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THE RELATIONSHIP BETWEEN CONSTITUENT POWER AND NATIONAL SOVEREIGNTY. SOME THEORETICAL CONSIDERATIONS

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Abstract *Constituent power is the base of modern democracy, for two main reasons, a historical and analytical one. First, the birth of the modern doctrine of popular sovereignty coincides with the conceptual advent of constituent power. From a historical point of view then, constituent power and modern democracy are intrinsically associated from their beginnings in the idiom of popular sovereignty. Secondly, there is a profound systematic and conceptual analogy between constituent power and democracy, insofar as they both describe collective acts of self-legislation and public events of self-alteration. From this elective affinity, democratic constituent politics evokes the principle of liberty as political autonomy, whereby the members of a collectivity deliberately constitute the political forms of authority in order to organize and institutionalize their common life. The addressees of the law become its authors. Hence, formulating popular sovereignty as constituent power is to affirm the basic democratic value of self-government*[1].

Key words:
Constituent power, popular sovereignty, modern democracy, self-legislation, basic democratic value of self-government, the people

1. Outlining the notions

Constituent power is generally defined as the power that has the right to adopt or amend a constitution. Both recipient and direct beneficiary of the provisions enshrined in the constitution is *the people*. Given that the people is the sole beneficiary of the fundamental law, and that this law defends and lay down the fundamental rights and freedoms, it is natural for the entire content of the constitutional text to match its sovereign will, because only in this way we can talk about the "strengthen" of the social contract between the governed and the governors, therefore the rules are established with the consent of those who are led, excluding the distrust of the individual that alienates its share of sovereignty.

Thus, we can say that the constituent power belongs to the *sovereign people*, the only one who has the legitimate ability to grant a constitution. Therefore, *state power* is legitimate if the sovereign power resides in the people. Due to its sovereignty, the people are entitled to take any decision, to determine the nature of the political system and the form of the government or state structure[2]. Similarly, the Constitution - established by the will of the people who invested a Constituent Assembly with the power to create a constitution that would represent their interests -, also contains the provisions and the limits to exercise the derived constituent power. Derived constituent power, as prof. Ion Deleanu says is derived because "its structure and limits are set by a previous constitution. (...) It [the constituent power] is therefore a constitutional power predetermined by constitutional rules in terms of its structure and powers: the power to review. Overcoming these powers is a fraud on the Constitution, because, in reality, under the pretext of the reviewing, the original constituent power substitutes itself to the derived constituent power"[3]. The derived constituent power is legitimate because is expressly stated in the constitutional provisions.

Art. 2 paragraph (1) of the Romanian Constitution states: "(1) The national sovereignty shall reside within the Romanian people, that shall exercise it by means of their representative bodies, resulting from free, periodical and fair elections, as well as by referendum". As we can observe the constitutional provisions establish an inextricable link between sovereign and people. Notions as *popular sovereignty*, *national sovereignty* and *state sovereignty* define the very existence of the State, only *he* has the freedom to decide its internal and external[4] rights, obviously in the limits imposed by the constitutional text.

Furthermore, we need to establish a conceptual clarification between the notions of *popular sovereignty*, *national sovereignty* and *state sovereignty*, as it was done in doctrine[5]:

A. *Popular sovereignty* means the people's right to decide its fate, to establish the political line of the state and the structure of the authorities that control their activities;

B. *National sovereignty* is based on the sociological idea of *nation*[6] considered to be a moral person who has a will of its own, distinct from the individuals who

compose it at a precise moment, this will is expressed by nation representatives designated in accordance with the procedures upon they had agreed.

C. *State sovereignty* is a general feature of state power, therefore supremacy and independence of government is the will of the whole society.

However, we find extremely interesting the role that is assigned to the people within this paragraph (art. 2 paragraph 2), sovereignty is exercised through "free, periodical and fair elections", thus is postulated the people's right to decide its fate, to establish the political line of the state and structure of authority and to control its activity, even if it means to sanction it at new elections. Another form of manifestation of the people's will is *the referendum*, and it is clearly the most effective and direct feedback of the popular will. Retaining *referendum* as a means of direct participation of the people in exercising state power, the Constituent legislator reaffirms the people the statue of constituent power holder. The constitutional amendment should take into account the existing procedural rules defined in the text of the Constitution[7], even if we are referring to referendum as a way of approving the revision of constitutional texts by the people.

