

# Deliberative Democracy and Constitutionalism

Aleksandar Jovanoski,  
University Kliment Ohridski, Bitola  
Kire Sharlamanov  
International Balkan University, Skopje

**Abstract**— In the last three decades, within academic debates about the future directions of development of the democratic practice, one new model has significant position, called deliberative democracy. On a level of theoretical elaboration, the conspirators of deliberative democracy develop arguments that justify proximate participation of the citizens in the process of creation of politics and political decision making. The goal of this paper is to show part of the viewpoint of the more significant political scientists and sociologists through the justification of deliberative democracy, as well as to indicate the connecting points between the principles of constitutionalism and deliberative democracy. This text also reviews the tension between liberalism and democracy at an ontological level and indicates the basic weaknesses and disadvantages in the attempts for consolidation of deliberative democracy under the principles of constitutionalism. The constitutionalism here is shown as a doctrine of rightfully limited authority, and it is reviewed in the light of the possibility to guarantee the individual rights and freedoms of the citizens under the menace of aggregating of the individual wills and reduction of the individual contribution in the process of creation of politics and political decision making.

**Index Terms**— Democracy, deliberative democracy, liberalism, constructionism, rights, equality, uniformity

## 1 INTRODUCTION

There are many disputes in the literature about the relation between liberalism and democracy. The noncritical implication of the models of democracy, very frequently conditions that the normative of the Westminster model of democracy is recognized under the syntagma liberal democracy. Yet, according to certain formally-logical and semantic analyses, there is tension between liberalism and democracy, and therefore the syntagma liberal-democratic system or order is problematized. In most cases, the implications of the differences between liberalism and democracy are concentrated on the semantic difference between egalitarianism and equality. Specifically, certain authors such as Norberto Bobbio, clearly point out that in the outcoming results, democracy and liberalism don't imply same things. In case of democracy, it stands for uniformity of all people, regardless any difference, above all through the principle of uniformed weight of each vote given (one man – one vote). On the other hand, liberalism stands for equal possibilities and rights for all factors (above all is the economic life) but in the final result, pursuant to the imperative of efficiency and profitability, it implies richer and less rich citizens (Bobbio, 1995). This tension is reviewed in the beginning of this work, but also the relation between liberal constitutionalism and deliberative democracy has been indicated as frames within which the participative political practice of the citizens can be promoted. In this case, the analysis of the relatedness and the complementarity of the deliberative engineering with the existing legal-political constellations and known forms of regulation of relations, remains at a normative level.

## 2 LIBERALISM AND DEMOCRACY

The initial defining of liberalism always starts from the etymological formulations that indicate the freedom (learning) or the individual initiative and entrepreneurial spirit (the ideology) that puts the free will and activity of the individual in the fulfillment of his/her goals. It seems that the best understanding of the core of liberalism is contemplated in the assumptions about the behavior of the individual (as a social factor) in the economic sphere. A part of those assumptions rests on the need of statutory-legal guarantee and protection of the rights of the individual, so that it can act in the economic society, and to accomplish the personal interest. The private property and the right of enjoyment of the same represent condition sine qua non of this type of acting. But this is only the beginning or a platform of what liberal democracy should imply.

Part of the common or extensively shared postulates of the representatives of the so called liberal democracy always refers to the basic political as well as social-economic rights<sup>1</sup>. At first sight, the examined tension between liberalism and democracy points out the ultimate goals, which as an agenda for acting or a platform for constitution imply the principles of equality and uniformity. The protection of an individual in the free acting as an economic subject im-

<sup>1</sup> This primarily includes: the equal right of vote in passive and active form (the right to vote and be nominated and voted), the freedom of speech, the right of joining, the right of access to information, the right of petition and complaint, presumption of innocence, equal treatment in front of court etc.

plies (constitutionally) guaranteed equality which in the end results in unequal status positions and roles. More specifically, the free market generates differentiation of the initially equal subjects, to rich and poor, whereby according to the necessary resources in politics, it significantly conditions and designs the political order. On the other hand, democracy in one or other form still tenaciously fights to keep the emancipating and republican inspiring impulse for complete equality of the individuals in politics.

As it was previously only announced, regarding this problematic, a different and communitarian inspired view of the differences between liberalism and democracy is provided by the Italian historian of political thought Norberto Bobbio. The psychological dimension of interpersonal relations prevails in his focus, determined by the goal or the agenda of the liberalism, that is, democracy.

