



ORIGINAL PAPER

Constituent power – the essence of democracy

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Abstract

The concept of constituent power is a purely democratic one, and democracy (in literal translation “leadership by the people”, from the Greek word “demokratia”, from demos, “people” + kratos, “power”) is a political regime which is based on the will of the people. In a democracy, constituent power belongs to the people, this freedom initially belonged to the individuals who, accepting the social pact, gave their share of sovereignty to the community and so they received a freedom guaranteed and protected by the law. The People as constituent power has the will to organize themselves, to establish a legal system and a form of government, only in this form a Government is legitimate. However we shall consider one of the problems debated in this matter: “The people can’t decide until someone decides who the people are”, so we face a constitutional dilemma, democracy implies a certain group of members who are actively involved in the democratic process, to express their opinion, to participate in the democratic process of decision-making. However, for the initial founding decision of the demos, its boundaries are not yet established and it is therefore unclear who should take part in the decision-making (Jennings, 1956: 56). This means that setting a government and setting limits to their governance takes place outside the democratic process – this is the dilemma of the demos’ limits in democracy that has been widely discussed in the literature. This study aims to clarify these conceptual and normative dimensions. Essentially, the question guiding this paper is: what is the link between democracy and constituent power and how can this influence the legitimacy? This means addressing the demos not only as the basis, but also the object of legitimacy (Scherz, 2013: 1).

Keywords: *constituent power, legitimacy, legality, Constituent Assembly, democracy*

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Guidelines regarding democracy and constituent power

The theory of constituent power began to assume its contemporary features in revolutionary America, and it was here that constituent power first emphatically asserted itself as the essential prerequisite for governmental legitimacy (Thornhill, 2012: 469). The conception of the state as constitutionally willed by the people, helped to consolidate the political system in different countries, starting with America, and following with states form Europe, in different ways, being the starting point in early forms of democracy. Both the early and the modern doctrine tried to answer questions regarding the legitimacy of power. The first theories on this subject were those of the social contract. But social contract theory cannot answer all these questions, and this is where modern doctrine intervenes. The classical theories of the eighteenth century (mainly represented by Sieye (Sieyes, 1994) and the *The Federalist Papers* (no. 38, no. 40 and no. 57)) presented the constituent power as a power able to create a constitution, and “the state was considered a conscious figment of the people” (Schochet, Chapman, 1979: 3). The Constitution contains the most important legal norms, the rule of organizing and structuring the entire legal and political system. But constituent power is more than writing and adopting a constitution (Dyzenhaus, 2012: 229-260); is, rather, a power that establishes a regime by creating institutions and rights for its citizens and by establishing relationships between members (fundamental rights) and certain obligations for these obligations imposed by compliance. Throughout this study we consider the analysis of this concept both from a legal perspective and from the perspective of sociological, psychological and political doctrine, as a constitution illustrates not only how to “be” and “to exist” of a people, but also the amount of social-historical traditions and experiences through which it has passed. “Written Constitutions come from a supreme power called constituent power, which in turn determines the existence and the constituted powers action. (...) It's called the *original constituent power*, the power to adopt the constitution of a state. It is the first constitution of a State or other new constitution” (Ionescu, 2008: 187). Based on this statement of professor Cristian Ionescu, we can extract the first attributes of constituent power: the power to generate a new constitution, a power outside the legal system because it comes from a supreme will, and a first distinction is made between two types of constituent power: the original and derived one.

The idea of the constituent power is used for the first time by Sieyes, he states that the powers created by the Constitution are multiple and they fulfill a particular function, but within the limits conferred on them by the fundamental law, drafted by the will of the constituent power (Neither aspect of the constitution is the creation of the constituted power, but of the constituent power. No type of delegated power can in any way alter the conditions of its delegation. In this sense, and in this sense alone, are constitutional laws fundamental. Those which establish the legislative body are founded by the national will before any constitution has been established; they form the first stage of the constitution) (Sieyes, 1994: 22). However they have a common element, they represent the general will of the people, the nation. As stated Sieyes, a constitution requires, above all, a constituent power. Moreover, Sieyes emphasizes the distinction between constituent power and constituted power, stating that the Fundamental Law, the constitution, is not merely the work of the constituted powers, but the constituent power. By making an opposite presentation to these terms, Sieyes considers that constituent

power is the power to make the constitution and the constituted powers are powers established in the constitutional provisions.