Popular sovereignty resides from "the equal shares of sovereignty which belong to each citizen, from every molecule that enters into the notion of the people, as a whole. In other words, every citizen is a registered keeper of a share of sovereignty and the sovereignty of the people is the sum of all individual wills. Government is entrusted, by suffrage, not sovereignty – because it is inalienable, but its exercise"[8]. Thus, given the close link between the concept of people sovereignty and constituent power, it is important to determine the content of sovereignty and its limitations, in this regard, prof. Ion Deleanu's definition seems comprehensive "sovereignty is a feature of state power that allows it to decide in all internal and external state affairs, without any interference, respecting the sovereignty of other states and all the generally-accepted international law principles. Therefore sovereignty involves the conjugation of two components: the supremacy of state power and the independence of that power.[9]"

However, according to prof. Maurice Hauriou[10], among other types of sovereignty, we can talk about institutional sovereignty and the sovereignty of the political will of the people. These two are not incompatible; they find themselves a complementary relationship. Institutional sovereignty implies the political will of each political institution, which in principle must not be in conflict with the sovereign will of the people. The institutional sovereignty means achieving the objectives determined by the formation of the political will of the people, to be the expression of the sovereign will of the people, laws and, in general, all the decisions that the direct and indirect representatives of the people (government and public administration) take due to their mandate, the people can express itself through formal, legal procedures upon the legitimacy and appropriateness.

The concepts of sovereignty and constituent power are closely linked to the idea of democratic regime, they are the structural pillars of democracy, the State organization is design by those who hold power management and it is conceived by the people through a sincere choice made on the basis of universal suffrage. In this regard, identifying the holder of sovereignty, prof. Paul Negulescu states: "The nation that underpins democratic edifice is, as texts say, the one who exercise sovereignty; all powers emanate from her. But the organized nation expresses its will? The Nation is represented by electorate. But who is the electorate? They are representatives, deputies and senators. In other words, the governed create the govern; they give the electorate a lower or higher content, they extend or restrict the right to vote in various categories of citizens by their good will. (...) The Constitution is the organizing state law, but the State is a form of artificial legal enveloping of the concrete reality that is human society, it needs altogether: family relationships, economic, religious, social dimensions to give it unity and consistency. The State is not how the legal framework in which develops the society, but also its individuals and institutions. (...) In other words, to legitimize the power of the governors the law established that the manifestations of their will are the expressions of the will of the State. This will supposedly is called the State Sovereignty. This will shall be supreme, there is no another will to command the State. So sovereignty appears as a quality that gives the holder the right to control and not be controlled [11]". In this regard, the State, the holder of sovereignty has a character of perpetuity, and it's acts have a permanent character, even if there is succession of generations, even if the nation, a body was in perpetual development, changes its configuration and its chooses other governments over time. Analyzing this situation, prof. Paul Negulescu trying to answer one of the most important issues of public law, *the legitimation of power*, states: "when, in a country, a group of people, social class try by force to seize power, it must keep all this dominion by force. The governors seek to transform this government, a government gain only by force, into a government of entitlements willingly accepted by the government. Because for legitimizing the power the people must believe in the legality, the legitimacy of government."

The dynamics of European integration has generated a new situation on the reception by European law by states, especially regarding its priority

application, so for this study we will consider as a representative example the situation of the Romanian state, where the European legal order has a 'supra-constitutional" value as the treaties are superior to domestic law[12], considering whether we can speak of interference of European law over domestic law and about *injuring* the national sovereignty.

2. Different forms of derived constituent power

The Constitution amendment in 2003 aimed, among others, at the creation of a constitutional framework on the implementation process of EU integration and accession to NATO, and also the adequacy of some regulatory principles of NATO. According to the Explanatory Memorandum of Law no. 429 from 23 October 2003 amending the Constitution of Romania: Romania's integration in the contemporary structures of Euro-Atlantic democracies will provide a new perspective on the country's economic, social and cultural future. The revision of the Constitution is an expression of historical necessity, a characteristic evolution in contemporary democracies, as important as the great moments that have marked the society and the modern state: Romania's independence, the reunification, and the integration of our state in the security of large modern democracies[13]. Accordingly, the main objective of the constitutional revision is to ensure the constitutional basis for achieving EU integration. It is an endpoint for both the procedure and the competence of the legislative power and it implies important constitutional consequences, for this purpose, relevant to this study are the newly introduced constitutional provisions, already EU law principles recognized such as preemption of the European law on internal legislation and the priority of the international human rights regulations.