However, liberalism and democracy differ in terms of the manner according to which they understand the relation of the individual towards the society. Liberalism separates the individual from the organic body of the community, and enables to the individual to live – at least for a longest period in his/her life – outside the embrace of the mother, and subjugates the person into an unknown and dangerous world of the struggle for survival. Democracy associates this individual with similar persons, so by means of artificial alliance of those individuals, the society will be built not as an organic entirety, but as a union of free persons (Bobbio, 1995:68).

Similar animosity (and sometimes an antagonism as well) between these two doctrines has also been noticed by many other authors, where noncritical usage of the syntagma liberal democracy is not present. So as an example, Alan Ryan, a contemporary liberal politicologist, addressing to larger part of the objections about liberalism today, will underline that history of liberalism as a doctrine and political theory marks a curve of postulates but also representations of equality. This view is even more interesting if one takes into consideration that part of this attitude, exploring the wide legitimacy of the contemporary (liberal) political systems, also affects the problematic of deliberation. According to Ryan, in regard to these oscillations, there was a period – especially in the English-American political practice – when the conspirators of liberalism in democracy saw a serious threat for the individual freedom and a tool for subjugating under the authority of the country.

Historically speaking, the liberals, in a certain period, considered that liberalism is jeopardized by democracy, and in another they considered that liberalism leads to democracy. Liberalism has always been loyal to the constitutional rule of law. Except in period of crisis, when the saving of liberal regime can push the governments to apply measures that in other circumstances would be unacceptable, the principles of rule of law refer to the manner in which governments gain and execute their authority. There is no fixed answer in any way this can be accomplished. Still a dispute exists whether the British attitude, that the liberal character of governments is maintained as a result of the public opinion and the attitude of the voters, is less or more probable from the attitude of the Americans that the written constitution and formal the Charter of rights are the solely efficient. It is more than probable that such institutional assets, such as the independent jurisdiction, diverse and free press and many different control organizations ... are useful and there is no need for simultaneous formal protection of the American constitution and the citizen with liberal opinion which could easily become

Taking into consideration that the relation between liberalism and democracy remains a subject of extensive observations today, the indicated viewpoints do not represent a representative reflection of the possible combinations between them. Even more because by following the insights of the older social theoreticians (Tomas Jefferson, Jon Steward Mill, Alexis de Tocqueville and others), we easily reach rigid attitudes that make liberal democracy possible only if the majority (whose will is general will and an ideology of ruling) has liberal attitude. On the other hand, yet, there are viewpoints that liberalism place in service of democracy. An evidence for this is the attitude of the modern liberal egalitarian Ronald Dworkin:

An alternative attitude is that liberalism is dedicated to democracy and that each liberal democracy doesn't represent democracy at all. Each individual has the right to participate in the decisions that affect hers or his society. No one should be ruled without hearing his voice, because this is a violation of his human rights or the right to be treated as a free and equal member of the society. (Dworkin, 1985).

This evidence for the dual nature of the relation liberalism and democracy only confirms the need of further lighting of the contradictions of the same, presented in the different views of many authors and conspirators of the model of deliberative democracy.

### 3 LIBERALISM AND DELIBERATIVE DEMOCRACY

However, there are viewpoints that indicate completely different constellations between liberalism and democracy, hence between liberalism and deliberative democracy. For example, John Dryzek, indicates the uncomplimentary between liberalism and deliberative democracy, and, above all, emphasizing the fact of the irreconcilability of the new design with the old idea about the stability of preferences. For the liberals, the viewpoints or preferences of the parties included in the negotiation and the creation of politics are determined in advance, in the deliberative democratic procedure they are flexible and change according to the new circumstances (Dryzek, 2000:10). However, the theoretical differences that exist between deliberative democracy and liberalism, can be successfully overcome in favor of the future coexistence of these value matrices, at least in their cases: if the principle of deliberation justifies the liberal rights; if the liberal constitutionalism promotes deliberation and if the process of creation of the constitution, is deliberative by itself.

