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Hohfeld's Concept of Immunity[1]

Ivana Tucak[2]

1. Introduction

The period in which we are living is often depicted as the age of rights.[3] Rights are characterised by their nearly holy status which is then transferred to and enjoyed by their holders.[4] The real meaning thereof implies comprehensive discussions of legal, political and moral theory. Many authors start their considerations on the nature and foundation of rights with the analytical scheme of fundamental legal concepts by W. N. Hohfeld. Hohfeld did not support the thesis that all legal relations can be reduced to rights and duties. Instead, he split the term "right" into four different terms: "claim-right", "liberty", "power" and "immunity", as well as the term "duty" into "duty", "no-right", "liability" and "disability". Each of these terms was given a precise meaning. Hohfeld never tried to define his fundamental legal concepts.[5] According to him, legal concepts are *sui generis,* while "attempts at formal definition are always unsatisfactory, if not altogether useless".[6] He thereby rejected the possibility of their determination pursuant to the principle of *per genus et differentiam.*[7] What he found the most

[1] Paper presented at the International Conference on Legal Theory and Legal Argumentation, European Faculty of Law in Nova Gorica, Faculty of Government and European Studies, Kranj, Nova Gorica, Slovenia, 11 – 12 November 2011.

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[3] Buchanan, "What is so special about rights", Social Philosophy and Policy, Vol. 2, No. 1 (1984), p. 61.

[4] Primus, The American Language of Rights, Cambridge University Press, 2004, p. 36.

[5] Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, Campbell. and Thomas . (eds), Ashgate, Dartmouth, 2008, p. 20. Com. Halpin, Rights and Law: Analysis and Theory, Hart Publishing, Oxford, 1997, p. 43.

[6] Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 2008, p. 12. Also see Tucak, I., "Rethinking the Hohfeld's Analysis of Legal Rights", Pravni vjesnik, Vol. 25, No. 2 (2009), p. 32.

[7] Simmonds, "Rights at the Cutting Edge", in Kramer, Simmonds, and Steiner, A Debate Over Rights: Philosophical Enquiries, Oxford University Press, Oxford, 2002, p. 148. Establishing a definition pursuant to the principle of per genus et differentiam originates from Aristotle's Organon (Definitio fiat per genus proximum et differentiam specificam – a definition needs adjustment to the closest genus

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appropriate in this context was to set out different jural relations in a scheme of "correlatives" and "opposites", together with examples of their individual scope and applications in real situations.[8]

Hohfeld saw correlations of the terms claim-right, liberty, power and immunity with the terms duty, no-right, liability and disability. Every jural relation is a relation between two legal entities. A particular jural relation necessarily involves both correlatives.[9] Person X as part of a pair cannot have immunity if the other, person Y, has no disability. Hohfeld also brought forward fundamental legal concepts in his scheme of opposites. Thus, claim-rights, liberties, powers and immunities stand in contrast to no-rights, duties, disabilities and liabilities.[10] In accordance with his scheme, none of the pairs of opposites can exist together.[11] If person X possesses immunity towards person y, the former cannot possess a liability with respect to the same item and person.[12]

The first two pairs of legal relations (claim-rights/liberties) are first-order relations, while the following two pairs (powers/immunities) are second-order relations. First-order relations refer to people's action and social relations, whereas second-order relations are closely linked with people's rights and only indirectly with people's action and social relations.[13] Claim-rights and immunities are passive rights – "rights that something be done" (the other party to the relation is consequently bound to act or abstain from action), while liberties and powers are active rights – "rights to do".[14]

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and to the differences between species) and is considered the best defining method. See Aristotle, Organon, Kultura, Beograd, 1970 and Petrović, G., Logika, 6th edn, Školska knjiga, Zagreb, 1972. In Hart's opinion, defining rights according to this principle seems to be impossible due, among other things, to inexistence of a well-known generic notion which rights would belong to, and the occurrence of borderline cases. Hart, Pojam prava, CID, Podgorica, Izdavački centar Cetinje, Cetinje, 1994, p. 36.

[8] Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 2008, p. 13.

[9] Corbin, "Legal Analysis and Terminology", The Yale Law Journal, Vol. 29 (1919-1920), p. 166. Also see Tucak, "Rethinking the Hohfeld's Analysis of Legal Rights, 2009, p. 33.

[10] Tucak, "An Analysis of Freedom of Speech", JURA, Dialóg-Campus, Budapest-Pécs, No. 1 (2011), p. 132.

[11] Singer, "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld", Wisconsin Law Review (1982), p. 986.

[12] Com. Corbin, "Legal Analysis and Terminology", 1919-1920, p. 166.

[13] Kramer, "Rights without Trimmings" in Kramer, Simmonds, and Steiner, A Debate Over Rights: Philosophical Enquiries, Oxford University Press, Oxford, 2002, p. 20. Com. Campbell, Rights: A Critical Introduction, Routledge, London, New York, 2006, p. 32. Also see Tucak, "Rethinking the Hohfeld's Analysis of Legal Rights", 2009, p. 34.

[14] Robinson, Coval, and Smith "The Logic of Rights", University of Toronto Law Journal, Vol. 33 (1983), p. 267. Also see Tucak "An Analysis of Freedom of Speech", 2011, p. 132.
The meanings of fundamental legal conceptions can be highlighted by means of the following features:
a) a claim-right is a legal position defined by what a holder of a duty ought to do or omit to do to

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The topic of this paper is an analysis of Hohfeld's concept of immunity. The paper is divided into three sections. The first part includes an analysis and evaluation of Hohfeld's concept of immunity. Special attention is paid to illuminating the fundamental difference between a claim-right and immunity. Unlike the right–duty relation which refers to required conduct, the immunity–disability relation is characterised by conduct which cannot lead to legal changes. The main goal of this section is to outline, using existing knowledge, what is relevant and still not satisfactory in Hohfeld's concept of immunity and how these deficiencies can be corrected.

The second part reviews contemporary debates on Hohfeld's concept of immunity. Arguments for and against the inclusion of immunity within a type of legal rights are investigated in this part. The third part aims to show that it is impossible to analyse some extremely relevant constitutional rights without the concept of immunity. Hohfeld's fundamental legal concepts enable a precise interpretation of what is understood by people when they require their rights. The concept of Hohfeldian immunity is useful for denoting a specific status of citizens protected from a particular harmful change by means of constitutional restraints or by the disability of the legislator. The immunity concept is irreplaceable when it comes to the "rights" of citizens not to be deprived of their property or freedoms without due process of law, as well as when it comes to the right to freedom of speech, the right to freedom of confession, the principle *ne bis in idem*.

