, courts amend the legislator's priorities, e.g. enforcement of welfare rights could be preferred over construction of a motorway.[111] All these things back the argument that such a practice is not democratic.[112] Yet, limitation of the democratic majority through a written charter of rights for the purpose of protection of human dignity and social security may be fully legitimate.[113] Here the author will not go, due to lack of space, any deeper in this issue.

At the end of this section, it needs to be mentioned that incorporation of welfare rights into constitutions may have sense regardless of their judicial enforceability. Schwartz puts forward that there is "political enforceability" too. The constitutional provisions on welfare rights can be of key importance to the legislator when defining budget priorities[114] and on the occasion of interpretation of ambiguous legal regulations.[115] Mark Tushnet also indicates that there are a number of other "institutional mechanisms" by means of which otherwise "unenforceable rights" can be enforced through, for instance, a civil society.[116]

The following example form Croatia can be interesting in this respect. The abovementioned decisions of 12 May 1998 led to a special social and political phenomenon known as "paying back the debt towards retired people". As a result thereof, it came to establishment of a new political party named "the Political Party of Pensioners" which programme included "the implementation" of the decision of the Constitutional Court. At the 2003 parliamen-

[109] *C. Sunstein, U of Chicago, Public Law Working Paper, p. 4*
[110] *Sunstein, East European Constitutional Review, p. 37.*
[111] *Tushnet, Texas Law Review, p. 1897.*
[112] *Tushnet, p. 1897.*
[113] *Fabre, Social Rights under the Constitution – Government and the Decent Life, p. 110. See also Kavanagh, A., "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.*
[114] *Schwartz, Human Rights Brief, p. 1.*
[115] *Tushnet, Texas Law Review, p. 1898.*
[116] *Tushnet, pp. 1900, 1909.*

tary election, this party won three seats in the Croatian Parliament and managed to push through adoption of the "Act on the Implementation of the CCRC Decision of 12 May 1998" (Official Gazette, no. 105/04).[117]

4. Conclusion

The paper examines some of the most relevant arguments for and against welfare rights. The fact that most contemporary countries today represent some form of a social state since they do not only appear as a negative legislator but also provide their citizens with a number of services makes this issue predominantly theoretical. The legal tradition of states encompasses various solutions. Some constitutions, such as the U.S. constitution, do not define welfare rights nor do their courts, by means of interpretation, expand the scope of their protection to these rights. The implementation of social policies thus remains in the hands of the legislator. Even constitutions which recognize welfare rights do not prescribe mechanisms for their protection in the same way. Some constitutions do recognize welfare rights but also clearly depict them as policy goals and thus make them judicially unenforceable.[118] Other constitutions, this includes almost all post-communist constitutions and the Croatian one, do not make any difference in the enforceability between civil and political, and welfare rights.[119] Such "blurring" of the difference between welfare rights, and civil and political rights and their enforceability entails various problems, from "betrayal of expectations"[120] to violation of the principle of the separation of powers. Betrayed expectations are particularly dangerous in post-communist countries where there is a need, due to the lack of relating historical traditions, for preservations of the credibility of the constitution and constitutional courts themselves.[121] The role of constitutional court has turned out to be crucial in this context.

[117] *J. Omejec, World Conference on Constitutional Justice.*
[118] *Tushnet, Texas Law Review, pp. 1915, 1919.*
[119] *Tushnet, p. 1898.*
[120] *See Sadurski, Law and Contemporary Problems, p. 236.*
[121] *Tushnet, Texas Law Review, pp. 1915, 1919.*

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