Sieyes's whole conceptualization is based on natural law doctrine and the contractual theories are the germs that created this essential concept in constitutional law. We cannot speak of conceptualizing the term of constituent power in Jean Jacques Rousseau, Thomas Hobbes and John Locke work, because their theories on the social contract, do not know the distinction between ordinary legislative power and constituent legislative power that would be given to a Constituent Assembly. In Rousseau's conception there is no higher power that is above the legislative power and that the people by agreement shall establish rules of their social life (Gözler, 1992: 7).

Although Sieyes was the first to ground in the European zone the term *constituent power*, a year earlier, in 1787, in the United States this concept already had been found in the Constitution adopted following the Philadelphia Convention (Loughlin, 2013: 2). Following the Federalists' essays, which were based on contractual theories and on the design of the separation of the three powers made by Montesquieu, the US already had a constitution, extremely modern and democratic, where the will of the people at that time was to impose a new form of government. In The Federalist no. 40, James Madison was condoning a higher power that can lay down, the power that "transcendent and precious right of the people to abolish or alter their government as to them shall seem most likely to affect their safety and happiness" (Madison, 1783: no 38) (James Madison in The Federalist no 38 states: "the improvement made by America on the ancient mode of preparing and establishing regular plans of government" was "to bring about a revolution by the intervention of a deliberative body of citizens" rather than to rely on mythical lawgivers").

Although the notion of constituent power seems simple, we will see as below, that it is a complex notion that involves a careful analysis of the evolution of the concept and various facets that it can have, especially in regard with democracy. Automatically, the concept of constituent power raises the question of power legitimacy, and this highlights the different understandings and views that have emerged over time.

As Arend Lijphart states, democracy is a controversial concept, which has been subject of numerous studies from different perspectives; however the criteria for establishing a democratic regime, promoted by Robert A. Dahl remains constant in the doctrinal analyses, including in Lijphart studies (Lijphart, 2008: 234). These criteria are: *universal suffrage, institutional guarantees that the elections are free and fair, freedom of speech, freedom to form and to join certain organizations, and also alternative sources of information.*

But what is the relationship between these two highly controversial concepts: constituent power and democracy? Böckenförde asserts that the concept of constituent power is a democratic and revolutionary one precisely because of its origins (Böckenförde, 1991: 11-12), basically the link between these concepts lies in the problem of legitimation. In a democratic regime, the fundamental law's legitimation and the legitimation of the constituted powers depends on the extent of the citizens' participation in the procedure of creating a Constitution. Freedom of expression and collective political will represent the basis of the constitutional theories; the constituent will is a fundamental democratic principle according to which the people shall establish their own form of Government that will represent their interests and provide laws that are meant to confer them the comfort and freedom that they wanted when they agreed on the social pact (Kalyvas, 2005: 237-238).

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The democratic regime gives the concept of constituent power a political and social dimension in assessing the legitimacy of the fundamental act, its justice or injustice, basically, the holder of the constituent power, the people, becomes subject in the analysis thorough which democracy is valued (Scherz, 2013). As Andreas Kalyvas states, the mere fact that a group of individuals was able to create a law which it is considered essential, it doesn't mean that we face a democratic system, because it doesn't represent the collective will of the individuals, therefore the law is not legitimate, because it doesn't illustrate the will of the majority (Kalyvas, 2005: 239).