2. The immunity/disability jural relation

This part of the paper focuses on presenting and explaining the Hohfeldian immunity–disability relation as well as Hohfeld's drivers for depicting it as a fundamental legal concept. Moreover, it provides reasoning with respect to the separation of immunity from other types of rights. The main goal is to clarify the fundamental difference between a claim-right and immunity.

a holder of a right (see Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 2008, p. 13. Com. Kramer, "Rights without Trimmings", 2002, p. 109).
b) a liberty is a lack of duty of a holder of a liberty to perform certain action (see Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 2008, p. 14).
c) a power enables its holder to initiate a concrete modification of jural relations (see ibid, p. 21).
d) an immunity is a jural relation in which a particular person, a holder of an immunity, can be sure that their powers cannot be modified by the action of another person (see ibid, p. 28. Com. Singer, "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld", 1982, p. 986.)

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Hohfeld's scheme of jural relations gave the notion of claim-right a precise meaning by means of the correlative duty. A claim-right always refers to the action or the omission of action by a person other than the holder of the right.[15] Every claim-right of person A necessarily implies a duty of person B. The jural relation between a claim-right and a duty is best described by the expression "you ought".[16] A claim-right always includes the subordination of another person. For instance, the claim-right–duty jural relation appears in its usual sense in the case of debts. Let us assume that person A owes person B 100 euros, then person B has a duty to pay 100 euros to person A and person A has the correlative right to be paid the same amount of money by person B. However, not every application of the term "right" implies a duty.[17]

The least common application of the term "right" is one that correlates with the denotation of immunity.[18] Hohfeld was one of the first theoreticians to realise the significance of immunity and he therefore attributed it with the status of a fundamental legal concept.[19] Hohfeld's predecessors in the field of legal theory, Jeremy Bentham and John Salmond, did not include this element in their analytical schemes. Bentham neither specified immunity as a type of legal rights nor dealt with the analysis of fundamental rights. In Hart's opinion, this was a result of Bentham being extremely suspicious of any legal solution which would prevent the legislator from adopting regulations aimed at "general utility".[20]

Salmond only thoroughly elaborated three types of rights ("rights in a strict sense", "liberties" and "powers"), although his note relating to the main text states that this division is not complete.[21] Although these are the most important types of "legal advantages", they are not the only ones. In Salmond's view, there

[15] See Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 2008, p. 13, Simmonds, "Rights at the Cutting Edge", 2002, p. 156, Wenar, "The Nature of Rights", Philosophy and Public Affairs, Vol. 33, No. 3 (2005) p. 3, Tucak, "An Analysis of Freedom of Speech", 2011, p. 132 and Kramer, "Rights without Trimmings", 2002, p. 109.

[16] Dias, Jurisprudence, 5th ed., Butterworths, London, 1985, pp. 25 and 28.

[17] This example originates from Lyons. See Lyons, "The Correlativity of Rights and Duties" in Carlos, Nino (ed.), Rights, New York University Press – Reference Collection, New York, 1992, p. 50.

[18] Cook, "Introduction" in Hohfeld, W. N., Fundamental Legal Conceptions as Applied in Judicial Reasoning, 3rd. ed., Yale University Press, New Haven, London, 1964, p. 8.

[19] Ibid., pp. 10-11

[20] Hart, Essays on Bentham: Studies in Jurisprudence and Political Theory, Clarendon Press, Oxford, 2001, p. 190.

[21] See Salmond, Jurisprudence, 9th ed. by J. L. Parker, Sweet & Maxwell, Limited, London 1937, p. 303, note Cook,. "Introduction", 1964, pp. 10-11.

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is another type of right – immunity. The term "right" is sometimes used as "an immunity from the legal powers of some other person".[22] Hohfeld based his analytical scheme of jural relations on Salmond's scheme. Hohfeld specified claim-rights, liberties and powers in almost the same way as Salmond defined rights in the strict sense, liberties and powers. However, unlike Salmond, Hohfeld attributed the concept of immunity with great importance with respect to other legal concepts and thus complemented the scheme of jural relations in an exquisite way.[23]

In the Hohfeldian sense, immunity is a generic term used to describe a legal situation in which a person can be confident that their entitlements cannot be changed by the actions of another person.[24] Immunity correlates with disability and opposes or negates liability.[25] Disability is characterised by a lack of power to change legal entitlements.[26] For example, if A has immunity against B, B is under a disability with respect to exercising powers referring to entitlements covered by the immunity.[27]

The immunity–disability relation may be described by the phrase "you cannot".[28] Hohfeld supported the above assertions with various examples such as immunity from taxation, the restriction of the powers of creditors or people having suffered damage in terms of their inability to be reimbursed for the damage by means of a debtor's assets.[29]

Immunity contrasts with power in the same manner as claim-right contrasts with privilege.

> *A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative 'control' over a given legal relation as against another, whereas an immunity is one's*

[22] Salmond, Jurisprudence, 1937, p. 303.
[23] Salmond also dealt with jural correlatives but did not pay much attention to jural opposites. He only briefly explained that a duty results from a lack of a liberty and a disability refers to the lack of a power. Hohfeld equally evaluated jural opposites and jural correlatives and hence completed his scheme in a logical way. See ibid., 304 and Cook, "Introduction", 1964, pp. 10-11.
[24] See Singer, "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld", 1982, p. 986 and Cook, "Introduction", 1964, p. 9.
[25] Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 2008, p. 28.
[26] See Singer, "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld", p. 986.
[27] See Harel, "Theories of Rights" in Golding and Edmundson (eds), The Blackwell Guide to the Philosophy of Law and Legal Theory, Blackwell Publishing, 2005, p. 193.
[28] Dias, Jurisprudence, 1985, p. 39.
[29] Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 2008, pp. 28-29, Com. Pound, R., Jurisprudencija, II, JP Službeni list SRJ, Beograd, CID, Podgorica, 2000, p. 462.

