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HUMAN DIGNITY AS PART OF THE MATERIAE CONSTITUTIONIS

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ABSTRACT

Over time, the content of the materiae constitutionis has not changed significantly, so even in the oldest constitutional texts, we can find provisions regarding the organization of power, a catalog of constitutional rights and freedoms, and finally, provisions about constitutional amendments. However, in the period after the Second World War, an indispensable part of the materiae constitutionis became those provisions that relate to the constitutional recognition and guarantee of human dignity as one of the core principles of the constitutional order. In this paper, the author will, through a comparative analysis, attempt to determine how constitutions increasingly include provisions on human dignity in their texts. Finally, special attention will be given to the role such provisions play within modern constitutional orders.

Keywords: constitution, materiae constitutionis, human dignity.

INTRODUCTION

In this paper, the author will present which provisions can today be considered as an inseparable part of the *materiae constitutionis*. The analysis will begin with the classic components of *materiae constitutionis* that can be found in the earliest written constitutions from the late 18th century, which have remained in constitutional texts up to the present day. First, the focus is on provisions related to organizational constitutional rules that structure state bodies and assign them the powers to resolve matters within their constitutional jurisdiction. Furthermore, since the first modern constitutions, constitutional texts also include provisions that guarantee fundamental rights and freedoms to the citizens of the state. Lastly, as the third component of classical *materiae constitutionis*, constitutions, from the very beginnings of modern written constitutionalism, also contain provisions regulating the procedure for constitutional amendments.

These three groups of rules: organizational rules, charters of fundamental rights and freedoms, and provisions on constitutional amendments - make up the classical part of *materiae constitutionis*, because all of these rules can be found in the vast majority of constitutions created since the early days of written constitutionality in the late 18th century, including the first written constitutions of the United States (1789) and the French Constitution (1791). The aforementioned parts of *materiae constitutionis* will be discussed in the first part of this paper through a comparative and historical analysis. However, the author will pay particular attention to the emergence of provisions related to human dignity and the constitutional guarantees for its protection, which began to appear in written constitutions after the end of World War II in 1945 and are now found in the vast majority of constitutions. In this way, the concept of human dignity, although present in philosophical and theological considerations since ancient times, only more recently became part of *materiae constitutionis*. The second part of the paper will analyze the reception of the concept of human dignity in constitutional texts after 1945 and its relationship with other parts of *materiae constitutionis*. In this analysis, both the content of the constitutional texts themselves and various viewpoints from comparative literature on the incorporation of human dignity into constitutions will be taken into account.

CLASSIC CONTENT OF *MATERIAE CONSTITUTIONIS*

When discussing the content of a constitution, it is important to start with the fact that, according to one of the many definitions of a constitution, it is: "A written act of the highest legal force that primarily regulates the foundations, but not all foundations, and not only the foundations of a given state and social order" (Bačić 2017:28). Based on this definition, it is easy to distinguish that the content of a constitution is not always precisely defined. For this reason, constitutions vary in terms of the scope of their text. On one hand, there is the example of the U.S. Constitution, which is extremely short, containing only 4,543 words, while on the other hand, there is the extraordinarily extensive Indian Constitution, which contains 183,175 words. However, over time, it has become customary for constitutions to include certain elements that are now considered an essential part of *materiae constitutionis*. The following section of this chapter will show which provisions, from the very beginnings of written constitutionality in the late 18th century (some even earlier!), have been considered an indispensable part of every constitution.

ORGANIZATIONAL RULES

First, we can state that every constitution primarily contains organizational rules that determine the competence of state bodies established by the constitution and also define the very form of the state (Bačić 2021:31). When speaking about these organizational provisions, we must bear in mind that this is precisely the point where we say that every state has a constitution in the material sense. In other words, every state has certain rules according to which the state's governance is organized, regardless of whether these rules are codified and written in a single document or are scattered across multiple legal documents, or simply applied and become unquestionable as constitutional customs over time (Bačić 2017:27-28). Therefore, authors emphasize that, in this sense, every state has had a constitution in the material sense, from antiquity to the present day. This is why we should not be surprised that Aristotle already distinguished between a constitution as a set of rules defining the functioning and organization of the state, and laws. According to him, *Politea* was the foundation upon which the entire state organization was built, where rules regarding the purpose and competence of state bodies could be found. On the other hand, *Nomoi* were laws based on these foundations that further regulated the exercise of power by state bodies. (Aristotle 1916: 147).