The obvious question arising is whether this way is impaired in any way the national sovereignty, and if the Constitution - the expression of the sovereign will of the people – still represents the ideals and the values of the people, and if, after this amendment, the derived constituent power respected the legal limits imposed by the constitution?

Art. 20 paragraph (2) of the Constitution states that if there is a conflict between the covenants and international treaties on fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence unless the Constitution or laws comprise more favorable constitutional provisions. Art. 11 of the Constitution contains several provisions important to the Romanian state, the state pledges to fulfill as such and in good faith "the obligations deriving from the treaties it is a party", thus "Constituent Assembly expressed itself through the latin principle *pacta sunt servanda*"[14] therefore, we must take into consideration that the treaties that were signed or ratified by the state, are by law, part of the domestic law.

Art. 148 of the Constitution creates the necessary accession to the constituent treaties of the Union, consecrating, on one hand, the transfer of competences to the EU institutions and, on the other hand, the joint exercise of the competences laid down in the Treaties with the other Member States. Paragraph. (2) enforces the EU provisions and overrides those contrary to the European law, according to the Act of Accession. Paragraph. (3) confreres the amending acts the European Union constituent treaties the same characters, an important example is the situation of the Lisbon Treaty. The Constitutional provisions through paragraphs. (4) and (5) state that the Government, the judicial authority and the President have the obligation to enact all the duties undertaken by the Act of Accession and to ensure the priority of EU law over national law.

A particularly important explanation is found in the content of paragraph. (1) of Art. 148 which states: Romania's accession to the constituent treaties of the European Union, in order to transfer some powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in *the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators* - this provision outlines the special situation that is required by an international act on the transfer of powers to the European Union, thus the constituent legislature imposed this special condition in order to avoid a transfer of powers to the detriment of national sovereignty. In this respect, as stated by Prof. Ion Deleanu "transfer of power in favor of European Union institutions does not mean the transfer of a share of sovereignty, on the contrary, it represents a manifestation of sovereignty through self limitation in matters of state power"[15]. Likewise, for utmost importance is the Decision. 148/2003 of the Romanian Constitutional Court ruling on issues relating to the relativization of sovereignty, the Court states: "in the current era of globalization the issues regarding: humanity, interstate developments, worldwide inter-communication, the concept of national sovereignty can no longer be conceived as absolute and indivisible without taking an unacceptable risk of isolation. However, the Court notes that, because the desire for accession to the Euro-Atlantic structures is legitimated by the national interests of the country, sovereignty can not be opposed to the goal of accession". Furthermore, the Court makes an analysis of the concept of sovereignty in relation to art. 148 (in revised form): state

sovereignty "as a feature of its peremptory, does not fall under Art. 148 (article. 152 revised – n.a.) provisions of the Constitution, which sets limits to the constitutional revision, but, instead, is regarding the independence of the Romanian state. Independence is an intrinsic dimension of national sovereignty, even if it is independently established in the Constitution. Essentially, the independence is the outside dimension of national sovereignty, giving full freedom of expression to the state in its international relations[16]. In this respect it is clear that joining the Euro-Atlantic structures represent the independent expression of the will of the Romanian state, and it is not a manifestation of will imposed by an entity outside the state. From this point of view, the Court finds that the inclusion of the two new articles in the Constitution - Art. 145^1 (art. 148 revised - na) and 145^2 (art. 148 revised - na) – are not a violation of constitutional provisions regarding the limitations of the amending. On the other hand, the Court also finds that joining the European Union, once performed, involves a series of consequences of constitutional type which might occur without proper regulation. The first of these consequences should be the integration of the acquis communautaire into national law and to determine the relationship between community provisions and national law. The solution proposed by the authors of the review initiative envisages the implementation of Community law in the national legal system and setting priority application of Community law over the provisions of the national laws in accordance with the provisions established by the Act of Accession. The result of accession is that the EU Member States agreed to situate the acquis communautaire - EU constitutive treaties and regulations - in an intermediate position between the Constitution and other laws when it comes to mandatory European legislation. The Constitutional Court finds that the provision contained in art. 145^1 does not invalidate the constitutional provisions referring to the revision limits or other provisions stated in the Basic Law, it is a particular application of the provisions of the current art. 11 paragraph. (2) of the Constitution, which states that treaties ratified by Parliament, by law, are part of national law. Considering all these aspects, it is clear that the accession to the EU and Euro-Atlantic structures was achieved in accordance to the independent expression of will of the Romanian people, without violating any provision regarding amendment limits. Furthermore, we must take into consideration the international political and economic situation and also the principles of international law, therefore we outline the principle of sovereign equality of states; however, we must keep in mind that the "*national state* is an element in the international system and, as such, *he* must accept all the incumbent servitude necessarily, as a part of a whole. So the only beneficial solution is *independence* in *independence*, and *national sovereignty* in a sovereignty system"[17]. Sovereignty, as seen today, is quite different than it was in the past, therefore we can talk about a diachronic development of this concept. Sovereignty finds itself an independent relationship with other sovereignties, proving this way adaptability from the European integration perspective.

