
Democracy and constituent power

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Abstract

Modern jurisprudence regards constituent power as the radical truth of modern democracy. The purpose of the study is to explore in systematized form the existing relation between both concepts of constituent power and democracy, bearing in mind the ideas of collective acts of self-regulation, popular sovereignty and their legitimation.

The thesis of the author is that democracy and constituent power are interchangeably linked. Democracy outlines conditions regarding the execution of the constituent power in a way to achieve democratic openness, while constituent power is a juristic expression of the democratic impulse, a mechanism that can be used if necessary, to modify the democratic government by changing the Constitution.

The study proposes a legal interpretation of the interaction between the democracy and constituent power, by concluding that the latter lays the foundations of the legal order, it is an expression of the will of the sovereign, therefore it can be understood as a radical truth of modern democracy.

Despite there are a lot of publications in Bulgaria analyzing in depth the concepts of constituent power and democracy, there are no significant legal studies exploring the relation between both concepts.

Despite democracy and constituent power are concepts vastly examined by the political science and sociology, the current paper limits its scope on the legal aspects of the interaction between them.

Key words: democracy, constituent power, popular sovereignty, self-regulation.

Introduction

In XX century, the majority of the legal science studies examine the concepts of constitutional power and democracy as often overlapping ones. This understanding of their nature is greatly due to the fact, that on one hand, the idea of the constituent power of the people denotes the right of the national community alone to determine the political forms of its existence (Bliznashki, 2019, p. 8). On the other hand, the concept of democracy is defined as the general will of the people, through which a certain legal order is created.

In this line of thought, the understanding of the legal nature of the concept democracy invariably requires to study its relations with the constituent power, both seen as collective acts of self-regulation, expressed by the common will of the people and resulting in the creation of certain legal norms.

Results and Discussion

Concept of democracy

The etymology of the term democracy is Greek. It is composed of the words “*δῆμος*” – people and “*κράτος*” – power, which literally can be translated as the power of the people, or in other words democracy. One the most quoted definitions of democracy is the one elaborated by the American president Abraham Lincoln in 1863, when he stated that “democracy is a government of the people, by the people and for the people” (Lincoln, 1863). Similar, but rather more punctual approach to

defining democracy is elaborated by Karl Popper, according to whom, it should be understood as a system of institutions that allows to be exercised a public control over the government, it also guarantees that the government can be changed by the will of the people, thus allowing them to carry out reforms without the use of violence, even if it is against the will of the governing (Popper, 1992, p. 12). Therefore, democracy does not reside entirely on the notion of people as the sovereign, but concludes that the power to rule resides with them.

Despite, democracy is a term studied in details by the political science, legal science does not pay the necessary attention to examine this concept. Nevertheless, one of the first legal definitions is presented by Thucydides, who concludes that democracy does not take into account the minority, but considers the interests of the majority, however all people have equal rights under the law (Thucydides, 1979, p. 125). Therefore, primarily democracy should be understood as the existence of a legal order, a hierarchy of legal norms, and only then it should be considered as a rule of the majority over a minority, political and social freedom (Radev, 2009, p. 11).

Hans Kelsen has a significant contribution to the understanding of the juridical nature of democracy. According to him, the democracy is a form of government in which law-making is not concentrated in a certain person or a group of people, rather it is decentralized in such a way that the governed themselves can make the decisions about the creation of the norms, which latter they should obey (Kelsen, 1955, pp. 3–4). Therefore, democracy cannot function if the people are not free to express and pursue their own political views, for the simple reason that governments cannot be changed by elections, unless the people are free to organize themselves and express their vote for a new government.

The Italian philosopher of law, Norberto Bobbio develops further Kelsen's idea, by pointing out that democracy should be perceived as a set of rules that establish who is authorized to make collective decisions, as well as prescribes the procedures for this decision-making. Therefore, in a narrow sense of view, democracy arises as a method for legitimizing and controlling the political decisions, or more precisely, for legitimizing and controlling the national and local "government", while the individual is considered only in his multiplicity of specific roles such as a believer, worker, student, soldier, consumer, patient, etc. (Bobbio, 1995, p. 4, 12).

