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Hohfeld's Analytical Scheme and Constitutional Civil and Political Rights

The purpose of this paper is to clarify some of the relevant misunderstandings relating to the application of Wesley Newcomb Hohfeld's analysis to constitutional rights. Hohfeld himself applied his analysis only in the field of private law, which made some authors contest the possibility of its broader application. The first part of the paper has a purpose to clarify advantages of its application in the field of constitutional law. The second part displays how Hohfeld's scheme can be useful in the Constitutional Court's review of the exercise of constitutional rights in general and the exercise of civil and political rights in particular. First it provides some general explanations, then it shows how Hohfeld's analysis is applied to the decisions of the Croatian Constitutional Court relating to the interpretation of constitutional civil and political rights and finally, it indicates the advantages of such an approach with respect to conventional legal reasoning.

In compliance with their content, constitutional rights can be divided into civil and political rights (liberty rights) and economic and social rights (welfare rights) (T. Smith, R. Guastini). Liberty rights are rights of the first generation, which protect their holders from other people's interference. These are rights to "personal liberty and integrity" (K. Touri). They create "a sphere of private autonomy, secured against infringements from the side of public power in the name of collective goods, such as public safety and order or national security" (K. Touri). On the other hand, welfare rights are entitlements to pecuniary benefits or to resources such as food or healthcare. These are entitlements, asserts Tara Smith, which are not granted to individuals based on a contract, such as wage, but they are inherent to individuals based on the fact that people are in need of those resources.

How does liberty constitutional right look like from the viewpoint of Hohfeld's analytical scheme? In legal orders with a hard constitution, fundamental constitutional rights cannot "be restrained, suspended, amended or abolished by the legislator" (R. Guastini). Constitutional rights protect citizens from arbitrary exercise of power and legally prevent overstepping of the competences of a legislative body (M. K. Addo). Does it mean that liberty constitutional rights primarily represent Hohfeldian immunities?

Horatio Spector criticizes the approach, according to which constitutional rights are immunities, for being contrary to "the ideal of moral autonomy" and rights-related "responsibilities". This author bases his standpoint on Joel Feinberg's conception of rights as "valid claims". Possessing a right means possessing "a power" to demand something and to lodge "a grievance" against those who have violated that right.

In this paper we will show that in constitutional texts, the term "right" can refer to any of Hohfeld's four concepts. However, neither constitutional liberty rights nor constitutional welfare rights necessarily match only one Hohfeldian concept. Those rights can be designated with a single Hohfeldian concept, but in principle they appear as a bundle of Hohfeld's fundamental legal concepts (A. T. O'Rourke). Basically, they occur to be "molecular compounds of various rights" (R. Guastini, A. T. O'Rourke). Hence, the term of constitutional right "encompasses many positions arising from different clauses and policies in the Constitution" (A. T. O'Rourke). We will also explore "the combinatorial principles" behind the constitutional rights (G. Postema). Moreover, we will show that Hohfeld's analysis clears up political choices behind particular legal rules (A. T. O'Rourke).