But what are the conditions which must be fulfilled before a constitutional regime, a newly created one, to enjoy democratic legitimacy? And how are these "limitations" reflected in the concept of constituent power (Colon-Rios, 2010: 199-245)? (In the opinion of this author, opinion that we share, not all constitutional regimes were created as a result of a democratic constituent act, some states which currently enjoy a democratic system were created as a result of a decision of a Constituent Assembly, composed of representatives of the State, without the participation of the people, this is the case of the Canadian Constitution of 1982, which is now a prosperous and democratic country which by decision of State officials was granted a Constitution and the people were not at all involved in this process). First of all, to be able to try to formulate some opinions in regard to these questions, we must establish that, if so far we had in mind the concept of democracy from the social-philosophical perspective, when we refer to the democratic legitimacy we will take into account the legal and procedural perspective that is involved in this process.

The question of democratic legitimacy has concerned Schmitt, and, in his studies, he states: "the logically consistent democratic theory knows no legitimate constitution other than a constitution based on the people's constituent power" (Schmitt, 1928: 143). Schmitt's conception, while resenting on the constituent power theory, has some problematic aspects. Schmitt considers that the consent of the electorate, as expressed in the participation in regular elections, is evidence that the constitution is based on the people's constituent power: "a conclusive action is discernible in the mere participation in the public life a constitution provides, for example, an action through which the people's constitution-making will expresses itself clearly enough. That is valid for the participation in the elections, which brings with it a certain political condition" (Schmitt, 1928: 139). On the other hand, the mere consent in the participation of elections is not enough, we consider that constituent power should be an episode of heightened popular participation, otherwise it would be considered legitimate a constitution imposed by an external agent according as long as a relevant group of humans accept it (Colon-Rios, 2010: 215). This is why we consider to be of utmost importance to try to delimitate the demos, as an important factor in the decision-making process.

Conceptual and normative dimensions of *the demos* and *the people* The demos. Some considerations

From an empirical point of view, the conceptual dimension that the term *demos* represents, is loosely shaped, but has a vital importance in the determination of the legitimacy of power and the individuals over which the political power is exercised. A. Scherz (2013) identifies two aspects for which the demos legitimacy is relevant from the standpoint of democracy: (i) if the legitimacy of the demos is questioned, then the democratic process of decision making is affected, and there is a confusion regarding

decision taking factors; *(ii)* the legitimacy of the demos affects the right to exclude certain individuals, so if the demos composition is arbitrary, their right to decide on its own members is not valid. This issue of legitimacy, has both a sociological and legal point of view. In legal terms when we are talking about legitimacy we refer to electoral rights, the person's ability exercise its rights, to restrict the right to vote, and others, all having relevant implications on the process in which the people, the *demos* – in the conception of the Scherz, is involved, but also on how democracy is understood.

To outline the size of the demos legitimacy we have in mind the following principles on which we can assess its composition: *(i)* the principle of those who are directly affected (all affected interests), *(ii)* the principle of all those subject to, and to those affected indirectly (all subjected, all coerced and interlinked interests), *(iii)* voluntary association (voluntary association), *(iv)* the mixed demos (unbounded demos or the all affected principle as a critical standard) (Scherz, 2013: 5-8).

Generally speaking, the demos can be defined as the political subject of a society, constituted by its members, who participate or have the right to participate in political decision-making. In this sense, the demos is defined as the individuals having participation rights. The definition of the demos through rights of political participation leads primarily to a descriptive understanding of the concept. Such an understanding would designate a group of individuals who have decision-making rights. Besides these descriptive elements, the demos also has a normative aspect. For example, if the majority of the population who can legally exercise its rights has no opportunity to participate in political decision-making and the deciding group is a small elite, we would not consider this elite the demos, and we would still refer to the citizens as the basis of legitimation. In other words, there is a descriptive understanding of the demos which answers only the question of who actually has participatory rights in a society, and a normative understanding of the demos which justifies or questions the distribution of political rights. This normative aspect of the demos is specifically relevant to democracy. Democracy always requires a subject, a body of people in its process of collective equal decision-making (Scherz, 2013: 8).