CHARTERS OF FUNDAMENTAL RIGHTS AND FREEDOMS

The second fundamental part of *materiae constitutionis* concerns the regulation of relations between state bodies and citizens. Here, it is primarily about prescribing certain fundamental rights and freedoms guaranteed to all citizens by the constitution itself. Since the very beginnings of written constitutionality, it became customary to include catalogues of rights and freedoms in constitutional documents. The oldest written constitution in the world, the U.S. Constitution, adopted in 1787 and entering into force in 1789, did not initially contain a catalogue of rights and freedoms. However, the founding fathers quickly recognized the importance of guaranteeing rights and freedoms through the constitution, so just two years after the constitution's adoption, it was amended with the first ten amendments that specifically contained the fundamental rights and freedoms guaranteed by the constitution. These first ten amendments to the U.S. Constitution, known as the Bill of Rights, became a model for future constitutions. Since then, it has become customary for drafters to include provisions regarding the protection and guarantee of fundamental rights and freedoms in constitutional texts. Moreover, these provisions are often considered so important that they are typically placed right at the beginning of the constitution, after introductory provisions, and almost always before provisions related to the organization of state power. Examples of this can certainly be found in the Constitution of the Republic of Croatia and the Constitution of Bosnia and Herzegovina.

The link between a constitution as a set of organizational rules regulating the existence and competence of state bodies and a catalogue of citizens' rights and freedoms that must be respected by the state is perhaps best demonstrated in understanding the constitution as a fundamental provision and a set of principles preventing arbitrary exercise of power (Sartori 1962: 855). Thus,

constitutions become, on the one hand, an effective mechanism for the functioning of state power, while, on the other hand, they ensure that such power is not exercised arbitrarily but is limited through the separation of powers into legislative, judicial, and executive branches. At the same time, it is also limited by the existence of constitutionally guaranteed rights and freedoms that must be respected by all, including state bodies. This understanding of the constitution as a means to limit state power and prevent arbitrary exercise of power by state bodies is supported by numerous authors, including F. Hayek (Trajkovska-Hristovska 2019: 44). Ultimately, in modern democratic constitutions, organizational constitutional provisions primarily serve to enable the normal functioning of state bodies while ensuring that state power and its holders are not arbitrary but limited in the exercise of their powers. They are limited by the principle of separation of powers, which is divided horizontally into legislative, executive, and judicial branches, vertically into state power and the power of lower organizational units (e.g., local and regional authorities), and, finally, by a temporal limitation, as in democracies, all holders of state power are elected for a specific term, after which citizens are given the right to elect new holders of particular state offices. However, it is important to emphasize that the existence of constitutionally prescribed fundamental rights and freedoms, along with the binding requirement for their respect by all, especially state bodies, is an extremely important element in limiting state power and preventing arbitrary rule.

CLAUSES ON CONSTITUTIONAL AMENDMENTS AS PART OF *MATERIAE CONSTITUTIONIS*

The third important part of *materiae constitutionis* consists of clauses on constitutional amendments, which set the rules for changing the constitution itself. Provisions on constitutional amendments can be found in the earliest written constitutions, including the U.S. Constitution, the oldest written constitution in the world (Article V of the U.S. Constitution). Although there were differing views among the founding fathers regarding the need to include a procedure for amendments within the constitution itself, the thoughts of T. Jefferson ultimately prevailed. He believed that constitutional amendments must be possible and that each generation must be guaranteed the ability to independently decide on the foundations of social order as outlined in the constitution, as everything "except inalienable human rights" (Posavec 1994: 74) should be subject to change and adaptation to the new circumstances of time. (Roznai 2017: 189) G. Mason shared a similar view, arguing that the constitution should foresee the possibility of change, as constitutional amendments would be needed in the future, and it was better to provide a procedure for peaceful amendments, as otherwise there would be a risk of changes occurring through violent methods (Farrand 1911: 202-203). Ultimately, the U.S. Constitution incorporated Article V, which provides for a complex and demanding procedure for constitutional amendments. Amendment clauses can also be found in some of the oldest European constitutions, such as the Polish Constitution of 1791 (Article VI) and the French Constitution of 1791 (Section VII).

