

CONSTITUENT POWER IN CONSTITUTIONAL DEVELOPMENT AND PUBLIC COMMUNICATION: COMPARATIVE ASPECTS OF CONSTITUTIONAL CHANGE**

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The subject. This article identifies the nature and origins of constituent power. It reveals the communicative character of constituent power together with the need to engage citizens, experts, and civil society institutions in the democratic constitution-making process. The historical, social, and legal foundations of generative public power are examined through the lens of legal and constitutional arrangements in France and Russia. This analysis further explains the basic theory of constituent constitutionalism and the fate of constituent assembly in Russia alongside international debate on the design and deployment of constituent power in modern democratic states.

The aim of the article is to explore the theoretical foundations and history of the constituent assembly and constituent constitutionalism in Russia, as well as the international debate on the purpose and active use of constituent power in modern democratic states.

Methodology. The article used hermeneutic and epistemological approaches, methods of formal-legal, concrete-historical, comparative constitutional-legal and complex analysis.

Main results, scope of application. The author explores the problem of people's power as the source of constituent power, the origins of the word and notion Constituent, the Abbé Sieyès's role in the conceptualisation of constituent power, and the function of national constituent assembly during the period of revolutionary constitutionalism in France and the three Russian revolutions of the early 20th century. Originating from the constitutional experience of the French Revolution, the word Constituent takes on a broader meaning to describe an institutional exercise of constituent power. This concise term has been used ever since for various types of citizens' assemblies empowered to draft and adopt constitutions (constitutional conventions, constituent assemblies, constitutional assemblies, and other popular assemblies with constituent authority). This foreign word entered common usage in Russian due to the dominance of French among the emperor's court and elites back in the 19th century. Both scholarly works and dictionaries of foreign words demonstrate that it became part of the Russian language at the turn of the 20th century.

Conclusions. The first quarter of the 21st century is marked by a critical rethinking of liberal constitutionalism throughout Western Europe and the United States on the one hand. But, on the other hand, there is ongoing discussion of prospects for creating a polycentric model of constitutionalism and expanding the social basis of constituent power with the help of citizens' assemblies and mini-publics as well as instruments of deliberative constitution making.

Latin America witnesses a growing reliance on constituent power and popular will in the processes of democratisation and adoption of new constitutions, a trend which has been conceptualised as Latin American neo-constitutionalism. Russia's 1993 Constitution and 2020 constitutional amendments are evidence for transformation of constituent constitutionalism towards strengthening presidentialism and its role in the exercise of constituent power.

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1. *Introduction: What is Communicative Constituent Power?*

In both the doctrine of constitutionalism and the practice of constitutional change, the 21st century has witnessed a strong tendency towards a *broader social basis of constituent power*, with citizens, experts, and civil society institutions being engaged in the process of democratic constitution making and constitutional amendment. The theory of constitutional law distinguishes *two doctrines: constituent power and constitutionalism which coexist in a complex, dual relationship*—one generative and the other normative-institutional—shaping the system of legal order and the structure of government.

2. *People's Power as the Source and Creator of the Constituent (The Challenge of Identifying the Constituent Subject)*

The word *Constituent* (French: *constituante*, the shorter form of *assemblée nationale constituante*) first appears in French at the close of the 18th century. It was introduced into constitutional discourse by Emmanuel-Joseph Sieyès in his pamphlet “What is the Third Estate”, linking it to the conceptualisation of constituent power and constituent processes of the Great French Revolution. The Estates-General’s transformation into a national constituent assembly (*assemblée nationale constituante*) ensured the transfer of sovereignty “from monarch to nation” [1, p. XI]. French literature typically references “la Constituante de 1789” (1789 Constituent) or “première Constituante” (first Constituent) [2, pp. 239–240]—this term is in Russian transliterated as “конституанта”. French scholars often use the partially abbreviated version “l’Assemblée Constituante” [3, pp. 341–342], which translates into Russian as “uchreditelnoe sobraniye” (lit. constituent assembly). Alongside the term *Constituent*, scholarly works on the French Revolution, in English and Russian, similarly identify this body as the National Assembly (Russian: Национальная Ассамблея, Национальное Собрание) omitting the word “constituent” to make it not only concise but also precise from a historical perspective; for the Estates-General did not immediately enjoy constituent authority. In fact, the Third Estate deputies

declared themselves the National Assembly on 17 June 1789 [4, pp. 281, 283]. By 9 July, the Estates-General had been completely transformed into the *National Constituent Assembly* (French: *Assemblée nationale constituante*), which shifted its focus from the interests of privileged estates to the representation of the nation’s collective interests. In doing so, the National Assembly took on the revolutionary task [5, p. 161]: drafting a new constitutional framework for the government and social structure in France.