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freedom from the legal power or 'control' of another as regards some legal relations.[30]

The term "immunity" resembles the term "claim-right" in a way that neither refers to the action of the holders of the claim-right or immunity.[31] Whereas the legal relation claim-right–duty is based on the action of a person on whom a duty has been imposed, the legal relation immunity–disability is based on the action of a person who is exposed to a disability.[32] At this point, any similarity between these two terms disappears.[33] Devine thinks that the link between claim-right and duty is used for observing action from the viewpoint of illegality ("unlawfulness"/violation of duty), while the purpose of the bond between immunity–disability is the monitoring of action from the viewpoint of "invalidity" since a failure to fulfil the "necessary requirements" prevents the realisation of "legal changes".[34]

While the claim-right relation is a first-order relation, immunity is a second-order relation and applied directly to people's entitlements and only indirectly to people's action and social relations.[35] In other words, claim-right is an independent term which can be described regardless of other rights in a broader sense, while immunity only comes in a package along with other rights in a broader sense (claim-rights, liberties and powers) which are immune to changes.[36] According to Devine, "...the immunity will always relate to some other right in the wider sense which it protects by rendering the latter immune from change by the disability holder".[37]

Hohfeld's fundamental legal concepts can be qualified as "relational".[38] Like other Hohfeldian relations, the immunity–disability relation also exists in the context of two legal entities. Immunity can be possessed with respect to one person or institution but also against the whole world (e.g. my request not to

[30] Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 2008, p. 28.
[31] Devine, "The Objects of Rights in the Wider Sense", 1973, p. 259.
[32] Ibid.
[33] Ibid.
[34] Ibid. Also see Lyons, "The Correlativity of Rights and Duties", 1992, p. 55.
[35] Kramer, "Rights without Trimmings", 2002, p. 20. Com. Campbell, Rights: A Critical Introduction, 2006, p. 32.
[36] Devine, "The Objects of Rights in the Wider Sense", 1973, p. 259.
[37] Ibid., p. 268.
[38] Com. Brower, and Hage, "Basic Concepts of European Private Law", European Review of Private Law, Vol. 15, No. 1 (2007), p. 18

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be subject to torture and other cruel or degrading treatment).[39]

Immunity is distinguished from a liberty in the sense that a liberty strictly relates to the actions of its holder.[40] It can be described by the expression "I may".[41] Concerning the relations of immunity and power, immunity represents, as shown above, a contradiction of power. These two terms are contradictory so the existence of immunity in a particular relation denies the existence of powers.[42] Immunities are restrictions of the scope of powers.[43]

The term "immunity" is relevant in private law. Hence, there are immunities from the deprivation of various rights relating to the term "ownership". An owner's entitlements are generally immune to deprivation without the owner's consent.[44] For instance, if person A possesses a bicycle, as a private citizen person B cannot deprive the former of their ownership by any "unilateral act" or, in other words, the right of person A to the bicycle is protected by an immunity against person B.[45] Although Hohfeld himself focused on private law and did not apply his fundamental legal concepts to describe legal situations referring to public law, nowadays his analysis serves as an instrument for describing situations relating to public, i.e. constitutional, law. Hohfeldian immunity is mainly applied to denote the special status of an individual who is protected from harmful action by constitutional constraints or by a disability of the legislator.[46]

A good example of immunity can be found in contemporary states where the law prohibits a person from putting themselves into slavery since citizens possess no power to deprive themselves of this right. Legislators can also face certain disabilities such as the disability to abolish particular procedural protection in criminal law, e.g. *ne bis in idem*, freedom from arbitrary arrest. Further, modern constitutions grant people the right to freedom of speech and confession. Citizens possess immunity from being

[39] Rowan, Conflicts of Rights, Moral Theory and Social Policy Implications, Westview Press, Boulder, Col., 1999, p. 24.
[40] Simmonds, "Rights at the Cutting Edge", 2002, p. 156.
[41] Dias, Jurisprudence, 1985, p. 28.
[42] Devine, "The Objects of Rights in the Wider Sense", 1973, p. 260.
[43] Wolterstorff, Justice: Rights and Wrongs, Princeton University Press, Princeton, Oxford, 2008, p. 253.
[44] Honore, "Rights of Exclusion and Immunities Against Divesting", Tulane Law Review, Vol. 34 (1959-1960), p. 466.
[45] This example originates from MacCormick. See MacCormick, "Rights in Legislation" in Hacker and Raz (eds), Law, Morality and Society, Clarendon Press, Oxford, 1977, p. 195.
[46] Hart, Essays on Bentham: Studies in Jurisprudence and Political Theory, 2001, p. 191.

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deprived of this right and from government interference. Due to effective constitutional constraints, the legislator is not allowed to pass acts aiming to restrict these freedoms. If a citizen possesses immunity against the state (legislator), they also have the right to be protected from state interference in the "area of immunity" regulated by constitutional law.[47]

3. Criticism of the term "immunity"

This part investigates arguments for and against the inclusion of immunity within types of legal rights. First, Herbert Hart's standpoint concerning this issue is presented. His concept of legal rights is limited to cases in which law respects the choice of an individual and it is therefore too narrow to comprise the concept of "immunity". Many have considered erroneous Hart's claim that immunities are not legal rights. This paper explores the standpoint that favours the respective inclusion of immunity, as advocated by Carl Wellman, George Rainbolt and Neil MacCormick.

3.1. H.L.A. Hart

Hart proposed a "general theory of legal rights" which views these rights as "legally respected choices" and offered a model of legal rights that can be applied to claim-rights, powers and liberties but not to immunities.[48] Hart's 1973 article entitled *Bentham on Legal Rights* represents a classical piece of modern will theory or, as he used to call it, choice theory. Hart followed Bentham when it came to differentiating between the three types of rights that roughly correspond to the Hohfeldian claim-rights, liberties and powers, although the element correlating to Hohfeldian immunity was not included in his work.[49] These types of rights are "rights correlative to obligations", the "liberty-right" and "powers". Hart intended to show what is common to these different types of

[47] Without the concept of immunity "the flaws of legislative acts within the area of immunity could only be incompletely explained. One would have to treat them as prohibitions. The flaw would have to be characterized as the consequence not of crossing of judicial boundaries but as breach of prohibition". Alexy, A Theory of Constitutional Rights, Oxford University Press, Oxford, 2004, p. 159.
[48] Wellman, A Theory of Rights: Persons Under Laws, Institutions and Morals, Rowman and Allanheld Publishers, Totowa, 1985, p. 75. For more details on Hart's theory of legal rights, see Tucak, "Dijete kao nositelj prava", in Dijete i pravo, Branka Rešetar (ed.), Pravni fakultet u Osijeku, Osijek, 2009, p. 64.
[49] Hart, Essays on Bentham: Studies in Jurisprudence and Political Theory, 2001, pp. 164 and 166. Also see Tucak, "Dijete kao nositelj prava", 2009, p. 64, note 9.