The practice of establishing rules for constitutional amendments became widespread over time, and today, almost every written constitution contains provisions regulating procedures for its amendment. In this sense, it can be said that amendment clauses are an indispensable part of *materiae constitutionis*. The importance of these provisions is recognized not only in constitutional practice but also in constitutional law theory. For example, one of the constitutional classics, A.V. Dicey, stated at the end of the 19th century that the issue of constitutional amendments was one of the central themes of constitutional law (Dicey 1895: 388), and similar views can be found in other older authors such as J. Burgess, who describes provisions on amendments as "the most important parts of the constitution" (Burgess 1902: 137). For K. Lowenstein, provisions on constitutional amendments, along with provisions on the separation of powers and guarantees of rights and freedoms, form one of the fundamental elements of a political constitution (Trajkovska-Hristovska 2019: 44). Finally, the importance of provisions on constitutional amendments is also emphasized by modern authors, such as R. Albert, who refers to amendment clauses as "gatekeepers" of the constitutional text (Albert 2014: 913-914).

Provisions on the possibility of constitutional change are closely linked to the principle of popular sovereignty as a fundamental postulate in organizing a constitutional democratic order.

According to D. Lutz, the principle of popular sovereignty was the guiding idea for the founding fathers when they decided to include provisions for constitutional change in Article V at the Constitutional Convention in Philadelphia. If supreme power lies in the hands of the people as the sovereign, it is entirely understandable that the people have the right to adopt a new constitution but also to change the existing constitutional order (Lutz 1995: 238-239). In this way, provisions on constitutional amendments are connected to fundamental human rights because the right to change the constitution, either through direct decision or via elected representatives, in accordance with the theory of popular sovereignty, is one of the inalienable rights of the people as the sovereign. Furthermore, the constitution often also provides for the power of state bodies to carry out the process of constitutional change. Thus, when discussing organizational rules that determine the competence of state bodies, this also includes a special power, constitutionally established, to carry out the process of constitutional amendment. Of course, it should be noted that only the people, as sovereign, always and exclusively possess the pre-constitutional constituent power (*fr. pouvoir constituant*), which establishes the constitutional order and from which all other constituted powers (*fr. pouvoir constitué*) arise, including the power to amend the constitution, which, unlike the constituent power, is always subordinate to the constitution itself (Zlatić 2021: 27-29).

HUMAN DIGNITY AS A PART OF *MATERIAE CONSTITUTIONIS*

The concept of human dignity today is inseparably linked to constitutional-democratic systems based on the rule of law. However, although human dignity has been present in philosophical and theological discussions since ancient times, it only started appearing in constitutions after the end of World War II. This chapter will explore in more detail when and how the concept of human dignity was incorporated into constitutional documents, and will then examine the relationship between human dignity and other fundamental parts of *materiae constitutionis*.

THE EMERGENCE OF HUMAN DIGNITY IN CONSTITUTIONAL TEXTS

Before the end of World War II, the concept of human dignity rarely appeared in constitutional texts. According to research by D. Shulztiner and G. Carmi, only five constitutions adopted before 1945 contained provisions related to the concept of human dignity. These were: the Mexican Constitution of 1917, the German Constitution of 1919, the Finnish Constitution of 1919, the Irish Constitution of 1922, and the Cuban Constitution of 1940 (Shulztiner, Carmi 2014: 464). However, after World War II, constitution-makers, surely guided by the horrific experiences of the war, began incorporating provisions that guarantee and protect human dignity as an inseparable part of human existence. M. Mahlmann, for example, notes that the concept of human dignity became the central part of the "normative project of human rights" and "civilized constitutionalism after 1945," and thus an essential element of almost all constitutional systems after World War II (Mahlmann 2010: 10). The trend of including human dignity in constitutions continued in the decades following World War II. According to the previously mentioned research by D. Shulztiner and G. Carmi from 2012, 80% of constitutions now contain provisions on human dignity.

