The Aporias of constitutionalism: The question of constituent power and democracy

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Abstract

This article discusses the paradox between democracy and constitution. It emphasizes to think constitutional amendment as a political problem not only a juridical issue. It first highlights some approaches to the problem of constitutional amendment such as proceduralism and substantialism and then criticizes them ignoring the fundamental political or participatory dimension of a constitution. Both of them ignore especially the problem of founding political subject that is important for the legitimacy of the constitutional amendment. In this regard, it suggests that it is essential to bridge the gap between democracy, political subject and constitution. One of the main claims of this paper is that only the constitution which is the work of a constituent power may have the potential to prevent the constitutional and political crises. Only the constitution as the work of a popular will or constituent power can be named “democratic”. Democratic constitutionalism can be seen as the embodiment or figuration of constituent power not as its limitation. It is the institutionalization and normalization rather than the negation of the popular constituent will.

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Keywords: Constitution, democracy, constituent power, popular will

1. Introduction

One of the most important political-legal problems in constitutional theory is the issue that how can a constitution be amended. This problem is even more important issue in recent years. As indicated by Martin Loughlin and Neil Walker, “a variety of global trends invite a close examination of the idea of a constitutional order… These trends include: the short lived triumph… of liberal democracy at the end of the Cold War and subsequent revival of ethnic and otherwise exclusionary forms of nationalism; the nurturing of a more localized politics of identity leading to the formation of political communities below the level of the nation-state; and, because of the globalization of capital, trade, labor, and communications, the emergence of supranational and transnational governmental agencies and 'governance networks' that invite increasingly insistent calls for their constitutionalization” (Loughlin and Walker, 2007, s. 1).

On the other hand constitutional amendment or new constitution-making processes, often discussed in terms of the constitution technique, is considered to be a legal problem. However, the formation of the constitutional order, as indicated in modern political theory, requires the presence of political subject. This situation cannot be addressed from the perspective of the constitution-making processes; it is also required the political-philosophical approach beyond the limits of the constitutional order. While some of the constitutionalist approaches restrict the question of constituent power to the substantialist contents of constitutional rules, the others reduces the construction of the
constitution to the procedural rules. Both approaches ignore the democratic and the political character of a constitution and refer constituent power of demos as the object of an assumption or reference. With the disconnection from the activities of political subjectivities constitutions undermine their own distinction of being dynamic texts. At the same time this means that the constitution conflicts with democracy and restricts on democratic processes. To cease to be a contradictory concept of constitutional democracy, the subject of constituent power needs to be grasped as a political subject not a juridical concept. In this article we focus on the paradoxes of the democratic idea of constitutionalism, as well as how to install a strong correlation between the constituent power as a political subject and constitution.

2. The Democratic Nature of a Constitution

There are the different types of answers given to the question of constituent power in contemporary constitutional and political theory. Loughlin and Walker collect these answers in four categories: “(i) the juridical containment thesis, whereby constituent power is exhausted by and absorbed within the settled constitutional form, as, for example, in much contemporary liberal theory based on contractarian assumptions (e.g. Rawls); (ii) the co-originality and mutual articulation thesis, whereby the legally constituted power of the polity operates in productive tension with a continuing background commitment to popular sovereignty (e.g. Habermas); (iii) the radical potential thesis, whereby constituent power is neither colonized by nor in symbiosis with the legal, but remains a latent revolutionary possibility which lies behind and shadows the legally constituted authority of the polity (e.g. Negri); and (iv) the irresolution thesis, which rejects the first two forms of accommodation, but also dismisses the possibility of isolating the radical potential of constituent power from the constituted forms of sovereign power, and instead views constituent power as an irreducible supplement which irritates and challenges rather than transcends the specific form of constituted power (e.g. Benjamin, Agamben)” (Loughlin and Walker, 2007, s. 6-7).

Last two types of answers focuses much more on the revolutionary and intersubjective character of constituent power. But these two aspects of constituent power appear often in a nested. According to the Andreas Kalyvas, the term constitüere, to constitute, “is a combination of the prefix con- and I the verb statuere. The prefix con- has numerous grammatical meanings, one of which is ‘with’ or ‘together.’ The verb statuere on the other hand, comes directly from statüo, which means to cause to stand, to set up, to construct, to put, to place, to erect. The word constitüere, therefore, literally denotes the act of founding together, founding in concert, or creating jointly” (Kalyvas, 2005, s. 235). Political philosopher Hannah Arendt’s formulation about the political identity of a society supports Kalyvas’ literal definition of a constitution. For Arendt in the collective legislative moment of a new constitutional order, contrary to the paradigm of sovereign command, “the constituent power carries its own principles within itself, instead of being subsumed by external norms” (Kalyvas, 2005, s. 235). These implicit presuppositions are: symmetry, autonomy, equality, mutuality, disagreement, discussion and inclusiveness. This means that constitution owes its existence to the collective, intersubjective and impersonal attributes of a constituent power.