The notion “constituent assembly”, a borrowing from France’s revolutionary constitutionalism, gained prominence during the first Russian Revolution of 1905–1907 and subsequent constitutional reforms. The idea of a constituent assembly profoundly shaped constitutional demands in the early 20th-century Russia, particularly through the local government organs’ (*zemstvos*) assemblies that sought to “crown the edifice” of the Russian Empire with a national representative body. This idea was central to Constitutional Democrats (Kadets) who pressed for transition to a parliamentary monarchy, as reflected in their draft of Fundamental Laws of the Russian Empire. The convening of the *Constituent Assembly in Russia*—rightly regarded as the first *Russian Constituent* [6, pp. 5–6, 359; 7, p. 3]—became possible in the wake of the February Revolution of 1917. The election of All-Russian Constituent Assembly was held in November 1917. On 6 January 1918, it convened for a single session (which lasted until 5 a.m.), but the next day deputies were blocked from entering the Tauride Palace (on the orders of Vladimir Lenin, chairman of the Council of People's Commissars). Accusing the Constituent Assembly of counterrevolutionary intentions and attempts to “falsify the will of the people”, the Bolsheviks dissolved it. They also voted to remove the stipulation “until final approval by the Constituent Assembly”¹ from earlier Soviet decrees. On 6 January 1918, the All-Russian Central Executive Committee adopted a decree dissolving the Constituent Assembly, which sealed the fate of the first *Constituent* in Russia.² The dissolution was thereafter

¹ Third All-Russian Congress Of Soviets Of Workers', Soldiers' And Peasants' Deputies / Russian Social Democratic Labour Party. Saint-Petersburg, 1918. p. 85.

² Decree on Dissolution of Constituent Assembly // Decrees of the Soviet Government. T. I. M., 1957. pp. 335–336. URL: <http://www.hist.msu.ru/ER/Etext/DEKRET/uchred2.htm>

ratified by the Third All-Russian Congress of Soviets (on 18 January).

Originally rooted in the French tradition, the word *Constituent* takes on a broader meaning to describe an institutional exercise of constituent power. This concise term has been used ever since for various types of citizens' assemblies empowered to draft and adopt constitutions (*constitutional conventions, constituent assemblies, constitutional assemblies, and other popular assemblies with constituent authority*). The foreign word entered common usage in Russian due to the dominance of French among the emperor's court and elites back in the 19th century. The dictionaries of foreign words, such as those published at the turn of the century, confirmed that *Constituent* became part of the Russian language over the late 19th and early 20th centuries. In the following decades, this word somewhat faded from prominence, as the Soviet state legal lexicon favoured borrowings from the Paris Commune, Jacobin dictatorship, and other French vocabularies of revolutionary constitutionalism over the classical concepts of constituent power. Furthermore, the actual dissolution of the constituent assembly (constituent power) in Russia in the early 20th century led to rejection of the conviction that constituent power represented societal interests and all social groups—rather than individual dominant or revolutionary classes—when adopting a new constitution.

For instance, the 1894 Dictionary of Foreign Words defines *Constituent* as “an assembly or Sejm that establishes and enacts constitution” [8, p. 413]. By contrast, the new 2003 edition returns the word to its original French constitutional context (“in France and other states—a constituent assembly convened to draft a constitution”) [9]. In contemporary international constitutional discourse, *Constituent* is recognised as a *cross-national* term used for various types of constituent bodies (empowered to draft and adopt constitutions). It has embodied the *French spirit of constituent power* introduced by Emmanuel-Joseph Sieyès. Yet the first empirical exercise of such power—prior to its theoretical articulation—can be traced back to the North American colonies' struggle for independence from Britain and to the proceedings of

the Constitutional Convention that took place in Philadelphia in 1787.