Constituent power is in direct link with a self-determining demos, a coherent group of individuals that are united by their will and solidarity. In this sense, we may say that the people are the bearer of the constituent power, that they ought to be sovereign and that in the exercise of their sovereignty they should be allowed to have any constitution they want (Colon-Rios, 2010: 209), this is, Preuss already said, “constituent power is the power of a collective body, which by the very act of constitution giving, exercises its right to self-rule” (Preuss, 1993: 647). This means that constituent power is by definition a democratic power, its absolute and unconstrained nature means that it can put at risk the democratic content of the constitutional regime. However, despite its unlimited nature, constituent power comes accompanied by an important procedural limitation: its exercise must include in the process of making a constitution those that will become subject of it, therefore the connection between constituent power and democracy is obvious: democracy, as constituent power requires the participation of citizens in creating the fundamental law. Democracy involves the participation of the citizens in the production of the law, a popular participation, one of the basic democratic ideal (Colon-Rios, 2010: 235).

The people. A constitutional perspective

The doctrine considers that citizenship can be viewed from the perspective of constitutional law both as a legal institution and the status of persons recognized by a particular state. As a legal institution, citizenship is seen as a set of legal rules governing the acquisition or loss of citizenship, and the social relations that this status requires.

The population of the state is presented as a composite entity in terms of specific legal and political relations they have with each member of the State in which a population lives in. *The population* is a distinct sociological category different of people and nation that meets a number of features relevant to constitutional law and public international law. The population is an undetermined group of people that at any given time are living in a State (Cadart, 1990: 55). We understand here that the notion of population include the whole people living in a State whatever the characteristics of their identity are in relation to the territory and to the state itself. From this point of view, the population of a country consists of its citizens, plus foreigners and, where appropriate, the stateless people.

Each of these three categories of individuals has certain legal relations with the State in which they live in and are subject to its authority. In this equation comes the third constituent element of the state *ie* its sovereign power. Sovereignty is an essential element in establishing relations of citizenship, as well as legal relations only a state can conclude with foreigners and stateless persons. The constitutional foundation of the concept of citizenship starts, as stated in the literature, from three factors that define the relations between the individuals and the State (Berceanu, 1999: 72): a) sovereignty principle; b) the distinction between their own citizens and people who have this quality; c) full equality before the law and public authorities of all citizens without discrimination.

Citizens are a unique civic body – a community of citizens – that cannot be divided into segments of social, ethnic, religious or political or older. Any distinction between citizens on the criteria of non-discrimination would be unconstitutional. For example, this is the conclusion drawn from art. 4 para. (2) of the Romanian Constitution, which states that “Romania is the common and indivisible homeland of all its citizens ...” and from art. 2 para. (1) which states that national sovereignty belongs to the Romanian people, every citizen is thus a segment holder and bearer of equal national sovereignty. As such, the citizens appear as the *foundation atom* of a state. We are in the presence of a constitutional statement that excludes the concept of citizen in an ethnic sense, even if accompanied by appellation “Romanian”. So when we refer to the concept of citizenship, we consider combining the two types of views: a) political and functional relations grafted on institutionalizing the principle of national sovereignty, according to which political power resides in the people/ nation, in a civic sense of the word; the people are the ones who transmit the power to the state in order to be exercised through representation; b) legal relations. These will regulate the actual status of the citizen, from birth registration – the highlight in which citizenship is established – and ending with proof of citizenship. We include these relations in the sphere of legal and constitutional rights recognized by state to its citizens and the citizens’ fundamental duties towards the state. The political link connecting the state with its citizens is not limited to the direct contribution of the electorate in the formation of the state’s representative institutions in regular cycles. People are constantly drawn to public life and civil society organizations, including associations and foundations of civic profile, political parties and unions. We see thus a civic activism of citizens through which they can fulfill certain rights and legitimate