Human dignity is incorporated into constitutional texts in various ways and can be found in different parts of the constitutional text. Some constitutions include human dignity in their introductory and fundamental provisions as one of the central principles of the entire constitutional system. For example, in Germany's Basic Law (German: *Grundgesetz*), Article 1 states that human dignity is inviolable and that it is the duty of the state and public authorities to protect it (Article 1, *Grundgesetz*). Finally, according to Article 79, Paragraph 3 of the *Grundgesetz*, the provision in Article 1 on human dignity represents an unamendable part of the German constitution, meaning that human dignity, as one of the central principles of the German constitutional order, cannot be changed even by constitutional amendments. As Hofmann and Hesse emphasize, human dignity represents the normative foundation of the Federal Republic of Germany (*Dreier 2014: 376*). Many other constitution-makers follow the German example and highlight human dignity as one of the core principles of their constitutional order, including it either in the fundamental constitutional

provisions (e.g., constitutions of Brazil, South Africa, Portugal, etc.) or mentioning it in the preambles (e.g., constitutions of Poland, Ireland, Czech Republic, etc.). The concept of human dignity is also found in the provisions of the Croatian Constitution, which in Article 35 guarantees the respect and protection of dignity, and in the Constitution of Bosnia and Herzegovina, whose preamble mentions dignity as one of the foundations of the constitutional order.

In addition to the general definition of human dignity as one of the core postulates of the constitutional order, many constitutions specify it by linking it to the protection and realization of other fundamental rights or goals intended to be achieved by the establishment of the constitutional system. In such cases, human dignity serves as a guideline for the application of constitutional norms, indicating how state authorities should act in specific situations. A common example of this is, as noted by D. Shulztiner and G. Carmi, the legal deprivation of individual freedom, which prescribes that detained or arrested persons should be treated in a way that respects their dignity. Such constitutional provisions can be found in Finland, Armenia, Nicaragua, and Croatia (Shulztiner, Carmi 2014: 477). Human dignity is also frequently used as a foundational principle when regulating constitutional rights related to labor, with an emphasis on preserving the dignity of workers and ensuring appropriate working conditions and compensation, as found in the constitutions of Portugal, Angola, Colombia, Argentina, and South Korea (Shulztiner, Carmi 2014: 477-478). Other constitutions prescribe the general obligation of the state to ensure adequate material conditions for a dignified life for all individuals, especially those belonging to vulnerable groups (children, the elderly, persons with disabilities, etc.), as seen in the constitutions of Switzerland, Finland, Bolivia, and Serbia (Shulztiner, Carmi 2014: 478-480).

THE RELATIONSHIP BETWEEN HUMAN DIGNITY AND OTHER PARTS OF *MATERIAE CONSTITUTIONIS*

Given everything previously mentioned, it can be concluded that, over the last 80 years, human dignity has become an indispensable element of *materiae constitutionis*. Furthermore, this concept has become one of the core principles of constitutional orders worldwide and is closely interwoven with other parts of *materiae constitutionis*. When discussing the connection between human dignity and fundamental rights, we should consider the definition accepted by many authors, including P. Bačić, according to which human rights are "universal legal guarantees that protect individuals and groups against actions that infringe on fundamental freedoms and human dignity" (P. Bačić 2007:13), and accordingly, "human rights are part of the inherent dignity and value of the human person" (P. Bačić 2007:13). It is clear that the concept of human dignity forms the basis for all other human rights. Therefore, human dignity is a *conditio sine qua non* for all human rights, as without its preservation, it is impossible to talk about the existence of fundamental human rights, since all human rights have their source in human dignity itself. Ultimately, any constitutional system that aims to ensure effective protection of fundamental rights and freedoms must have human dignity as a foundational value (Brownsword 2014: 1, 13), and thus, it can be said that human dignity is the core of what is recognized and defined in theory as Western constitutionalism based on the rule of law (Baer 2009: 435).

