GENERAL CONSIDERATIONS REGARDING THE CONCEPT OF CONSTITUENT POWER

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Abstract:
Constituent power means the body that benefits from a special political authority, has the right to adopt the Constitution. At the basis of the written Constitution are a series of theories and practices that preceded it and were imposed along with ideas such as written contracts, the rule of law, the social contract, the educational rebate, the constitution, which raises the individual to the status of the citizen by knowing his rights. The study of the various constitutions shows us that, in order to ensure the supremacy of the constitution in the legal system, there has always been the problem of finding special forms called procedures for adoption..
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Constituent power is a modern concept that has its origins in medieval thought and establishes the people as a source of political authority. Power is an essentially social phenomenon:

a) it cannot be conceived outside society and can only be manifested through social relations

b) in the absence of power society is an inert body, it is unable to satisfy its raison d'être. It is a condition of social order and the rapprochement of the common ideal, and freedom and good are possible only in such an order. [1]

The purpose of power is, as the case may be, to ensure the stability of the relationship between the rulers and the governed or, on the contrary, to determine and maintain its tension and precariousness. [2]

The concept of constituent power derives from the Enlightenment revolutionary movements of the eighteenth century and consists in recognizing that the source of political authority comes from the will of the people and the acceptance of the idea that the fundamental law is a creation of the people. Thus, the constitution becomes a legal instrument, it is an expression of the constituent power of the people, to establish in various institutional ways the way in which it should be governed. [3]

According to the meaning of the constituent power, the powers created by the Constitution are multiple powers and fulfill a certain function, but within the limits conferred by the text of the constitution, which is elaborated by the constituent power. Thus, a constitution presupposes above all a constituent power. The constitutionalists saw the adoption of the constitution as a complex process, with profound socio-political and legal significance, in which they distinguished: [4]

We must specify that the fundamental law is not the work of a constituted power but of the constituent power. Therefore, the constituent power is the power to make the constitution, and the constituted powers are the powers created by the constitution.

Hegel stated that "the people must have a sense of their right and their state of affairs to their constitution, otherwise it may exist, it is true, externally but has no meaning or value" and each people has its constitution what suits him and what suits him. [5]

We consider it necessary to correlate the definition of the constituent power with the general definition of the constitution. One of the most successful definitions given to the constitution, in our opinion, is the one formulated by the doctrinaires Ioan Muraru and Simina Tănăsescu, according to which the constitution can be defined as the fundamental law of a state, consisting of legal norms invested with supreme legal force and regulating relations fundamental social issues that are essential for the establishment, maintenance and exercise of power. [6]

Of course, starting from this notion we try to formulate another definition of the constituent power according to which the constituent power represents the authority established by the holders of national sovereignty invested with the prerogatives of elaboration and power in force of the norms with supreme legal power that regulate indispensable fundamental social relations. [7] the process of establishing, maintaining and exercising state power. In the specialized doctrine there are two types of constituent power, namely original constituent power and established constituent power (derived). The original constituent power intervenes when there is no (situation of the newly emerged states) or there is still (as a result of revolutions) a constitution in force. The derived power is provided by the constitution in force (or by the previous one) both in terms of its organization and functioning. [8]

Regarding the difference between the original constituent power and the established constituent power, two major currents can be identified. The first current proposes a formal criterion of distinction, and the second current operates the distinction based on a material criterion. Although Sieyès is considered the father of the notion of constituent power, he did not make the distinction between the two types of power. This division is recent. Thus, it is estimated that for the first time this division of terms was systematized by Raymond Carré de Malberg. [9]

The constituent power, as the power of law, must not be imposed by force but by authority. The whole issue of the concept of constituent power and constituted powers due to Sieyès is based on the doctrine of natural law and contractual theories. The derived constituent power, as stated by Prof. I. Deleanu, is a power dependent on the pre-established constitutional regulations, their overcoming being the fraud of the constitution. [10]

Regarding the issue of the limits of the constituent power, both of the original constituent power and of the derived constituent power, some clarifications are required. In the case of the original constituent power, we consider that it is an unlimited power as long as it has the competence to establish a new constitution, so it does not bear any limit because otherwise it would not be absolute and unconditional sovereign.