Although the term *Constituent* originates from French, the term *constitutionalism* was also common in both spoken and written English at the end of the 18th century. Constitutionalism derives from the notion of constitution (whether written, codified, or unwritten); yet the two are not synonymous, as constitutionalism has its own legal attributes. *Constitutionalism is nourished by a set of legal ideas and shaped by legal ideology*. We see a rising awareness of *worldviews and ideological influences* on the trajectories and current crisis in constitutionalism. As a legal ideology of liberalism, constitutionalism undergoes transformation and modification driven by geopolitical, cultural-historical, socio-economic, and socio-political dynamics across the Global South, Global East, Global West, and Global North. The evolving landscape includes components of global, societal, socio-democratic, populist, illiberal, post-liberal, and authoritarian constitutionalism [10, p. 43; 11]. Given a variety of ideological elements in law and politics, different doctrines centre around a *discussion on the constituent subject* acting as the source of power, the conduit of constitutional change as well as justification for the legitimization of constitutional-making processes at both national and supranational levels.

The doctrines of constitutionalism define values, goals, principles, and institutions within constitutional law. Among constitutional-law concepts, the value-based approach carries special weight, since “constitutional values are what the socio-spiritual environment in the society—and the goal setting in the state—must align with” [12, p. 35]. A complex question remains: How do the ideologies of social and liberal democracy, combined with Russia's public law traditions, including popular participation and power personalisation, affect the articulation and *achievement of modern and traditional constitutional values*? The principle of popular sovereignty is undeniably essential to both the theory and the practice of contemporary constitutionalism. As observed by S.V. Narutto, “the constitutionality of a state can be guaranteed through ensuring popular sovereignty” [13, pp. 90–91]. However, the limits and spheres of sovereignty are a point of contention. It is

important to develop not only mechanisms for civilian oversight of public administration and municipal governance but also new forms of citizen participation [10, p. 45] in deliberations on constitutional change.

Russia's constitutional legal scholarship is in the active process of critical rethinking of liberal constitutionalism, a tradition widespread in the United States and Western Europe, *while creating a polycentric model* [14, p. 11] with diverse constitutional experiences of different states amidst geopolitical tensions [15, p. 4]. Russian scholars' extensive studies contribute to the advancement of critical rationalism in relation to the philosophy of constitutionalism [16] and its specific aspects in Russia [17].

Constitutional scholars from Eastern Europe advocate for a critical reassessment of established concepts such as *illiberal constitutionalism*, *illiberal democracy*, *populist constitutionalism* [18, pp. 1–10; 19] and also *post-liberal constitutionalism* [20]. These debates address the subject of constitutional populism and the role of popular will in constitutional change. Latin American researchers highlight a growing reliance on constituent power and popular will in the processes of democratisation and adoption of new constitutions. This trend, conceptualised as *Latin American neo-constitutionalism* [21, pp. 109–110], reveals continuity with the constitutional traditions established in the region. At the same time, *Ibero-American constitutionalism* has given the 21st-century a qualitatively new level of citizen engagement in both constitutional change and public policy debate [22]. In Venezuela, for instance, *citizen engagement and mobilisation exemplify constitutional populism*, whereas in Brazil, *popular inclusion* promotes the *creation of an entire institutional framework for democratic participation* across various levels of public administration.

Another relatively recent constitutional development in Latin America is the *rise of grassroots democracy as an integral part of constitutional change*. Expressing the will of the people is seen as “the most revolutionary component of emerging—and often contradictory—political processes in Latin America” [23, pp. 1–3]. According to Emelio Betances and Carlos Figueroa-Ibarra, the experiences of countries such as Venezuela, Bolivia, Brazil, Argentina, Mexico, and the

Dominican Republic demonstrate the progress of participatory democracy based on “constituent power” [23, pp. 1–13]. The principle of popular sovereignty is broadened in scope to cover the constitutional expression of the general will.

3. *Constituent Power, its Instruments and Social Foundations: Historical and Contemporary*

Modern and contemporary constitutions are characterised by different historical conditions of origin and legitimisation. The supremacy of the constitution—as a constituent act representing the will of the people—was first established in constitutional doctrine and practice during the American anti-colonial revolution and the French anti-feudal revolution in the last quarter of the 18th century [24, p. 12]. The *supremacy of the constitution gains greater social support and justification for legitimisation* where citizens, as true architects of legal order, are actively involved in the process during drafting, deliberation and adoption of a constituent act.