When discussing the relationship between human dignity and other parts of *materiae constitutionis*, we must also consider that the requirement to preserve and protect human dignity forms a fundamental demand for the action of all state bodies, both in the performance of their regular functions and when exercising their powers within the process of constitutional amendment. We have already mentioned that provisions on human dignity in constitutional texts first serve to position human dignity as one of the core principles of a given constitutional order. In this sense, state bodies are initially required not to do anything in the exercise of their regular powers that could endanger the dignity of individuals. However, on the other hand, these same bodies are also expected to actively work toward promoting and protecting human dignity in the exercise of their constitutional powers, which is particularly evident in those constitutional provisions that, as we have already shown, link human dignity to the realization of other rights or values of the constitutional order (the right to decent working conditions, wages, or ensuring material conditions for a dignified life).

Furthermore, state authorities are also required to safeguard human dignity during constitutional amendments. In this process, the protection of human dignity must not be jeopardized. Indeed, some constitutions explicitly prohibit changes to parts of the constitution related to constitutional guarantees of human dignity. The most well-known example of this is the provision of Article 79, Paragraph 3 of the German *Grundgesetz*, which explicitly prohibits changes to, among other things, the provisions of the *Grundgesetz* that pertain to human dignity. However, it is our belief that, given that human dignity represents the very foundation of the constitutional order (Zlatić 2022: 33-48), even in constitutional systems that do not explicitly prohibit the amendment of certain parts of the constitution, such limitations on the power of constituted authorities to amend the constitution are implicitly assumed, and they are obliged to adhere to them. An example can be found in the Croatian Constitution (Kostadinov 2011: 320, Omejec 2015: 28, Horvat-Vuković 2015: 488-492). Otherwise, they would undermine the very foundations of the existing constitutional order and thereby exceed the constitutional powers granted to them, which consist of amending the existing constitution, not destroying it or replacing it with a new one. Moreover, human dignity as an inseparable part of human existence limits even the sovereign in the exercise of constituent power in the process of adopting a new constitution. Although constituent power cannot be limited by legal rules, including constitutional ones (since it precedes them), those holding constituent power cannot exercise it in a way that would endanger human dignity, as this would negate the very idea of constituent power, which necessarily implies the creation of a new constitutional order by a community of equal individuals gathered in a people who are sovereign (Friedrich 1950: 135, Kalyvas 2005: 235, Colón Ríos 2012: 117–118, Zlatić 2022: 43–47).

CONCLUSIONS

The constitution, as the fundamental legal act of any democratic society, has always had the task of regulating the essential aspects of political and social life. Analyzing historical and comparative sources, it is evident that from the very beginnings of modern constitutionality at the end of the 18th century, written constitutions have contained certain sections that became inseparable elements of every constitution, or the classical parts of *materiae constitutionis*. These sections include: organizational rules establishing the structure of state authority, charters on fundamental rights and freedoms protecting individuals from arbitrary actions by the authorities, and provisions on constitutional amendments that ensure flexibility and adaptability.

However, what represents a significant turning point regarding *materiae constitutionis* is the ubiquitous and growing role of human dignity in constitutional texts after World War II. The experiences of war, totalitarianism, and systemic violations of human rights prompted constitution-makers to place human dignity at the center of their constitutional systems as a fundamental value. The German Basic Law (*Grundgesetz*) of 1949, with its provision on the inviolability of human dignity, set a normative precedent followed by many other constitutions around the world.

It is important to emphasize and understand that human dignity is not merely an additional element, it now stands at the core of constitutional architecture, permeating all other parts of *materiae constitutionis*. As shown in the paper, fundamental rights have their source in human dignity; the organizational structure of power must act in a manner that respects and promotes the dignity of citizens, and even the possibility of constitutional amendments must align with the preservation of dignity as an inalienable value. In this sense, it can be concluded that human dignity has definitively become a new, fourth, inseparable, and substantial part of *materiae constitutionis*. Its inclusion in constitutional texts does not only represent a reaction to historical traumas but also an affirmation of the idea that the legal order, if it is to be just and sustainable, must be founded on the respect for every human being as an autonomous and equal member of the community. Ultimately, a modern constitutional order, without the explicit recognition and protection of human dignity, can hardly achieve the purpose of the rule of law, democracy, and fundamental human rights. This confirms that human dignity does not merely become a part of the constitutional text but also represents the ontological foundation of the entire constitutional order that strives for the realization of the ideals of the rule of law.

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DECLARATIONS OF INTEREST STATEMENT

The authors affirm that there are no conflicts of interest to declare in relation to the research presented in this paper.

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