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rights.[50] He rejected Bentham's theory of interest or the benefit theory which is based on a utilitarian idea of benefit as the unifying feature of rights. Hart pointed out that the essence of rights is reflected in the fact that the rules creating or encompassing them should "recognize and respect the choice of an individual".[51] Being a right holder does not necessarily mean that someone's interest is protected by imposing a duty on another person, but it involves the possession of a "bilateral liberty" (the liberty to do X and the liberty not to do X). [52]

All of the above types of rights contain the idea of "bilateral liberty" and they may be distinguished by the type of action or legal act to which a bilateral liberty refers. In terms of liberty-right, one speaks about a *natural act* for which the legal order foresees no "special legal effects".[53] When it comes to powers such as the "right to alienate property" (assignment of ownership), the respective action appears in the form of *act in the law*, which means that this act entails particular legal effects as an appropriate instrument of change or an instrument for modification of the "legal positions" of the parties.[54] Eventually, rights correlative to obligations seem to be a particular type of powers, the holders of which acquire liberty of modification or termination of the obligations of other people, or to "enforce others' obligations", i.e. the freedom of filing or non-filing a claim due to a failure to meet contractual duties.[55]

Hart's will theory faces the issue of a limited analytical scope. It cannot encompass immunities whose holders cannot deprive themselves of and which are correlative to constitutional disabilities.[56] Hart does not see inalienable rights as protected choices but as immunities from powers of others to modify someone's position.[57] Hart emphasises the idea that both of the confronted theories on subjective rights were primarily shaped as

[50] Wellman, C., An Approach to Rights, Studies in the Philosophy of Law and Morals, Kluwer Academic Publishers, Dordrecht, Boston, London, 1997, p. 6. Also see Tucak, "Dijete kao nositelj prava", 2009, p. 64, note 9.
[51] Finnis, Prirodno pravo, CID, Podgorica, 2005, p. 215.
[52] See Wellman, An Approach to Rights, Studies in the Philosophy of Law and Morals, p. 6. and Tucak, "Dijete kao nositelj prava", 2009, p. 65.
[53] Hart, Essays on Bentham: Studies in Jurisprudence and Political Theory, 2001, p. 188.
[54] Finnis, Prirodno pravo, 2005, p. 237. Com. Hart, H. L. A., The Concept of Law, 2nd ed., Oxford University Press, 1987, p. 96.
[55] Hart, Essays on Bentham: Studies in Jurisprudence and Political Theory, 2001, p. 188.
[56] Steiner, "Working Rights" in Kramer, Simmonds, and Steiner, A Debate Over Rights: Philosophical Enquiries, Oxford University Press, Oxford, 2002, p. 298, note 110.
[57] Kamm, "Rights" in Coleman, J. and Shapiro, S. (eds), The Oxford Handbook of Jurisprudence and Philosophy of Law, Oxford University Press, Oxford, New York, 2002, p. 482.

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an explanation of citizens' rights against other citizens, i.e. rights according to "ordinary law". Various elements used to analyse rights pursuant to ordinary law are not, in Hart's eyes, sufficient for the consideration of fundamental rights that represent rights against the legislator. These rights are "individual rights granted by the constitution" which limit the legislator's powers when enacting ordinary acts whose adoption might deny certain freedoms and benefits of individuals relevant to people's welfare, for instance, the freedom of speech and association.[58]

In Hart's opinion, the term "right", even in its broadest application, should not be used to indicate the fact that a person is immune to an "advantageous change". He gave examples in support this assertion: the fact a city council has no power to allocate a pension to him and the fact his neighbour has no power to release him from paying income tax do not constitute any right of his. An individual's immunity from a change of their legal status initiated by someone else can only be considered, Hart claimed, a right if this change is "adverse". A change is defined as adverse if it deprives an individual of other types of legal rights (liberties, claim-rights or powers or "benefits granted by the law").[59] Hart believed that immunities cannot be described as the legally protected choices of a right holder. As a type of legal rights, constitutional immunities are inspired by the needs of individuals for particular "fundamental freedoms", "protection" and/or "benefit".[60]

> *The upshot of these considerations is that instead of a general analytical and explanatory theory covering the whole field of legal rights I have provided a general theory in terms of the notion of a legally respected individual choice which is satisfactory only at one level – the level of the lawyer concerned with the working of ordinary law. This requires supplementation in order to accommodate the important deployment of the language of rights by the constitutional lawyer and the individualistic critic of the law, for whom the core of the notion of rights is neither individual choice nor individual benefit but basic or fundamental individual needs.* [61]

According to Hart, some authors attempt to combine three

[58] Hart, Essays on Bentham: Studies in Jurisprudence and Political Theory, 2001, p. 190.
[59] Ibid., 191.
[60] Ibid., 192.
[61] Ibid., 193.

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different perspectives which he reduced to a general formula, including: a) the perspective of an ordinary jurist; b) the perspective of a constitutional jurist; and c) individualistic critique. Such a formula provided him with a benchmark for Hohfeld's claim that a right in the generic sense means "any legal advantage".[62] In Hart's eyes, these attempts are a "mere juxtaposition" of the will theory and the benefit theory.[63]

3.2. Defence of the "immunity" concept

3.2.1. Can disadvantageous immunities be rights?

Rainbolt lists disadvantageous immunities as rights, although this assertion significantly deviates from the English comprehension of the term "right".[64] Rainbolt finds the viewpoint that all rights are advantages implausible for the analysis for the way it requires a determination of whether a legal relation is useful or not. One person may find an immunity advantageous and another one may find the same immunity harmful. Other authors indicate similar views. Hohfeld's scheme does not imply that the possession of immunity is necessarily useful to the holder.[65] Rainbolt provides us with an example of a religious ascetic who may see the fact that his neighbour is not in a position to deprive him of paying income tax as an advantage while the majority of other people may see it as a harmful immunity.[66]

A similar problem occurred in Hohfeld's scheme in relation to a concept which is the negation or opposite of the term "immunity", namely "liability". This term is used imprecisely as a synonym of "duty" or "obligation" and usually denotes something unpleasant and undesired.[67] However, Hohfeld gave this term a new and precise meaning, defining it as the status of a person who is subject to someone else's exercise of power.[68] Being subject to someone's exercise of power is not always unpleasant. The correlative powers

[62] Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 3rd. ed., Yale University Press, New Haven, London, 1964, pp. 42 and 71.
[63] Hart, Essays on Bentham: Studies in Jurisprudence and Political Theory, 2001, p. 193.
[64] Rainbolt, The Concept of Rights, Springer, Dordrecht, NL, 2006, p. 47.
[65] Steiner, "Rights at the Cutting Edge", p. 254, note 32.
[66] Rainbolt, The Concept of Rights, 2006, p. 48.
[67] See Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 2008, p. 26, Corbin, "Legal Analysis and Terminology", 1919-1920, p. 169 and Cook, "Introduction", 1964, p. 8.
[68] See Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 2008, p. 27 and Kramer, "Rights without Trimmings", 2002, p. 21.