The Bulgarian researcher Venelin Ganev also has a major contribution to the development of the legal concept of the nature of democracy. In his research, he considers that democracy should be analyzed from both factual and normative side. Therefore, democracy analyzed from its factual side, is a political regime, while examined from its normative side – it is a form of state government, where the most important political decisions are made by the people (i.e. the collectivistic element), along with public authority protection of a wide range of basic human rights in favor of the individual (i.e. the individualist element) (Ganev, 1946, p. 7).

Based on all these definitions, we can conclude that on one hand, all of them bring to the fore some of the basic principles of the modern democracy – representative government, electability of political representatives, political pluralism, political freedom, etc. On the other hand, they do certainly reveal the existing close relation between democracy and constituent power, to great extend visible in the common ideas that they share similarities regarding their legitimation, as well as their subject – the sovereign.

Democracy, constituent power and sovereign

Contemporary approaches to the study of democracy are significantly impacted by the concept of constituent power. A number of researchers agree that constituent power should be considered as the radical truth of modern democracy, as well as their origin is directly related to the idea popular sovereignty (Böckenforde, 1991, pp. 11–12; Arato, 1995, p. 202; Negri, 1999, p. 1). At the same time, the research should not overlook the fact that there is also a profound systematic and conceptual analogy between constituent power and democracy, insofar as both describe collective acts of self-regulation. Therefore, the understanding of popular sovereignty as a constituent power is an indication of the affirmation of one of the basic democratic value, namely self-government (Kalyvas, 2018, p. 87).

According to Emmanuel Joseph Sieyès, the nation is subject of the constituent power, therefore the nation is the sovereign, who by the creating of the Constitution is expressing its will. In his research, Sieyès states that the nation is the source of everything, its will is always lawful, in fact it is the law itself, therefore the nation is the ultimate source of political power. Based on this assumption, the Constitution is an expression of this will, therefore neither of the delegated powers (so-called constituted powers) can amend the terms and conditions of their own establishment. Hence, according to this, the constituent power rises above all the other powers. In other words, the unitary and indivisible constituent power encompasses within itself the foundations of all the other powers, as well as all the possible separation of powers (Bliznashki, 2009, p. 65).

Rather similar is the definition of the term democracy. According to Venelin Ganev, popular sovereignty is closely related to the social contract theory and aims to justify the rule of the people (Ganev, 1946), therefore, democracy is a government built on the general will of the people, similar to the constituent power that expresses the will of the sovereign. That is, what democracy and constituent power have in common is the sovereign perceived as *summa potestas superiorem non recognoscens* or the supreme command power (Steinberger, 2000, p. 511), an exclusive power that cannot be subjected to a lawful control exercised by other powers, as well as it cannot be invalidated by the actions of another human will (Grotius, 1925).

In its democratic form, the constituent power refers to the "power of the people" able to create a legal-political order without being bound by the normative constraints of the existing legal framework. However, at the same time, constituent power, in the situations when it can be executed outside the scope of the existing laws, can be read as an invitation to arbitrariness and abuse (Briedis, 2023, p. 396).

Constituent power and democratic legitimacy

According to Ernst-Wolfgang Böckenförde, considering its origin, the constituent power is a democratic and revolutionary concept (Böckenförde, 1991, pp. 11–12), therefore one of the strongest links between the latter and the democracy is rooted in the problem of their legitimation. In a democratic regime, the common feature of constituent power and democracy is legitimation, streaming from the fact that both legitimation of the basic law and the legitimation of the constituted powers depend on the degree of the citizen participation in the procedure for the creation of a Constitution. In this regard, the constituent will of the people is considered a basic democratic principle, according to which they establish their own form of government that should represent their interests and should create laws that aim to protect their rights and freedoms (Kalyvas, 2005, pp. 237–238).