Since the 18th-century French Revolution, the *paradigm of constituent power*—grounded in the will of the people—has taken shape and evolved. Democratic constitutions have thus emerged as constituent acts enacted by the constituent power of the people and/or their representatives. Modern theories of participatory and deliberative democracy reveal a connection between the democratic potential of constituent power and the expansion of democratic citizen participation in framing and implementing constitutional and ordinary legislative policies.

As international scholars observe, “the idea of constituent power has been used to indicate the power the people have to create legal-political orders” [25, p. 926]. Law and politics represent distinct domains for the normative regulation and realisation of constituent power. *Public law aims* to set a certain legal standard for the exercise of constituent power—defining its forms, methods, and potential limitations within the existing constitutional framework or the legal order at large. *Public policy reflects* the process of permissible and potential use of constituent power, typically by the public authorities that are at best the

bearers of derivative constituent power and have the right to initiate constitutional change.

The renewed interest in constituent power in academic discourse and constitutional politics during the first quarter of the 21st century arises from three factors in the development of international constitutional law.

First, a *new wave of deliberative constitutional politics* is emerging globally. Institutional and normative democratic innovations reaffirm citizens' role in the drafting, deliberation and adoption of a variety of constitutional changes—ranging from constitutional amendments to new constitutions. This is especially evident in Latin America (Brazil, Chile, Colombia, and Argentina) as well as in Europe (Iceland, Ireland, Luxembourg, and Belgium). The information society impacts on how different forms of public power are exercised. Both *original and derivative constituent powers undergo democratisation in the network society*. Governments confront the *challenge of creating and integrating new network formats with analogue methods* to effectively exercise constituent power. Recent examples, such as Iceland's constitutional crowdsourcing and the crowdsourcing platforms used by the parliaments of Chile and Brazil, "illustrate the innovative revolutionary nature" [26, pp. 1–2] of crowdsourcing solutions in the sphere of public law in the age of digitalisation and algorithmic systems.

Second, the *rise of populist constitutionalism and illiberal democracy* has become a defining trend in politics, particularly in European countries such as Poland and Hungary. According to Angela Di Gregorio, the 21st century witnesses an intensifying degeneration (degradation) of contemporary democracies, giving rise to populist constitutionalism and illiberal democracies. Di Gregorio considers "the degeneration of contemporary democracies as a trigger for a new phenomenology of constitutional transition" [27, pp. 101, 103] and argues that "degraded" democracies constitute intermediate forms between democracy and authoritarianism. Similarly, this is true for the *use of technologies for civic mobilisation* as part of constitutional initiatives to advance constitutional reforms or adopt new constitutions (such as the 1999 Venezuelan Constitution promoted by Hugo Chávez). According to the Venezuelan constitutional scholar, the people of

Venezuela hoped that in a democratic environment the new constitution would "transform the state and establish a new legal system to foster effective social democracy with broader participation" [28, p. 171]. Many aspirations, however, remained largely unmet. Even though the National Constituent Assembly was endorsed by referendum on 25 April 1999 and elected on 25 July 1999, the constitution turned out to be "created for authoritarianism, state paternalism, populism, and insolvent statism" [28, pp. 171, 192, 193]. A critical analysis of populist constitutionalism reveals risks in the institutions of direct democracy alongside relative effectiveness and relevance of democratic innovations, whose combination does not necessarily produce a desired result.

Third, *constituent power can be implemented through the use of new technologies*—such as crowdsourcing platforms, new democratic mini-publics, and citizens' assemblies—or through *hybrid methods* combining new technologies, citizens' assemblies, and traditional constituent assemblies in varying proportions. However, it is digital and information technologies that enable broader public involvement in constitutional processes through interactive discussion and deliberative participation, thereby creating a new space in public law for deliberating constitutional initiatives and changes as a way to return constituent power to the people. Modern democracies must be prepared to produce *interactive crowdsourcing platforms* not only to facilitate interaction between parliaments, parliamentarians, and citizens but also in order to discuss and design new constitutional changes, constitutional reforms or individual amendments [29, p. 124].