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of another person may exist only for the purpose of the creation of useful claim-rights, liberties, powers and immunities.[69] The term "liability" includes both advantages and disadvantages.[70]

Notably, where someone's debt has been affected by the statute of limitations the creditor has a liability to again establish their right through a new voluntary promise of the debtor. Further, being provided with inheritance based on a will also represents an advantageous liability.[71] A liability can be harmful or useful so its negation or opposite (immunity) can also be harmful or useful.[72]

According to Kramer, Hohfeld tried to show that, as in other fields, the term "right" is overused in the field of immunity.[73] In his opinion, immunities represent the same exclusion from undesired changes in someone's entitlements as that from desired changes in someone's entitlements. The special function of immunities as Hohfeldian second-order entitlements was not denoted in an evaluative manner, with direct reference to advantages and disadvantages. In this view, second-order entitlements differ from first-order powers.[74]

3.2.2. Is Hart's general theory of rights general enough to deal with immunity rights under ordinary law (immunities a citizen possesses with respect to another citizen)?

MacCormick stated that it often comes to a situation in which a person possessing an immunity may renounce ("extinguish" or "waive") it at their own option.[75] For example, in terms of the

[69] Corbin, "Legal Analysis and Terminology", 1919-1920, p. 170.
[70] See Kocourek, "The Hohfeld System of Fundamental Legal Concepts", Illinois Law Review, Vol. 15 (1920-1921), p. 26 and Cook, "Introduction", 1964, p. 8. Therefore, application of the word "liability" is in contradiction with its generally accepted usage, but Hohfeld's system prescribes the separation of words from their ordinary usage.
[71] See Harel, "Theories of Rights", 2005, p.193, Kramer, "Rights without Trimmings", 2002, p. 13, Corbin, "Legal Analysis and Terminology", p. 169 and Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 2008, p. 46, note 92. What can also be seen as a useful liability is Hohfeld's illustrative example of the abandonment of a mobility. According to Hohfeld, "... X, the owner of ordinary personal property 'in a tangible object' has the power to extinguish his own legal interest (rights, power, immunities etc.) through the totality of operative facts known as abandonment; and – simultaneously and correlatively – to create in other persons privileges and powers relating to the abandoned object – e.g. the power to acquire title to the later by appropriating it". Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 2008, p. 22.
[72] Goble, "The Sanction of a Duty", Yale Law Journal, Vol. 37 (1927-1928), p. 425.
[73] Kramer, "Rights without Trimmings", 2002, p. 111.
[74] Ibid., p. 107.
[75] MacCormick, "Rights in Legislation", 1977, p. 195.

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abovementioned bicycle case, the right of person A (the owner) is protected by an immunity against person B (a citizen) in the sense that the latter cannot deprive the former of their ownership by some kind of "unilateral act".[76] However, MacCormick thinks that the immunity of person A is not absolute but dependent on their own choice. Person A may decide to transfer ownership of the bicycle to some other person by selling or conferring it. MacCormick therefore emphasises that there is an entire class of immunities that can be subsumed under Hart's version of will theory. Some immunities are characterised by the holder's power of waiver. In the light thereof, a genus right should, beside claim-rights, liberties and powers, also include immunities which are subject to the holder's will to waive or enforce them.

> *It is often the case that A's immunity is waivable by A's choice ... it follows that there is a class of immunities which could comfortably be brought within the Hartian version of will theory, namely the whole class of those immunities in relation to which the immunity holder has a power of waiver.*[77]

3.2.3. The failure of Hart's theory to explain constitutional immunities possessed by citizens towards the state

According to MacCormick, any contemporary legal system does not allow a person to waive their immunity from being put into slavery or their other fundamental rights granted by the constitution and charters on rights. Exclusion of this protection of people's interests from the category of rights would be too violent and contrary to general understanding.[78] In compliance with Hart's theory of rights, a person has the right not to be exposed to minor attacks since in those cases, e.g. sports events or when performing *bona fide* medical interventions, they can deny the correlative obligations of others.[79] In contrast, this person has no right not to be exposed to serious attacks, e.g. with respect to legal rules adopted for employees' protection on both an individual and collective basis such as the right to a minimum wage or the right to a safe work environment (occupational safety). The

[76] Ibid.
[77] Ibid.
[78] Ibid., p. 197
[79] Ibid.

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employer's duty has been made independent of the employee's will so this cannot be contractually terminated.[80] At this point, MacCormick sees "the basic flaw" of the will theory as being reflected in the fact that sometimes a right can be protected by preventing the holder from renouncing it. "We may sometimes protect the right by depriving the right holder of a power to waive that right".[81] According to the will theory, one cannot say that employees possess a right. This means that when protection is enhanced, rights vanish. That brings us to what MacCormick calls "the paradox of the will theory". The more inalienable rights are, the fewer features of rights they possess.

4. Constitutional immunities

This section attempts to explain how Hohfeld's scheme can improve constitutional analysis, particularly in the context of constitutional rights. In our opinion, Hohfeld's analysis enables us to precisely interpret the constitution and provides us with conceptual tools for accomplishing this task.[82] Therefore, this section investigates the interpretation of the expression "has a right to" in compliance with the constitution.[83] Our explanation assumes that Hohfeld's fundamental concepts are ideal types which ensure that concrete properties of positive law are described as being more or less compatible with one or more of these concepts. These concepts were created in compliance with particular