interests. The state is also interested in the well-functioning of civil society as a form of release and civic orientation towards certain directions and energies, as an expression of social solidarity. Of course, it is arguable whether in these particular forms of integration of citizens in public life they are true members of a state, but they can contribute to a greater sense of civic loyalty of the individual to the structures of state entities that guarantee free status of civil society and represents a symbol of political unity between state and citizen. The fundamental elements of the symbolism of national unity are: the national anthem, the national flag, the national day, the national currency, the commemoration of historic personalities or political events anniversary with a great national etc. (Rouvier, 1998: 178). These values or symbolic elements are likely to strengthen the relations of citizenship, increase the feeling of national pride, the deep attachment to the community of political, social, economic and cultural, and social responsibility and the respect of their constitutional duties. The community of citizens will express a homogenous election, with the sole purpose of electing a parliament and a president of the republic, which does not mean that voters expressed a single will, on the contrary, it represents the will of different individuals towards different partisans. The electoral body is expressed, however, homogeneous and remains so because national sovereignty - which he exercise - is by nature indivisible. Also, each member of the community is equal subject in his relations with the state and has no privileges. The German philosopher Kant said that only a citizen is given the ability to vote (as individual component) for a political union. This means, he continued, the independence of the people, people that not only plans to participate in the social existence of a State but also is a member, ie takes an active part along with others, by its own will (Kant, 1991: 164). A similar idea is found in Hegel's studies, who analyzing the concepts of governance in the world of Greek and Romans finds that is specific to them that all citizens should participate in debates and decisions on laws and issues of general interest (Hegel, 1997: 78).

This model has been adapted over the modern era and in a different historical context, where direct democracy is no longer possible, only representative government. In this model, the society is structured in the ruling elite, designated through democratic procedures and the community of citizens. For example, it is a fundamental requirement resulting from art. 2 of the Constitution, the citizens have the ability to participate and exercise political power through democratic procedures, free, periodical and fair elections, and also at the exercise of state power itself. We are talking about a citizens' initiative recognized and guaranteed by art. 74 para. (1) and art. 150 of the Constitution and the referendum, understood as a way of consulting the will of the people.

Legitimacy vs legality. Constituent power and democratic legitimacy

Joel Colon Rios, discussing the legitimacy of the democratic system, states that a regime is democratic not only if it recognizes the freedom of political rights of individuals, but, furthermore, whether it has provided institutional mechanisms to allowing its citizens to initiate and to decide on any changes in the basic law, when they no longer correspond to the current reality; basically to allow the expression of constituent power when this is required by certain social events (Colon-Rios, 2010: 201). Sometimes, as in fact history has proven with countless occasions, constitutions often exceeded social transformations and their change is required, and a Constitution which does not provide the mechanisms for change, or these mechanisms involve a very strict procedure, difficult to fulfill, denies

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the existence of freedom of the political expression itself that a democratic regime requires, and limits the power of the original constituent power, which is, by its nature, an unlimited power (Colon-Rios, 2010: 202). Any mechanism through which the alteration of the fundamental law is allowed, by default rules established by a Constituent Assembly, through a certain type of procedure, is a manifestation of the derived power, which means, in fact, the expression of democratic legitimacy. Thus, as we have already stated, the original constituent power is unlimited and its essence lies in the intrinsic connection with the concept of democracy. Joel Colon-Rios propose a specific terminology for a democratic society open to the manifestation of constituent power, which he calls: *democratic openness*. From his point of view, the constituent power is the ideal expression of this “democratic openness”, i.e. the capacity of individuals to make laws that let them organize the forms of Government, as well as the ability to change the basic law ensuring the participation of the people within this democratic activity (Colon-Rios, 2010: 212). Changing the fundamental law, i.e. enabling the derived constituent power, determines certain particularities in relation to the concept of democracy. Thus, the more significant the change in the basic law is, the more need for participation, obviously thinking these issues from a utopian perspective, because the process of revision of a Constitution is the same for all the changes, and in regard to the Constitution provisions we cannot prioritize its requirements [See the example of the Canadian constitutional laws of 1927 when such a proposal for revision made by various procedures based on their relevance has been made (Colon-Rios, 2010: 230)]. Although it is essential that when we look at the concept of democracy, we should not ignore the “people’s control” over how they are governed.