In regard to the first opportunity, deliberation justifies liberal rights, this argument not only implies appropriate mechanisms for control of the authorities by people and confirms the individual rights, but also according to some representatives of deliberative democracy (such as Joshua Cohen, 1996 and Claus Offe, 1997), it implies a wider concept of liberal deliberative democracy. According to this concept, approaching to the left liberalism, the liberal deliberative democracy departs from the presumptions about the fixation of political preferences, and moreover, under the label of *reasonable pluralism* it rejects the orthodox liberal attitude. This attitude is actualized once again in Rawls's comprehensive doctrine as an *umbrella under which there are integrated attitudes and interests of all who share one "strong" identification mark*. Also, the attitude is rejected, that the argument which is delivered in the public in order to defend the position of the appropriate group or community will not be accepted by everyone that it refers to. This leads to the realization that there it takes development of arguments in public, which will be confirmed and protected by individuals with a different way of thinking and different positions in society. This position or assumption of the liberal deliberative democracy enforces the meaning of the right of free public speaking, but this time as a part of reasonable pluralism. Joshua Cohen accepts this logic of thinking and emphasizes the essential political principles that

need to support the deliberative democracy. Thereto, his point of departure is not liberal values, but he derives them from the initial position in democracy (Cohen, 1996:107).

Regarding the second case, the manner in which liberal constitutionalism promotes deliberative democracy, we can say that it is the protection of so called public identity of individuals as future deliberators and participants in the creation of politics. Here, in the defense of this attitude, according to John Rawls, essentially significant are the three essential elements of deliberative democracy – especially the supposed frame that the Constitution provides and which is used for formation of the bodies where deliberative practice is performed.<sup>2</sup> The practice of deliberation within liberal institutions is more elaborated by authors with liberal education, and in their observations a conclusion can be made that the prevailing assurance is the one according to which:

... the decision making under (according to) constitutional law is not only stating categorical judgment in the application of common rules and rights for certain cases, or a decision what to take over when rules and rights are in conflict. Instead, deliberation ... and the execution of rules gain a status with a central importance... The rights have real power, if they express reflective acceptability of the citizens that use these rights for their benefit, but also respect such rights when they are used by others (Dryzek, 2000:13).

In that regard, for determining and enforcement of constitutional basis of the deliberative engineering, especially significant are the attitudes of Gus Sunstein – the most significant solicitor between the conspirators of deliberative democracy. According to him, the Constitution of USA in its entirety does not represent legal order as much as it represent “a means for protection and promotion of generalized deliberation through the entire political system and not only (or primary) in the legal system (Sunstein, 1993).

Regarding the third case, the acceptance of the attitude that the process of forming and adoption of the Constitution, enters in one of the more interesting fields of dispute between the conspirators of the deliberative model for democratic practice, a wider debate for the limits of its application is open. The American authors very often portrait the process of determination and voting of the American constitution as a deliberative process. Given the fact that

<sup>2</sup> At this point the authors very often refer to the first text were Joseph Bassett seriously and theoretically attempts to present deliberative democracy in context of the perception of the highest legal act of the new state (USA) as a “sum of principles that secure effective public deliberation” (Bessette, 1980).

this assertion is relatively widely spread<sup>3</sup>, a question appears whether all political decisions and actions should be established on the basis of the model according to which the constitution is created and adopted or the deliberative democracy is, and should be, functional only in regard to the questions related to creation, adoption and modification of the constitution.

One of the more significant authors who promote the stand that deliberative democracy is in the core of liberalism is John Rawls. For Rawls, the issues of creation and modification of the Constitution are issues which imminently must go through a deliberative public discussion „the well -constitutionalized democracy should be understood as a deliberative democracy as well” (Rawls, 1997 : 771-2). However it is worth to emphasize once more, one of the more significant differences that distinguish this author from the Habermas’s projection for the deliberative democracy. It is the minimizing or neglecting of the social context in the theory of deliberative democracy. With this, Rawls neglects the interaction as an agent of public will and the use of public reason in the process of creation and political decision making. According to Rawls, the individual participant in the public discussion (deliberation) will also contribute for adoption of the same result, as in the case of the solidaristically molded individual within the frames of *the communicative rationality and social acting* (Habermass). In fact, there is a small difference between Rawls from 1971, that is 1993 and Rawls from 1997, when besides the public reasoning, part of the three core integral parts of the deliberative democracy are also *the knowledge and desire* of part of the citizens to follow the public reasoning to realize their goals, which implies cases where arranged and serious discussions on public issues will be in the agenda of deliberators (Rawls, 1997:772) <sup>4</sup>.