[80] Ibid., p. 198.
[81] Ibid., p. 195. Com. Simmonds, "Rights at the Cutting Edge", 2002, p. 227.
MacCormick's objections with respect to immunity can be mitigated by, as Simmonds proposed, referring to Hart's previous formulation of immunity elaborated in a paper called "Definition and Theory in Jurisprudence" (see Simmonds, "Rights at the Cutting Edge", 2002, p. 228). In the same work, Hart defined immunity as a "legally protected choice". A choice of a person is protected in a negative way, i.e. there is no law which would prevent a person from keeping their private status unmodified if that is what that person wants. In the paper Hart tried to find out what claim-rights, liberties, powers and immunities have in common and why pre-Hohfeldian analytics were unable to sort them out (Ibid., p. 218). According to Hart, "The unifying element seems to be this: in all four cases the law specifically recognizes the choice of an individual either negatively by not impeding or obstructing it (liberty and immunity) or affirmatively by giving legal effect to it (claim and power). In the negative cases there is no law to interfere if the individual chooses to do or abstain from some action (liberty) or to retain his legal position unchanged (immunity) ..." (Hart, "Definition and Theory in Jurisprudence", Law Quarterly Review, Vol. 70 (1954), p. 49, note 15).
In the paper Bentham on Legal Rights, Hart emphasised that the idea of "bilateral liberty" is vital for claim-rights, powers and liberties (Com. Simmonds, "Rights at the Cutting Edge", 2002, p. 218). Nevertheless, this does not concern immunity which, in his view, cannot be comprised by the choice theory (Hart, Essays on Bentham: Studies in Jurisprudence and Political Theory, 2001, pp. 190-192).
[82] Com. Wellman, An Approach to Rights, Studies in the Philosophy of Law and Morals, 1997, p. 235
[83] Also see ibid., p. 233.

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implicit liberal-philosophic assumptions common in the Western world so they also appear to be applicable to interpretations of the Croatian constitutional order.[84]

A constitution generates obligations between a person and the government.[85] A constitutional right may refer to any legal position arising from the constitution, which in Hohfeld's analysis appears as a claim-right, liberty, power or immunity.[86] Notably, there is a constitutional provision stipulating: "Anyone lawfully within the territory of the Republic of Croatia shall enjoy the liberty of movement and freedom to choose his residence" – which includes a liberty to do something (a Hohfeldian liberty).[87] There is also a provision regulating that someone cannot do something: "No one may be tried anew nor punished in criminal proceedings for an act for which he has already been acquitted or sentenced by a final court judgment in accordance with law" (a Hohfeldian immunity).[88]

It is impossible to analyse some extremely relevant constitutional rights without the concept of immunity. The parliament has no power to impose particular duties on citizens with immunities. Like claim-rights, immunities impose normative constraint.[89] One should note that citizens have no powers providing them with the control over the correlative disability of the legislator and they cannot renounce ("waive") these constitutional immunities, which is not the case with "ordinary immunities" regulating relations between citizens.[90] Citizens are not allowed to abolish ("extinguish") the disability of the legislator to pass bills which would constrain the citizens' constitutional rights such as freedom of speech and confession.[91]

Constitutional immunities are actually a guarantee against "arbitrary authorities" and are also legal instruments combating

[84] See Tucak, "An Analysis of Freedom of Speech", 2011, pp. 132-3.
[85] O'Rourke, "Refuge from a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law", South Carolina Law Review, Vol. 61 (2009), p. 168.
[86] Ibid.
[87] Article 32(1) of the Constitution of the Republic of Croatia – consolidated text, Official Gazette (Narodne novine), No. 85/10 of 9 July 2010 (hereinafter The Constitution of the Republic of Croatia).
[88] Article 31(2) of the Constitution of the Republic of Croatia. Com. O'Rourke, "Refuge from a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law", 2009, p. 142.
[89] This issue was also under the spotlight in George Rainbolt's "justified – constraint theory of rights". Pursuant to that theory, only claim-rights and immunities may be seen as rights. See Rainbolt, The Concept of Rights, 2006, p. 39. Also see Gero "Moral Injury and the Puzzle of Immunity-Violation" (2010). Philosophy Theses. Paper 73. http://digitalarchive.gsu.edu/philosophy_theses/73, p. 8, note 15.
[90] Wellman, A Theory of Rights: Persons Under Laws, Institutions and Morals, 1985, p. 77.
[91] Ibid.

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the legislator's abuse of powers.[92] Liberal democracies ensure that decisions of democratic authorities are restrained by the fundamental rights stated in the constitution.[93] Contemporary democratic states consider people as the original source of powers[94] and thus paragraphs 2 and 3 of Article 1 of the Constitution of the Republic of Croatia stipulates as follows: "Power in the Republic of Croatia derives from the people and belongs to the people as a community of free and equal citizens. The people shall exercise this power through the election of representatives and through direct decision-making". Pursuant to these provisions, the Constitution assigns the power to pass bills to the legislature. Decisions of democratically elected people's representatives can be nullified due to a violation of constitutional rights. Judicial review is a consequence of the ultimate supremacy of the constitution and finds its place in most liberal constitutions. [95]

The purpose of a written constitution is to restrain the powers of the state. This famous thought was expressed by the Chief Justice of the Supreme Court of the United States John Marshall in the case of *Marbury v. Madison*.[96] In order to achieve this basic purpose, legal acts of the legislator which are contrary to the constitution shall be declared null and void, which means that the constitution is superior to laws in the event they are in conflict.[97]

Europe introduced special forms of constitutional control in the period after World War I.[98] These forms were inspired by the idea of establishing a separate body to take care of honouring

[92] See Spector, "Judicial Review, Rights, and Democracy", Law and Philosophy, Vol. 22, Nos. 3-4 (2003), p. 298.
[93] Ibid., p. 285.
[94] O'Rourke, "Refuge from a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law", 2009, p. 158.
[95] Spector, "Judicial Review, Rights, and Democracy", 2003, p. 305.
Today, virtually all states have accepted the principle of the judicial review of laws and control of constitutionality and legality of bylaws. Today, as few as five states do not apply the constitutional review of legality: the UK, the Netherlands, Lesotho, Liberia and Libya. See Blagojević, "O ulozi ustavnih sudova postkomunističkih europskih država u tranziciji prema demokraciji: hrvatski slučaj" in Ustavi i demokracija: strani utjecaji i domaći odgovori, HAZU, Zagreb (in print).
[96] Spector, "Judicial Review, Rights, and Democracy", 2003, p. 305.
The case of Marbury v. Madison 1 Cranch 137 (1803) meant the commencement of the judicial review of the constitutionality of federal laws. The above interpretation of the Constitution by the US Supreme Court attracted harsh criticism. The states found the derived right of the Supreme Court and of other federal courts threatening to their sovereignty. Since 1965, this competence of the Supreme Court which is not specifically stated in the Constitution has no longer been disputed. See Smerdel, "Nadzor ustavnosti i zakonitosti" in Smerdel and Sokol, Ustavno pravo, 4th edn, Narodne novine, Zagreb, 2009, pp. 173-4.
[97] Spector, "Judicial Review, Rights, and Democracy", 2003, p. 305.
[98] Blagojević, "O ulozi ustavnih sudova postkomunističkih europskih država u tranziciji prema demokraciji: hrvatski slučaj".