Constituent power should be the manifestation of the will of the majority of individuals who form a community. Constituent Power must not be imposed by force, but by authority, only by acceptance legitimacy is granted (Negulescu, 1939: 49). We must mention that legitimacy does not necessarily mean legality, the original constituent power speak of legitimacy, because, as Maurice Duverger said, “the constitution is the one that extract its authority from the constituent power, I and not the constituent power that extracts its authority from the constitution”, therefore this implies that the legitimacy of authority is accepted by the majority (Duverger, 1948: 78). In the case of the derived constituent power, however, we can speak of legality, because this power is expressly stated in the constitutional text, and any deviation from the scope of this text, as prof. Deleanu said it is “a constitutional fraud” (Deleanu, 2006: 430). The conception of democratic legitimacy can be analyzed through two perspectives: (i) the initial constitution-making moment; (ii) the way a constitutional regime is susceptible to democratic alteration. Andreas Kalyvas also connected constituent power to the idea of democratic legitimacy, his conception focus on the democratic origins of the constitution: “in a democratic regime, the legitimacy of the fundamental norms and institutions depends on how inclusive the participation of citizens is during the extraordinary and exceptional moment of constitution making” (Kalyvas, 2005: 223). This kind of passage suggests that constituent power is only relevant at the time of making a new constitution.

But, as Colon-Rios argues, we should consider it to be important also from the perspective of the democratic alteration, because, amending and revising a constitution also implies constituent power, a derived form of constituent power. Democratic openness, in this situation, i.e. *the way a constitutional regime is susceptible to democratic alteration*, requires an openness that can be accessed by the citizens, and that offers real opportunities for the participation of ordinary citizens. From this point of view, democratic

legitimacy is not only about the procedure that the constitution establishes for law making, but about the procedures it establishes for its own transformation; it is a conception heavily informed by constituent power and its democratic implications. For the possibility of democratic re-constitution to mean something, it must have actual institutional implications. In other words, the constitutional forms must provide the means for constituent power to reappear after the constitution is in place, and, if needed, to put the entire institutional arrangement into question. The basic condition of democratic legitimacy is also connected to the principle of the “rule by the people” in one fundamental sense. To say that the people rule themselves is to say that they are a “self-governing” people: a group of human beings that come together as political equals and give themselves the laws that will regulate their conduct and the institutions under which they live. A self-governing people must be able to reformulate their commitments democratically: for there to be democratic self-rule, no rule can be taken for granted or be impossible (or virtually impossible) to change (Keenan, 2003: 10).

Conclusion

To be considered democratic, a regime must not absolutize the constituent power, nor to limit or to hide it through a difficult procedure, but on the contrary, should it give it a real chance to manifest, only in this matter we're talking about *democratic openness*. However, the detailed provisions established by the Constitution to assure a democratic regime must be real. Citing the whole doctrine which opposes the idea of considering the ratification of constitutional amendments through referendum, as democracy (Colon-Rios, 2010: 235). Colon Rios says that this mechanism is insufficient, since a constitutional referendum is not a manifestation of the democratic constituent power, it is a manifestation of established power, a pre-established constitutionally procedure because people are called upon to rule on alternative constitutional provisions default, as they are not involved in the actual process of elaboration, as otherwise it may happen in a utopian world (Colon-Rios, 2010: 235-237). Given these considerations, we can say that in countries with a democratic tradition, there must be some sort of *checks and balances* between the citizens and the public powers.

As we can see, both the concepts of democracy and the constituent power support various meanings and are understood differently in the world, giving states more or less democratic legitimacy, but qualifying them as being democratic. An objective analysis can be done starting from the idea of the concept of ideal democracy, applying some of the markers the doctrine gives, and so we can establish a certain degree of democracy in different constitutional regimes. In this equation, derived constituent power is a mechanism by which the degree of democracy can be modified in the constitutional text, and provide it with the democratic opening that a fundamental law needs. Because, as prof. Cristian Ionescu said, democracy is defined not only as *Government of the people by the people and for the people, but also under the control of the people* (Ionescu, 2015: 254).

Acknowledgment

This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resources Development 2007-2013.

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Article Info

Received: May 11 2015

Accepted: September 3 2015