#### 4 CONSTITUCIONALISM AND DELIBERATIVE DEMOCRACY

Although from the beginnings of the aggregate model of democratic practice (related to the appearance of first nations – states and the massification of the right to vote), delegation seriously gnaws this archetype minimal equality, the appeals for preservation of the public sovereignty as a guarantee of the legitimacy of the order, relatively successfully resist the gusts for aggregation and elitization of

the entire political process. It is precisely the deliberative model the represents the last reactualization or signalization for disturbance of the principle of equality in politics. However, what seems to be most important in this observation is the establishment of engineering for creation of politics and political decision making. The process of creation of politics and political decision making, if it assumes deliberation in the political-legal system, should be compatible with the principles and criteria of liberalism and equity contained in the higher legal acts of a country with valid democratic legitimacy!

In great part of the basic determinations of constitutionalism and acceptance of the principle of rule of law, there is independence of the three branches of the authorities and the guaranteeing of their independence and intactment. Having in mind the basic role or function of constitutionalism as a theory and doctrine to an “authority limited by law”, the research of the correlation between deliberative democracy and constitutionalism in great part is conditioned by the needs as well, in future the delegated sovereignty of the citizens to be protected with a law from possible abuse of mandates. This implies that the analysis does not only go further from the liberal principles of monitoring for performing the authority in all three branches, but it also challenges the up to now relatively passive role of citizens.

The intention of constitutionalism is to protect the basic human rights of an individual, and to provide to the existent political a legal frame for functioning, implies care for preservation of the liberal political values in the institutions in the system that enable (and develop) conditions for comprehensive use of the *public reason* in the creation of politics and political decision making. All this in a manner which is characterized by a significantly higher level of civil responsibility and cooperation. Through these realizations, it can become clear how important is the political education and culture of the deliberators. In this case, not only one has to take care of the other people’s interests, but also for the general interest – which in one way or another should sublimate the individual interests, above all, through a healthy process of discussion, counseling and consensus decisions – but it also has to make sure that the entire form remains within the limits of the liberal political viewpoints and values. Since the most significant appearing form of constitutionalism is the written political act called Constitution – which after its adoption gets its ultimate form as a legal document for regulation of more significant relations in society, then the problematics constitutionalism is not depleted only with its positively-legal or formal side, but it also contains moral-practical knowledge (Ten, 2006:120). Therefore, the constitutionalism, or more precisely defined, the principle of constitutional protection of fundamental rights and freedoms, as well as the prevention from abuse of authority in the light of the deliberative

<sup>3</sup> An example for confirmation of this conclusion is the famous book with indicative title of Bruce Ackerman *We the people* (Ackerman, 1991) where one of the leading theses is that writing and adopting of the Constitution of USA is a typical example of deliberative democracy in action.

<sup>4</sup> Rawls is one of the few who assess the work of the Supreme Court of USA as an action of deliberation, however in this regard there are numerous notes and critics from which the most significant are in favor of the thesis that the Supreme Court is not a democratic institution. Above all, due to the expertise of the involved people there and the absence of public responsibility of the mandates and the work in its frames.

democratic practice, in the future should be considered as a promising concept, but at the same time it requires significant redefining of part of its integral elements. First, what should be reviewed is the legitimacy of the *aggregation and delegation* as institutes which according to the view of constitutionalism so far, are in favor of the efficiency of the executive authority. Should the maximal marginalization of the citizen be supported and justified at the cost of the expediency and thriftiness of the political process? This on the other hand initiates the question whether in such participative-enthusiastic atmosphere one can allow elementary political illiteracy and uninformativeness of the potential deliberators. If it is considered that the jointly acceptable and widely obligatory solution will be the basis of the future political rule, then it seems that the status of deliberator will at least imply regular information about the movements in politics but also education about the basic principles of the constitutionally established authority. Inter alia, this means everyday confirmation of the objective of constitutionalism – maintenance of depoliticized (or in other words non-party) jurisdiction as a guarantee of the basic rights and freedoms of the citizen and a regulator of the political process. However, the assumption itself regarding the inclusiveness of every citizen-deliberator in the principles and values of the political justice according to the doctrine of liberalism seems too much optimistic and the belief in this type of “general” transformation is mostly put in the section impossible! Therefore, the relation constitutionalism – deliberate democracy is so far reviewed on a strict normative point of view with firm insistence on proceduralism.

Having in mind, that there are viewpoints and theoretical attitudes about the theory of deliberative democracy that review the potential embodying of this model in politics and judiciary (civil courts, simulation of a jury as a model for decision making), the research of the relation constitutionalism and deliberative democracy, is expected to be one of the more significant fields which in future will get bigger attention in the theoretical discussions.