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constitutional rights and freedoms.[99] The Constitutional Court as an independent third party *is guided by a principle* originating from Roman law – no-one should be a judge in their own cause (*nemo judex in causa sua*).[100] Some authors believe that such a challenge to democratic legislature suggests a lack of trust in people and that converting fundamental rights into constitutional disabilities is not in line with the ideas of "moral responsibility" and "autonomy".[101]

Later in this paper the usefulness of Hohfeld's scheme will first be analysed through the prism of the freedom of speech and then through the prism of representatives' immunity comprising the highest level of protection of the freedom of political expression.[102] Behind the above rights, including many other constitutional rights such as the right to freedom of confession, the right to have property exempted from seizure or deprivation of freedom without legal proceedings, lies the concept that citizens are somehow exempted from the modification of their jural relations by the authorities.[103] The right to freedom of speech is protected by national constitutions (it is a constitutional category) and international treaties, meaning that it is superior to rights granted by statutes.[104]

. The Constitution of the Republic of Croatia stipulates freedom of speech in paragraph 1 of Article 38 which guarantees "freedom of thought and expression". According to Hohfeld's analytical scheme, what denotes freedom of speech is the (bilateral) liberty

[99] Smerdel, "Nadzor ustavnosti i zakonitosti", 2009, p. 177.

[100] Austrian theoretician Hans Kelsen was the first to take advantage of this principle to explain judicial review (Spector, "Judicial Review, Rights, and Democracy", 2003, pp. 285, 298 and 300).
The Constitutional Court was established as prescribed by the 1920 Constitution of Austria (Verfassugsgerichtshof). This Austrian model had been further developed by the time to become the most popular European and world model of its kind. The Croatian Constitutional Court was constituted by the 1963 Constitution of the Socialist Republic of Croatia. However, it has only been of major significance since the fall of communism and establishment of the independent Croatian state. The provisions on the Constitutional Court are contained in Chapter V of the Croatian Constitution (Articles 126 to 132) as well as in the Constitutional Act on the Constitutional Court of the Republic of Croatia and in the Rulebook of the Constitutional Court of the Republic of Croatia. See Blagojević, "O ulozi ustavnih sudova postkomunističkih europskih država u tranziciji prema demokraciji: hrvatski slučaj" and Smerdel, "Nadzor ustavnosti i zakonitosti", 2009, p. 177)

[101] For more details, see Spector, "Judicial Review, Rights, and Democracy", 2003, pp. 287-288.

[102] See Barukčić, "Profesorica Zlata Đurđević: Nema kaznene odgovornosti za izražavanje mišljenja", http://www.tportal.hr/vijesti/hrvatska/153761/Nema-kaznene-odgovornosti-za-izrazavanje-misljenja.html.

[103] See Cook, "Introduction", 1964, p. 8 and Ross, On Law and Justice, Stevens and Sons Limited, London, 1958, p. 168.

[104] See Alaburić, Sloboda izražavanja u praksi Europskog suda za ljudska prava, 2nd edn., Narodne novine, Zagreb, 2002.

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to speak publicly about various controversial issues. A holder of the right to freedom of speech is entitled to talk about public issues, but the same person may abstain from doing that if they so desire.[105] Freedom of speech as a Hohfeldian liberty does not imply duties of other people to listen to the speaker or to assist the speaker when talking to the public. Still, citizens have certain duties towards the speaker – they are not allowed to use physical force against the speaker.[106] The above duties are not correlative to the speaker's right to freedom of expression, but form part of the general duty not to attack other people.[107] In Hart's words, this refers to "the protective perimeter of duties". Freedom of speech is actually a Hohfeldian liberty encircled with the protective perimeter of duties to avoid interference.

Carl Wellman found Hart's general theory of rights inadequate. According to him, every right, including the right to freedom of speech, does not relate to a single Hohfeldian element but represents a group of Hohfeldian elements.[108] What prevents a right from divergence is its core. The core of every right involves one Hohfeldian element which determines the essential content of that right.[109] Other affiliated Hohfeldian elements find their places around the core. From Wellman's point of view, every affiliated element is connected with the core such that it provides a right holder with some form of freedom or control over the core. Wellman's explanation of freedom of speech is as follows: "the core" of this right also involves the thing that defines it – the "liberty" of a person to express their opinion whereas this liberty is not accompanied by a duty imposed on other people. The claim-right against interference of other people (the protective perimeter of general duties), the power to require judicial protection from violent forms of interference and the immunity from deprivation of this liberty by the state all circulate around that core.[110]

Pursuant to Wellman's model of rights, the legislator's immunity to abridge the freedom of speech belongs to the protective

[105] Wellman, An Approach to Rights, Studies in the Philosophy of Law and Morals, 1997, p. 2. Also see Tucak, "An Analysis of Freedom of Speech", 2011, pp. 135-137

[106] See Lyons, "The Correlativity of Rights and Duties", 1992, p. 55 and Williams"The Concept of Legal Liberty", Columbia Law Review, Vol. 56, No. 8 (1956), p. 1144.

[107] Lyons, "The Correlativity of Rights and Duties", 1992, p. 56.

[108] Wellman, Real Rights, Oxford University Press, New York, 1995, p. 61.

[109] See Wellman, A Theory of Rights: Persons Under Laws, Institutions and Morals, 1985, p. 81 and Rainbolt, The Concept of Rights, 2006, p. 105.

[110] Wellman, An Approach to Rights, Studies in the Philosophy of Law and Morals, 1997, pp. 70-71.