In this line of thought, according to the modern interpretation of constituent power, elaborated by Andreas Kalyvas, it is defined as the radical truth of modern democracy; a truth that reveals the ideal for a popular self-government beyond the paradigm of state sovereignty. Only on the basis of the collective dimension of the foundations of the Constitution, one can distinguish between the legitimate constitution and the one forcefully and illegitimately imposed by the law. Elaborating on the eclectic interpretations of constituent power and democracy by Hannah Arendt and Carl Schmitt, A. Kalyvas perceives that the functions of the power are primarily an external tool for assessing the legitimacy of the constitutional frameworks (Kalyvas, 2005, p. 225).

Therefore, for A. Kalyvas, constituent power directly corresponds to the idea of democratic legitimacy, but it should be noted that his concept is focused primarily on the democratic origin of the Constitution, rather than the possibility of it being changed by democratic means. He also points out that in a democratic regime, the legitimacy of the basic norms and institutions depends on exactly how inclusive the citizen participation is in the constituent power (Kalyvas, 2005, p. 223).

In other words, constituent power is seen not only as an omnipotent and expansive principle capable of creating the constitutional norms of any legal system, but it is also the subject of this creation. From this point of view, the constituent power is identified with the very concept of politics in a democratic society. In order for the constituent power to be recognized as a constitutional and legal principle, it should not be perceived solely as the creation of constitutional norms and the

constitution of the constituent powers, but rather it should also be examined as a subject that regulates the democratic politics (Negri, 1999, p. 1).

Based on these conclusions, Antonio Negri states that constituent power is the force that creates the political life, it is the so called *potenza*, from which democracy evolves, because even if we accept the postulates of natural law, that people are born equal and free, law is the creator of the main features of democracy (Radev, 2009, p. 11). However, unlike many scientists, who focus on the question on how constituent power is absorbed by the established political order, Negri emphasizes on its permanence and absoluteness. According to him, the paradigm of constituent power is the force that destroys, disrupts, interrupts, puts out of balance any possible continuity.

Therefore, constituent power is closely related to the idea of democracy as absolute power. Thus, considered as a violent and expansive force, constituent power is a concept related to the social restructuring of the democratic totality (Negri, 1999, p. 11). In this regard, prof. Dimitar Radev points out that the democracy is a “respect for the laws”, but besides that there is no eternal democracy, that is why it is a subject to a continuous improvement (Radev, 2009, p. 15) – respectively, the democracy, as a constructed system of government is also a subject to change by the will, representing the constituent power.

Regardless of the fact, that by definition the constituent power is democratic, under certain conditions, its absolute and unlimited nature can put the democratic constitutionally established regime at risk. On the other hand, it should not be forgotten that the constituent power comes with a certain procedural limitation, namely, during the process of drafting a new constitution, this power is subordinated to the general will of the people, who will subsequently obey it. Therefore, taking into account this, we can conclude that the relationship between constituent power and democracy is rather obvious and can be expressed as follows: both democracy and constituent power require the participation of the citizens for the creation of the laws, including in relation to the Constitution.

In this regard, constituent power is a conceptual expression of the ideal of democratic openness, the ability of the people to create the laws that govern their political association and the ability to change their basic commitments in a democratic manner. Democratic self-government not only requires for the citizens to be active participants in the creation of the laws, but rather proclaims that the community of citizens, or the so-called *demos*, is the absolute sovereign.

Conclusions

In modern legal science, the study and analysis of the concept of democracy is inevitably associated with the concept of constituent power. On the one hand, the democracy sets the conditions so that constituent power is not absolutized and limited, which is a mandatory condition for achieving democratic openness. On the other hand, constituent power is a mechanism that, if necessary, can be used to modify the democracy as a form of government, by initiating changes in the Constitution. Therefore, the relationship between democracy and constituent power can be defined using the following formula – the democracy is the government of the people, by the people and for the people, but at the same time it is also under the control of the people (constituent power).

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