By its definition, it is emphasized that it is not subject to any pre-established rules or limits. Over time there have been opinions and theories that have taken into account the fact that there are intrinsic limits of constituent power. These were explained by:

- the limitation of the constituent power as a result of some principles of natural law, as a result of a system of values;
- limitation of the constituent power by norms of constitutional law.

Derived constituent power is a power limited, first of all, by the procedural conditions that must be met for its exercise. Considering the fact that these conditions are included in the fundamental law, it is considered mandatory. Therefore, through the text of the fundamental law, the limitation of powers is achieved.

Regarding the possession of power, we must specify that history knows innumerable situations by which the absolute power was held by a single holder, whether we are talking about a king, a prince or an emperor. According to theocratic theories, he

legitimizes his authority as being of divine origin: all power belongs to God and he invests a king with absolute power, thus legitimizing his power as "God's anointed on earth." Theocratic theories have evolved and even if they do not change radically they have a new approach: power belongs to the divinity but it does not directly choose the holder of power but people are those who do, and this choice is led by divinity. [11]

John Locke, a follower of the school of natural law, in his Essay on the Social Contract, tries to find an answer to the legitimacy of power: naturally. It is a state of complete freedom, a state in which without asking someone's permission and without depending on the will of another person they can do whatever they want and can dispose of their own goods and persons as they wish provided they respect the law of nature. [12]

The subordination of government to the ruled is one of the most important ideas we find in John Locke's essay. According to Locke's theory, man renounces his state of natural freedom in favor of the freedom which the community confers on him. The entire legislative power is delegated by individuals to Parliament and then they submit to its supreme will. [13] Although parliament is the supreme power in the state, in John Locke's opinion people have the right to remove or change the legislature when it no longer corresponds to their will. "The majority, having all the natural power of the community over the people united for the first time in society, can use this power to make laws, from time to time, for the community and to enforce them through the officials it appoints, and then the form governance is a perfect democracy." [14]

The analysis of this text shows that when power is given by the majority to the legislature for a limited period, when it ends its sovereign power belongs to society.
Thomas Hobbes, analyzing the social and political evolution of English society up to that point, stated that everything is the result of the social contract as a result of the voluntary convention between people. By associating, the people created the state as a necessary tool for the better satisfaction of the individual interests of each of the members of the civil community. This is the only reason why people have agreed to end the social contract. Thomas Hobbes states that the emergence of the state started from the "natural state", but the natural state of the people is one of war and not of peaceful coexistence (bellum omnium contra omnes), and in order to live people must submit to systems of government. "The only way to establish a common power to protect people from the invasion of aliens

and the blows against each other," Hobbes writes, "is to give all their power and strength to one man or a gathering of people who can reduce all wills to one by plurality of votes." [15]

The novelty that Hobbes brings in political theory consists in the democratic establishment of an absolute sovereignty, and the principle underlying the social contract is that everyone willingly agrees to abandon their own natural freedom in favor of the state. [16] In Hobbes' view, the state becomes the one that enacts the norms of good and justice. This absolute power has legitimacy only in that it guarantees individual security as a natural right. In Thomas Hobbes' conception, there are two contracts: the one by which individuals associate with each other and the one by which they transmit all the rights of the sovereign, and the sovereign is what in doctrine is called Hobbes's double contract theory. [17]

Jean Jacques Rousseau, in his analysis of his work The Social Contract, states that in civil society people were in their natural state free and equal, forming society by a voluntary act and denying divine intervention in establishing this natural subordination between people. as Catholic thinkers argue. "Since force does not give rise to any right, and since no man has natural authority over his fellow man, it follows that the basis of any legitimate authority among men can only be the convention." [18] Rousseau proposes a model of society in which each individual and his property are protected and guaranteed full freedom. "To find a form of society that defends and protects with all the common force the person and the goods of each associate in which each of them, uniting with all, still listens only to himself and remains more and more free as before. This is the fundamental problem whose solution is the social contract." [19]