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perimeter of this right and not to its core.[111] Wellman finds Hart's general theory of rights inadequate for immunities not because individuals do not possess a legally recognised choice over immunity but since Hart's general theory of rights only refers to duties and not to other Hohfeldian elements such as immunity in its protective perimeter.[112]

Wellman's model ensures that every Hohfeldian element can constitute the core of a right.[113] The lack of a representative's responsibility for spoken words is a constitutional right with immunity in its core.[114] The purpose of this right is the protection of representatives from the executive branch of the government.[115] In Croatia, representatives possess the substantive immunity to express an opinion which is a right that cannot be abolished and remains in force even when a representative stops performing their duty. The Criminal Code includes a provision that a politician or public person cannot be sued for an insult or defamation.[116] Procedural immunity can be denied in the case of some other crimes.[117]

Hohfeldian immunities are one of the main issues of the Croatian Constitution. For instance, one can single out Articles

[111] Wellman, A Theory of Rights: Persons Under Laws, Institutions and Morals, 1985, p. 79.
[112] Ibid., p. 78.
[113] According to Wellman, in the American constitutional system "...the clearest example is the right of the federal judges, conferred by Article III, Section I of the Constitution, not to be removed from office except on impeachment and conviction". Ibid., p. 79
[114] Paragraphs 1 and 2 of Article 76 of the Constitution of Republic of Croatia stipulate as follows "Members of the Croatian Parliament shall enjoy immunity. No representative shall be prosecuted, detained or punished for an opinion expressed or vote cast in the Croatian Parliament".
[115] Grgić "Koautor ustava Smerdel: Skidanje imuniteta Jovanoviću kraj je demokracije u Hrvata!" http://www.politikaplus.com/novost/44864/koautor-ustava-smerdel-skidanje-imuniteta-jovanovicu-kraj-je-demokracije-u-hrvata. Also see Stefanović, J., Ustavno pravo FNR Jugoslavije i komparativno, II., Školska knjiga, Zagreb, 1956, pp. 218, 219 and 246.
[116] See Article 203 of the Criminal Code of the Republic of Croatia (Official Gazette, Nos. 110/97, 27/98, 50/00, 129/00, 51/01, 11/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08). "There shall be no criminal offense in the case of the insulting content referred to in Article 199 and Article 200, paragraph 3, the defamatory content concerning personal or family conditions referred to in Article 201 which is realized and made accessible to other persons in scientific or literary works, works of art or public information, in the discharge of official duty, political or other public or social activity, or journalistic work, or in the defense of a right or in the protection of justifiable interests, if, from the manner of expression and other circumstances, it clearly follows that such conduct was not aimed at damaging the honor or reputation of another."
[117] Barukčić, "Profesorica Zlata Đurđević: Nema kaznene odgovornosti za izražavanje mišljenja", http://www.tportal.hr. Also see Krapac, Kazneno procesno pravo, Prva knjiga: Institucije, 4th edn, Narodne novine, Zagreb, 2010, pp. 68-72.
Putting such people in detention and the initiation of respective proceedings require the approval of the Croatian Parliament or a decision of the Credentials and Privileges Committee (paragraphs 3 and 5 of Article 76 of the Constitution of the Republic of Croatia). There is only one exception "A representative may be detained without the consent of the Croatian Parliament only if he has been caught in the act of committing a criminal offence which carries a penalty of imprisonment of more than five years. In such a case, the President of the Croatian Parliament shall be notified thereof" (Article 76(4)).

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22, 23 and 24(1) of the Croatian Constitution protecting people's personal freedoms and the status of suspects under investigation (*Habeas Corpus*).[118] The Constitution strictly sets out the "principle of legality in criminal law" – crimes and respective sanctions shall be prescribed by law (*nullum crimen sine lege, nulla poena sine lege*).[119] Moreover, the Croatian legal order guarantees the principle of *ne bis in idem* which is basically a personal right.[120]

From Wellman's viewpoint, Hart's theory of rights is not competent for explaining this model since its core includes constitutional immunity over which its holder has no power or control.[121] This constitutional immunity is obviously very important for individuals and can usually "be asserted in the form of justiciable claims that some purported enactment is invalid because it infringes them".[122]

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The term "right" is ambiguous and indefinite. It is one of those legal terms popularly used by jurists, even though they do not exactly know what the term means, often leading to legal misinterpretations.[123] The purpose of this article is to resolve these ambiguities by employing Hohfeld's scheme to explain the nature of constitutional rights. In our opinion, one cannot disagree that Hohfeld's analysis represents an "essential tool for improving legal reasoning about constitutional rights".[124] Hohfeld thought that the word "right" embraces four different terms. Among these four terms, "immunities" are the least frequent topic of legal discussions.[125] Immunities are individual rights guaranteed by the legal order and restrain authorities from undertaking certain action and adopting particular legal documents. Their foundations refer to liberal-democratic constitutionality while they are inspired by the need to protect people's interests and freedoms.[126] Immunities differ from "traditional rights", such as

[118] See Čepulo, "Vladavina prava i pravna država - europska i hrvatska pravna tradicija i suvremena zbilja", Zbornik Pravnog fakulteta u Zagrebu, Vol. 51, No. 6. (2001), p. 1353.
[119] Article 31(1) of the Constitution of the Republic of Croatia.
[120] Article 31(2) of the Constitution of the Republic of Croatia.
See Garačić, and Grgić, "Ne bis in idem u zakonima, konvencijama i sudskoj praksi", http://www.vsrh.hr/CustomPages/Static/HRV/Files/AGaracic_Ne-Bis-In-Idem_Opatija_Zagreb_2008.pdf.
[121] Wellman, A Theory of Rights: Persons Under Laws, Institutions and Morals, 1985, p. 80.
[122] Wellman paraphrases Hart. Ibid.
[123] Dworkin, Shvaćanje prava ozbiljno, KruZak, Zagreb, 2003, p. 12.
[124] O'Rourke, "Refuge from a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law", 2009, p. 169.
[125] Sumner, The Moral Foundation of Rights, Clarendon Press, Oxford, 1987, p. 37
[126] Hart, Essays on Bentham: Studies in Jurisprudence and Political Theory, 2001, pp. 190 and 192.

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claim-right, since the former do not include the possibility of the subordination of other people.[127]

This paper attempts to show that certain constitutional rights clearly belong to immunities. A number of legal theories were consulted while preparing it. The evaluation of theories is a comparative matter.[128] The viewpoints of supporters of the will theory whose conceptions have failed to integrate those constitutional immunities which cannot be denied by their holders (inalienable rights) have turned out to be highly disputable. According to such views, rights in general cannot encompass "inalienable rights" protecting our fundamental interests, for instance, the right to life, the right to freedom of speech, the right to freedom of association, the right to freedom of confession etc. Such opinions lead to arguments since the immunities of citizens and disabilities of the legislator exist to provide for the welfare of citizens. Inalienable rights have resulted from the need to provide people's most important interests with protection by means of right inalienability. [129]

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[127] Halpin, Rights and Law: Analysis and Theory, 1997, pp. 181-2.

[128] Rainbolt, The Concept of Rights, 2006, p. 110.

[129] See MacCormick, "Rights in Legislation", 1977, p. 195 and Simmonds, "Rights at the Cutting Edge", 2002, p. 227.

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