As pointed out by Kalyvas, Arendt is aware the paradoxes of the concept of constituent power. On the one hand “extraordinary politics is synonymous with the originating power of establishing the man-made public space”, on the other hand it is “confronted with the problem of … extra-political source of authority, beyond the people themselves, is usually summoned to justify the institution of society” (Kalyvas, 2008, 197). As a result of this there emerges a deeper conflict between freedom and authority, contingency and determinism.

3. From Constituted Power to Constituent Power

The most important crucial problem in this regard is that after the construction of a constitution, is the subject (constituent power) still there or should be still there? For the conventional constitutional thinking, the constituent power is a fiction, a hypothetical presupposition and a mere allegory or useful metaphor in a fable of foundations. For example, according to Hans Kelsen’s Pure Theory of Law, it did’nt matter how and when a constitutional democracy is created or by whom. Also, Jürgen Habermas’ constitutional theory rejects an extra-legal political
source of a constitution (Habermas, 1992). “Constitutional power is bound by the formal conditions essential for the constitution of a legal order that can produce legitimate law” (Nickel, 2005, s. 156). Habermas attempts to reconcile the principle of popular sovereignty and the concept of individual liberties. In Habermas’ legal theory, “legal form (with its liberties of autonomous private individuals) and the mechanism for producing legitimate law are co-originally constituted” (Nickel, 2005, s. 152). For this purpose, Habermas defines the form of catalogue of rights. A catalogue of rights means that every citizen must confer one another if they want to legitimately regulate their interactions and life contexts by means of positive laws. In this regard, as Nickel (2005) said that “the thrust of Habermas’ theory is counter-factual: a group of people, a society may establish an order but it does not constitutional or legal order that deserves recognition if it neglects the conditions that are spelled out in the system of rights” (s.158). Habermas’ constitutional theory absorbs the source of legitimate authority or constitutional order-the constituent power- into the system of rights that can be justified via discourse in a pre-political context.

Ronald Dworkin’s constitutionalist theory repeats Habermas’ institutionalist, substantialist and proceduralist type of constituent power in another style. He believed that “democratic credentials of a country’s fundamental laws depend not on when or by whom these laws are made, but on their content” (Dworkin, 1990, s. 327). For Dworkin, democracy is really about abstract and universal rights not the popular will. This results in a low-intensity democracy and repressing the question of legitimacy of the constitution. This indicates “the rejection of ideal of democracy at the fundamental laws, of making irrelevant popular participation in the positing and repositing of the norms that govern the state” (Colôn-Rios, 2008, s. 18). We can say that these approaches ignore constituent power or democracy as a moment in the life of a constitutional regime: the moment in which citizens come together to effect important constitutional transformations. Colôn-Rios criticizes these approaches for their conception of constitutional supremacy: because of the sovereignty of constitution than of the sovereignty of the people (Colôn-Rios, 2008, s. 120).

Is it possible democracy at the level of fundamental law? This question requires understanding constituent power of demos as an active agent of a constitutional change. For this reason, democratic constitutionalism necessitates an understanding of constituent power not as a threat to the order of law but as the possibility of correcting existing injustices. Democratic constitutionalism based on the active participation of demos indicates “a process in which citizens are allowed to propose, to deliberate and decide on the content of their constitution through an extraordinary body such as a constituent assembly triggered from below” (Colôn-Rios, 2008, s. 5). Democratic constitutionalism presupposes a political terrain that is never closed and so a constitution that is never finished. As Sheldon Wolin said that democracy includes the moment of democracy as episodically dictating the content of a constitution and as representative of a moment in the life of a polity (Wolin, 1999, s. 55). “Democracy is not exercised in accordance with certain pre-established procedures or limited principles already sedimented in the constitution” (Colôn-Rios, 2008, s. 99).

4. Conclusion

Democratic constitutionalism can be seen as the embodiment or figuration of constituent power not as its limitation; “as the institutionalization and normalization rather than the negation of the popular constituent will” (Kalyvas, 2008, s. 136). For most of the constitutionalist thinkers, a constitution signifies a set of limitations imposed on the political or the constituent power of demos in favor of the apolitical individual liberties. But this approach may not exceed the problem of democratic legitimacy because of the repressing democratic features of a constitution. The constituent power is the one “who has the power and the authority to take a concrete total decision on the type and form of the political existence…to determine the existence of a political unity in its entirety” (Kalyvas, 2000, s. 349). In this regard a constitution is democratic only when it is directly derived from the direct and immediate expression of the constituent power of the sovereign will.
References