3. Conclusions

Early modern political theory assumed the relevance of these questions for legitimacy of law and politics. One set of classical guidelines came in the form of the social contract theories. But contractarianism did not address the specific sub-questions of the *institutional* origin and authorship of the first rule and first author; neither did it ask about the relevance of the original authorship and choice for the established legal and political regime. An important attempt to address these sub-questions assumes the shape of the theory of the constituent power. In its classical 18th century expositions (Abbe Sieyes, The Federalists, deep differences between them notwithstanding), the constituent power is presented as the source of the constitution (the constitution-making power). The constitution is the first and highest juridical norm, the rule of recognition for the whole legal and political system. It follows that the constituent power is not 'merely' about writing and enacting a constitution. Rather, it is a power that establishes political community, by creating and institutionalizing its members (citizenship), the relationships among members (basic rights), and political authority bound by the requirements of constitutionalism (the 'constituted power').

Theories of the constituent power rest on a difficult to comprehend dualism between the original power and the constituted powers: they often assume that the constituent power remains beyond the limits of the established constitutional democracy. While they typically hold that the bearer of this original power is the people (nation) as a pre-legal category, constitutionalism sees the people as the legally established and constrained entity. This leads to the problem of the circular reasoning ('the paradox of the constituent power'): the ultimate author of the constitution is the constitutional creation. The analysis of the concept of *sovereignty* in relation to the *constituent power* brings a new perspective on the evolution of these two concepts, which over time provide new ways to describe the social-historical realities.

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[2] *C. Ionescu*, Tratat de drept constituţional contemporan, 2nd ed., C.H. Beck Publishing House, Bucharest, p. 326.
[3] *I. Deleanu*, Instituţii şi proceduri constituţionale, C.H. Beck Publishing House, Bucharest, p. 223.
[4] *E.S. Tănăsescu*, în *I. Muraru, E.S. Tănăsescu*, Constituţia României. Comentariu pe articole, C.H. Beck Publishing House, Bucharest, p. 21.
[5] *I. Muraru, E.S. Tănăsescu*, Drept constituţional şi instituţii politice, 14 ed., vol. II, C.H. Beck Publishing House, Bucharest, p. 45.
[6] The nation, as prof. I. Deleanu states, quoting J. Giquel, incorporates the past, the present and the future, not only the sum of all those who live on a territory. Deleanu, I. (2006). Instituţii şi procedure constituţionale, C.H. Beck Publishing House, Bucharest, p. 373.
[7] *E.S. Tănăsescu*, în *I. Muraru, E.S. Tănăsescu*, Constituţia României. Comentariu pe articole, C.H. Beck Publishing House, Bucharest, p. 1452.
[8] *I. Deleanu*, Instituţii şi proceduri constituţionale, C.H. Beck Publishing House, Bucharest, p. 372.
[9] *I. Deleanu*, Instituţii şi proceduri constituţionale, C.H. Beck Publishing House, Bucharest, p. 376.
[10] *M. Hauriou*, Precis de droit constitutioneel, Recueil Sirey, Paris, pp. 285-297.
[11] *P. Negulescu*, Principiile fundamentale ale Constituţiunei din 27 februarie 1938, Atelierele Zanet Corlăţeanu, Bucureşti, 1939, p. 22, 48, 49.
[12] *R. Schutze*, Dreptul constituţional al Uniunii Europene, Ed. Universitară, p. 176-220.
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[15] *I. Deleanu*, Instituţii şi proceduri constituţionale, C.H. Beck Publishing House, Bucharest, p. 378, nota 4.
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[17] *I. Deleanu*, Instituţii şi proceduri constituţionale, C.H. Beck Publishing House, Bucharest, p. 376.