The real purpose of the social contract is to ensure freedom. Natural freedom is alienated in order to obtain a conventional freedom in return. Every individual gains from this because natural freedom is not guaranteed, while conventional freedom is protected by contract. The first effect of the social contract is the creation of a collective body - the people, and the shaping of a unique collective will that gives it strength. As Rousseau pointed out, the social pact gives existence and life to the political body and through legislation movement and will. In Rousseau's theory there is no legitimate power and legitimacy without the people's exercise of their sovereign right. It should be noted that

one cannot speak of the conceptualization of the term constituent power in JJ Rousseau, Th. Hobbes and J. Locke, because their theories on the social contract do not know the distinction between the ordinary legislative power and the constituent legislative function that a Constituent Assembly would have. We also mention the indissoluble link that exists between the concept of constituent power and the principle of supremacy of the constitution. The principle of the supremacy of the constitution over ordinary laws lies in the fact that it comes from a supreme sovereign will. So, the constituted powers and their acts are created by the constitution and they must be in accordance with the constitution. In Rousseau's theory there is no higher power that is above legislative power. People are the ones who by common agreement establish their rules of social coexistence. [20]

Although Sieyès was the first to conceptualize the term constituent power in the European area, in 1787, a year earlier, in the United States this concept had already materialized in the constitution adopted following the Philadelphia Convention. [21]

The idea of a written constitution that came from a sovereign will of the people was theoretically based on the ideas of American federalists, who based their documentation on contractualist theories and Montesquieu's conception of the separation of the three powers in the state. By Sieyès, there was already a modern, democratic constitution in the United States for those times, in which it was the will of the people that imposed a new form of government. Invoking the majority of the constituent power, James Madison stated that the states legally represented in Congress had the authority to represent the interests of the people and then, by ratifying the Constitution, which is subsequent to its adoption, its legitimacy was obtained in terms of constituent power. As Madison said, if this had not happened and the states had not ratified the Constitution, it would have remained a "simple written paper" signed and approved by those whose interests promote and protect them. Although the people become the holder of sovereign power, it cannot manifest itself in absolute freedom, they must submit to limits and these limits are primarily those imposed by delegating power to certain representative bodies and the limits imposed on them by the constitutional text itself. The purpose of these limits is to prevent irresponsible changes in the will of the people. [22]

In 1789 the National (Constituent) Assembly of France adopted the Declaration of the Rights of Man and of the Citizen, which became the preamble to the constitutional

text of 1791, and in 1793 a new Declaration was adopted which became the preamble to the constitution and is not limited to recognition of the right to resist oppression but enshrines the right of the people to revolt when the government violates their rights. With this right, the idea emerged that the constituent power is unlimited and cannot be defeated by certain rules of social organization because it has the power to overthrow one form of government and establish another that corresponds to the will of the people. By granting a constitution, the people manifest both their freedom and its guarantee through constitutional provisions. [23]

Carl Schmitt argues that even when constitutions have a limited term of existence when they lose their legitimacy or when significant social events take place, they disappear and are replaced by others. Constituent power cannot disappear and cannot be eliminated, it is perpetual and does not lose its substance once it has created a constitution. [24]

Conclusions

The constituent power is the body that benefits from a special authority that has the right to adopt the constitution. The supremacy of the constitution lies in the fact that the fundamental law is the foundation of the state organization, the legal basis of the entire legislation.

The control of the constitutionality of the laws is one of the legal guarantees of the supremacy of the constitution. The constitutional order is dynamic and the analysis of the concept of constituent power must exceed the limits of its understanding as an existential unit prior to the formation of the constitution, being necessary to focus on an understanding of it related to the relationship between emanates this authority.

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