When it comes to the constitutional rights or constitutional guaranteeing of the fundamental human rights of the individual, so that it can function and act within a democratically established order, the minimum required for effectuating of the same contains a long list of rights. Carlos Santiago Nino, trying to find out the connection between constitutional rights (constitutionalism) and deliberative democratic practice, separates the individual rights within the following typology:

- *rights – freedoms* that include only absence of prohibition and by themselves they cannot provide any type of protection;
- *rights – authorizations* that are created from tolerant norms, although their status is as if they belong to an independent category or rely on some other (rights – AJ), it depends how these tolerant norms

are understood;

- *rights – privileges* that correlate with the active and passive duties of other people who belong to certain specific classes or to a universal class;
- *rights – demands* that include the possibility to present a requirement to a certain authority in accordance with the strengthening of proper responsibilities;
- *rights – powers* that imply the ability to make rules in accordance with the changes of the legal relation of other people;
- and finally, *rights – immunities* that correlate with the lack of power by others to replace the legal status of the one who enjoys the rights (Nino, 1996:45)<sup>5</sup>.

It must be stressed out that despite the instructivity of this suggestion list of the professor for Constitutional law - Nino, almost two decades after the publication of the constitutional strengthening of the practices for deliberation, there are still serious debates and discussions about the compatibility of constitutionalism and deliberative democracy.

## 5 FINAL CONSIDERATIONS AND LAST CHALLENGES

The indicated viewpoints confirm the relation and potential for restitution that exist between the deliberative democracy and (liberal) constitutionalism. Regardless of whether it comes to the three possible connections (previously indicated) or categorization of the fundamental human rights, with the purpose of more detailed explanation of the legal (constitutional) assumption about the practice of deliberation, the constitutionalism and insistence on human rights, only in small extent leave space to be an obstacle to the real embodying of deliberative politics. However, there are certain challenges between constitutionalism and deliberative democracy.

One of them is the perceived tension between the first connection that implies certain liberal rights and freedoms for the individual and the voting of the constitutional provisions and amendments. Namely, ever since Cohen's notes it becomes clear that the tension between deliberative democracy and the freedom of speech does not mean reduction or suspension of the same. The engaging of citizens in the deliberative process of political decision making is impossible without the guarantee for freedom of speech (no deliberator will limit the freedom of speech of another person, assuming that tomorrow he can also be a victim of that same censure).

This, on the other hand, does not mean abuse of the same,

<sup>5</sup> Nino as a solicitor perceives the role and importance of the philosophic frame in the fulfilling of goals of constitutionalism and the rule of law, and for this reason he says „the rights that need to be accepted as part of the ideal of constitutionalism cannot be determined without articulation of a concept of political and moral philosophy (Nino, 1996:46).

but greater responsibility for the significance of public matters for which (fast end effectively) decisions should be made. The confirmative attitudes about the compatibility between deliberative democracy and liberal constitutionalism exist in the work of Gateman and Thomson as well. There, they offer arguments for the liberal principles that come out of the procedure of deliberative decision making. They also once again strengthen and reaffirm Cohen's claim that certain freedoms and rights of the citizen, can actually be efficiently enjoyed (and one can also claimed that they arise) from certain types of deliberation. One of the more significant differences in relation to Cohen is that Gateman and Thomson develop a *theory of wellbeing*, where they try to indicate the basic material needs, which must necessarily be satisfied so that the citizens can become active deliberators in the political process. This returns the entire debate about the deliberative democracy to the issue of resources in the processes of political decision making. The solution of Gateman and Thomson are the basic principles of deliberative democracy inspired by Rawls: *reciprocity* (capacity to achieve fair conditions for society contest for personal needs), *publicity and accountability*. However, the difference that exists between theirs and Rawls's attitude about deliberation must be emphasized – difference which is in favor of the originality of Gateman and Thomson. Unlike Rawls, they do not share the attitude that the argument (which is an issue of discussions and decision making) should be limited to something that is of common interest. On the contrary, they consider that, deliberators should try harder to create and fight for an argument that is intangible and according to the individual viewpoints and interests, which is not something that they follow in their life as a system of values. This means that the deliberators should defend an argument or arguments that they don't share or feel as their own. It is interesting to notice that because of this insisting, some scholars of the opus of deliberative democracy of Gateman and Thomson design them as parents of full political theory of the deliberative democracy.

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