There are various concepts of constituent power. Some of them predate the 18th-century French Revolution, while others have emerged in the 21st century in response to normative prospects for new (digital and information) technologies. *Emer de Vattel's constitutional doctrine of natural law preceded the conceptualisation of constituent power* and its implementation in France and the United States. Vattel's theory rests on the principle of popular constitutional design, asserting that it is the nation itself that holds the right to adopt and alter

constitutions [30, pp. 52–54]. And for legislators (who, according to contemporary constitutional theory, exercise only derivative constitutional power) the constitution remains sacred “unless the nation explicitly empowers them to alter these laws as well, for the constitution of a state ought to possess stability.” [30, p. 54]

In Russian constitutional practice, the adoption of the 1993 Constitution of the Russian Federation showcased constituent power operating as *constituent constitutionalism* [31, p. 210]. The subsequent period (2008–2020) marked a paradigm shift towards Carl Schmitt’s theory of decisionism. When combined with information technology, *constitutional decisionism* may lead to the emergence of *information communicative or digital constitutionalism*, wherein decisions on constitutional changes remain dependent on the head of state, without any legal guarantees for the constitutional engagement of citizens [32, p. 38].

Decisionism evolved as a new concept of constituent power through the work of Carl Schmitt who expanded the boundaries of legal positivism by linking the comprehensive form of political existence to sovereign will. Schmitt defines constituent power as “the political will, whose power or authority is capable of making the concrete, comprehensive decision”—hence decisionism—“over the type and form of its own political existence” [33, pp. 125; 31, p. 212]. Constituent power functions as a “bridge concept” between the spheres of law and politics [25, pp. 926–927]. In the information society with algorithmic decision-making systems, *constituent power becomes a “tripartite bridge”* that connects public law institutions, political forms of citizen participation, and digital technologies in constitutional decision making.

The concept of *constituent constitutionalism*, as articulated in academic literature, is based on the analysis of Russia’s constitutional design and its constituent moment in the early 1990s [31, pp. 210–212]. On 12 December 1993, Russian citizens exercised their electoral rights in a historic referendum, casting five votes across four ballots to shape the country’s future. In the contemporary history of Russia’s constitutional development, this date is recognised as a *constituent day—the birth of constituent constitutionalism*—marked by three pivotal processes: (1) the nationwide vote on the draft of the new

Constitution (one vote, one ballot); (2) elections to the State Duma (two votes across two ballots: a plurality system of single-mandate constituencies and a party-list system of proportional representation); and (3) elections to the Federation Council, the upper chamber of the Russian parliament (two votes for one ballot: a plurality system of double-member electoral districts across Russia).

This approach marked a departure from Russia’s established public law tradition, as it was used for the first time to adopt a new Constitution. In this context, the public law concept of constituent constitutionalism has the following characteristics.

Constituent constitutionalism integrates the doctrinal, normative, and institutional foundations of the system of constitutional institutions in different proportions based on distributed constituent authority, constitutionally embedded constituent forms, both formal and informal mechanisms for constitutional change as well as the rights of subjects in the sphere of constitutional change and modernisation—including those not explicitly codified in the existing constitution but derived from the natural law tradition of constitutionalism.

4. Conclusions

In today’s world order—where the emphasis is on sustainable and progressive development rather than fragmentation—constituent power claims the role of a transformative force and a democratic institution that has generative capacities to improve legal order and social relations, to accumulate and express popular aspirations as well as to create a public space for a dialogue among public authorities, civil society, and citizens. Returning constituent power to the people through the Russian referendum on 1 July 2020 necessitates appropriate and innovative forms of constitutional consolidation. This involves cultivating a collective political identity, the “self-identification of the Russian nation,” and social solidarity as a constitutional norm introduced by the 2020 reform. Subsequent efforts persist in seeking an optimal “organisation and interaction of levels of public authority” [34, p. 53] and a proper balance of the principles of subsidiarity and centralisation. In the context of constitutional development, constituent power is seen as a communicative sphere where

deliberative imperative procedures and forms of citizen participation are needed to ensure engagement in the discussion and approval of key constitutional changes.

The energy of this power should not be perceived as an extraordinary force beyond the existing legal order. Rather, its transformative capacity should help revitalise the public sphere of communicative actions and provide for modern forms of participation of citizens, experts, public and civil society institutions in a shared commitment to social and legal progress.

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